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SUPPLEMENTAL MATERIAL

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SUPPLEMENTAL MATERIAL

INTRODUCTORY NOTE

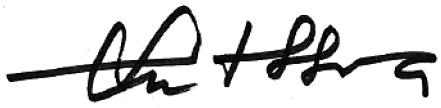
It is with pride that the United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders (UNAFEI) offers to the international community the Resource Material Series No. 103. This volume contains the work product of the 166th International Training Course, conducted from 10 May to 15 June 2017. The main theme of the 166th International Training Course was *Criminal Justice Procedures and Practices to Disrupt Criminal Organizations*.

The rise of globalization has led to economic development around the world, but it has also enabled criminal organizations to use international borders to avoid prosecution and to hide their illicit proceeds. In response, the United Nations Convention against Transitional Organized Crime (UNTOC) entered into force in 2003 with the goals of harmonizing substantive criminal laws to combat organized crime, promoting the confiscation of illicit proceeds and enhancing international cooperation. Although UNTOC has been ratified by 187 countries, combating organized crime, including its links to terrorism, remains a global threat to the rule of law and sustainable development.

UNAFEI, as one of the institutes of the United Nations Crime Prevention and Criminal Justice Programme Network, held this Course to explore various issues that relate to combating organized crime. This issue of the *Resource Material Series* contains papers contributed by the visiting experts, selected individual-presentation papers from among the participants, and the Reports of the Course. I regret that not all the papers submitted by the participants of the Course could be published.

I would like to pay tribute to the contributions of the government of Japan, particularly the Ministry of Justice, the Japan International Cooperation Agency, and the Asia Crime Prevention Foundation for providing indispensable and unwavering support to UNAFEI's international training programmes. Finally, I would like to express my heartfelt gratitude to all who so unselfishly assisted in the publication of this series.

December 2017



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RESOURCE MATERIAL SERIES

No. 103

Work Product of the 166th International Training Course

"Criminal Justice Procedures and Practices to Disrupt Criminal Organizations"

UNAFEI

VISITING EXPERTS' LECTURES

THE UNITED NATIONS AND THE FIGHT AGAINST ORGANIZED CRIME: THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME AND THE PROTOCOLS THERETO

*Dr. Francesco Testa**

I. BACKGROUND

The fifth United Nations Congress on Crime Prevention, held in Geneva in 1975 was the first context in which the United Nations examined and discussed matters related to organized crime. The Congress devoted a session (entitled *"changes in the form and in the dimension of crime at the transnational and national level"*) to crime as a form of "business" at all levels. However, it was in the seventh Crime Congress held in Milan in 1985 that States definitely realized that the increase of the activities of organized crime represents a serious threat at the global level. In particular, the Congress took stock of the fact that organized crime had reached a completely new geographical extension, international dimension and diversification in different lucrative activity.

Furthermore, the eighth Crime Congress held in Havana in 1990 discussed matters pertaining to organized crime under the agenda item *"national and international actions against organized crime and terrorist activities"*. The Congress examined the situation in light of some new historical developments. In fact, the quick increase of the number of countries reaching their independence, together with the expansion of many criminal activities beyond national borders, made clear the need of new international institutions to adopt measures to strengthen the effectiveness of efforts in preventing and combating organized crime and to assist Member States in this endeavor.

Upon recommendation of the eighth Congress, the General Assembly in 1991 took a first fundamental step for this political process, establishing the Commission on Crime Prevention and Criminal Justice, as a functional Commission of the Economic and Social Council, composed by the representatives of 40 States so as to ensure the direct involvement of governments in the decisional process and in the supervision of its activities.

The Crime Commission has become since then the leading entity of the United Nations for the definition and the adoption of the universal policies in the areas of prevention of crime and criminal justice.

The first session of the Crime Commission was held in 1992, and in the same year the Economic and Social Council (Res. 1992/22) established that the Commission would have to address with high priority the matters related to transnational crime, organized crime, economic crimes, including money-laundering, and environmental crimes.

The matter of the elaboration of a specific convention against transnational organized crime turned back at the forefront of the UN agenda thanks to resolution of the General Assembly no. 51/120 of 12 December 1996, which followed the initiative of Poland to submit to the Assembly the text of a draft convention against transnational organized crime.

During its sixth session (1997), the Crime Commission decided to establish a "in-sessional open-ended working group" with the objective to consider the possibility to elaborate a convention or more conventions against transnational organized crime and to select all the elements that should have been included therein.

The Working Group recognized that it would have been appropriate to elaborate a convention as comprehensive as possible. Of course, it was clear since the very beginning of negotiations that it would have

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been very difficult to reach a common and shared definition of "organized crime".

Many States were of the view that such definition was not the most important element of the convention and that the instrument could have been elaborated and put in place even without such definition. In this vein, it was also mentioned that organized crime was evolving in such a quick manner that the elaboration of a definition would have the only effect to limit the scope of application of the Convention. Other States, on the other hand, noted that the lack of a definition would have sent a wrong signal about the political commitment of the international community in this regard.

It was also noted that the Convention should have been a "capacity-building" tool for States and the United Nations itself, so that it should have included provisions on collection, analysis and exchange of information on programmes, plans and practices put in place by States Parties. Besides, the convention had to provide measures against money-laundering, as well as to include provisions to set the obligations of States to seize and confiscate illicit assets, and to regulate bank secrecy by limiting its use.

The Convention, finally, had to guarantee the protection of human rights and to ensure conformity to the fundamental national legal principles. During the seventh session of the CCPCJ (1998), Member States also raised issues that also deserved attention at the international level, especially under the legal point of view. Argentina proposed the elaboration of a new convention against the trafficking of minors (even though the discussion widened very soon, so as to first include trafficking of women and then trafficking of human beings). Austria introduced the draft of an international convention to the Commission against "smuggling of migrants", while Italy introduced a draft of an additional protocol against smuggling of migrants by sea. Japan and Canada represented the idea that the discussion related to the illegal production and illegal trafficking of firearms were sufficiently mature to be considered at a normative level.

The political consensus found recognized the close connection between these proposals and the one related to the adoption of a convention against transnational organized crime. In this regard, it was preferred to make reference to "additional instruments" with respect to the new proposed tools.

As a consequence, the General Assembly (Res. 53/111 of 9 December 1998), established an "open-ended intergovernmental to hoc committee" to elaborate a comprehensive international convention against transnational organized crime and to further discuss the elaboration of additional tools on trafficking of human beings, on illegal production and illegal trafficking of firearms, their components and ammunition and on smuggling of migrants (also by sea).

It was this Committee to negotiate the text of the Convention and of its Protocols, that were finally adopted in 2000 by General Assembly resolutions 55/25 (The Convention and the Protocols on Smuggling of Migrants and Trafficking in Persons) and 55/255 (Firearms Protocol).

II. PURPOSE AND CONTENTS OF THE CONVENTION AND THE PROTOCOLS THERETO

We can certainly affirm that the Palermo Convention is the most innovative, complete and balanced international tool in criminal matters available at a universal level. To date, it counts 178 States Parties out of a total of 193 States Members of the United Nations.

But the Convention is, above all, a flexible tool, that does not fall under the traditional "thematic" classification of multilateral treaties. On the contrary, it is applicable to every form of transnational criminal activity (as specified in paragraph n. 6 of Res. 55/25 of the General Assembly, that refers to "all forms of criminal activity"). Therefore, it potentially has as boundless scope of application, being able to cover all kinds of criminal phenomena.

The purpose of the Convention—well described in its art. 1—is to promote cooperation among States Parties in preventing and fighting transnational organized crime in a more effective way. Aware of the threat posed by many forms of organized crime crossing national frontiers, the international community has taken conscience of the need to make, as far as possible, homogeneous and mutually compatible the plans of action of Member States, first of all by providing the conventional obligation to criminalize certain typologies of

illegal activities put in place by international criminal groups (and also the mere participation in them, as stated in article 5) and the provision of advanced forms of mutual legal assistance and law enforcement cooperation, so as to make investigations and gathering of evidence more effective and to ease all the procedures of international cooperation, extradition, transfer of criminal proceedings, as well as seizure and confiscation of proceeds of crime. The existence of a common obligation to criminalize illegal activities committed in an organized form must be appreciated on the basis that the legal and cultural tradition of many States did not recognize the concept of criminal association as an independent and autonomous form of crime. The Italian system, for instance, since 1930 criminalizes certain kinds of so called "multi-person delinquency", from the most elementary form of cooperation in a crime to the more complex criminal associations.

Other particular forms of criminal aggregations were subsequently criminalized like, among others, criminal associations for the smuggling of tobacco products; mafia-type associations; criminal associations to traffic drugs; sexual violence committed in groups; crimes committed for the purpose of racial discrimination; all of them make use of the terms criminal organization, criminal association or criminal group.

The UNTOC Convention has been ratified in Italy by Law no. 146/2006. According to the Italian law, "transnational crime" is considered as one punishable by a maximum deprivation of liberty of at least four years, if an organized criminal group is involved and the crime: a) is committed in more than a State; b) is committed in a State, but a substantial part of its preparation, planning, direction or control takes place in another State; c) is committed in a State, but with the involvement of a criminal group operating in more than a State; or d) is committed in a State but has substantial effects in another State."

The "transnationality", in the Italian system, is not a constitutive element of an autonomous crime. On the contrary, it is considered a peculiar modality of commission of any kind of crime. In particular, our legislation attaches the transnational nature of a crime to the fulfillment of **three different parameters**.

The **first parameter** is related to the gravity of crime, in accordance with the measure of penalty (not less than four years of imprisonment maximum). It is therefore a non-flexible factor of gravity, in accordance to the definition of "serious crime" embedded in art. 2 of the Convention.

The **second parameter** refers to the "involvement" of an organized criminal group. The term that appears in the text of the Convention ("involves") actually has a generic meaning, but it was chosen as to make this provision able to encompass, with this wide formulation, different models of incrimination of the "multi-person" criminal phenomena, like the French **"association de malfaiteurs"** (usually elaborated in civil law legal systems), the **mafia-type associations** elaborated in the Italian system, and the **conspiracy**, traditionally provided by common law criminal systems in which, as you know, less clear is the distinction between the participation of more than one person to a crime and an organized criminal group.

The **third parameter** is connected to one of the elements that the Convention requires in alternative form: a) commission of the crime in more than one State; b) commission in a State, but with substantial part of its preparation, planning, direction or control in another State; c) commission in a State but with the involvement in it of a criminal group operating in more than one State; d) commission in a State, with production of substantial effects in other State.

The characteristic of transnationality in the Italian system does not remain merely descriptive, but brings remarkable effects both from substantive and procedural points of view.

Such effects certainly implicate that transnational crime is considered more serious in comparison to the ordinary form, due to a coefficient of great dangerousness that the criminal justice system assigns to it.

Among others, the Italian law: allows to prosecute legal persons involved in transnational organized crime; requests the mandatory confiscation of illicit assets, even for equivalent valve; provides extraordinary financial investigation powers of the Public Prosecutor in order to seize all the proceeds of crime; provides the possibility to transfer criminal proceedings, in line with art. 21 of the Convention and within the limits of international agreements.

Besides, the Italian law states that offences punishable in accordance with the Convention, in the commission of which has given its contribution a criminal group operating in more than a State, the penalty is increased from a third to half. As you might see, a special aggravating circumstance for the "serious" crime that is committed with the "contribution" of an organized criminal group has been introduced. But what does it mean "organized criminal group" in the Convention? The concepts "criminal association", as defined in many legal systems, and "organized criminal group", beyond their improper use made in current language, do not express, in legal terms, homogeneous or conceptually overlapping entities.

For the concept of "organized criminal group" we make reference to the definition offered by the same Convention, that to the art. 2, a) defines **organized criminal group** 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 other *material benefit."*

Point e) of the same art. 2, set forth the definition of **structured group** as a group *"that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members,* continuity of its membership *or a developed structure"*. It is a complex concept, indeed, but we can certainly affirm that it is clearly different both from the conspiracy and the criminal association set forth in other legal systems.

According to the Italian System, "Organized criminal group" is certainly **more** than the mere participation of more than a person in a crime, but it is certainty **less** than a criminal association. UNTOC requires only a certain level of stability of relationships between the participants and a minimum of organization, without any specification of their roles. In fact, an organized criminal group may occur when even a single crime is envisaged, provided that a financial or other material advantage is pursued by the participants.

On the contrary, for the purpose of "criminal association or organization", including mafia-type organizations, an articulated organization is requested, even though in elementary form; the membership of the group must be potentially stable and permanent; a precise division of roles and the planning of an indefinite series of crimes is also required. In short, this kind of criminal group must be seen as functional to the commission of an indefinite number of crimes, even though none of them was concretely committed. Furthermore, the Italian offence of "criminal association" does not require the financial or other material benefit element requested by UNTOC.

It is obvious that, when the "organized criminal group" brings together all these characteristics, it becomes a criminal association, and in such case the offences will coincide.

III. MODERNITY OF THE UNTOC

Other relevant provisions of the Convention. Tools provided by UNTOC and their correspondence to the European level of integration (summary).

1) Confiscation of proceeds of crime for equivalent valve (art. 12 UNTOC) and reversal of the burden of the proof (art. 12 paragraphs 7 UNTOCs);

2) Non-conviction based confiscation (preventive measures; see UNCAC art. 54 paragraphs 1 lett. c), and EU Directive no. 2014/42);

3) Extension of national jurisdictions and "universality" of transnational organized crimes (art. 15 UNTOC: paragraph 2: *"a State Party may also establish its jurisdiction over any such offence when: (a)* ***The offence is committed against a national of that State Party****; (b)* ***The offence is committed by a national of that State Party*** *[….]; or (c) The offence is: (i) One of those established in accordance with article 5, paragraph 1, of this Convention and is committed* ***outside its territory with a view to the commission of a serious crime within its territory****; […].*

4) Joint investigation teams (EU Decision no. 2002/465; see. Art. 19 UNTOC);

5) Special investigation techniques (controlled deliveries, electronic surveillance and undercover operations; see art. 20 UNTOC);

6) Transfer of criminal proceedings (art. 21 UNTOCs);

7) Criminalization of obstruction of justice (art. 23 UNTOC);

8) Freezing of assets and the European seizure warrant (EU decision 2003/577 - see Art. 13 UNTOC).

IV. OTHER TOPICS UNDER DISCUSSION IN THE UNITED NATIONS

Technical assistance to developing countries and connections with the sustainable development. Essential role of the UNTOC in the promotion of the programmes of technical assistance (art. 30 UNTOC: legislative reforms, capacity building and awareness raising).

I have already said that the Convention UNTOC is a flexible tool, able to cover any kind of criminal phenomenon. For instance, I would like to particularly recall the results achieved with two resolutions on smuggling of migrants (Ris. n. 2014/23 ECOSOC) and on trafficking in cultural property (Ris. n. 69/196 GA - International Guidelines) adopted over the last two years.

But from time to time the international community discusses about the possibility to consider UNTOC applicable to the so-called *"new and emerging form of crimes",* like environmental crimes (among which the trafficking of protected species, poaching, trafficking in precious metals and trafficking in hazardous waste), trafficking in cultural property, counterfeiting of trademark goods, trafficking in organs, piracy and most recently also cybercrime and transnational tax and corporate crimes (see the Doha Declaration).

Is it possible to make use of the Palermo Convention to fight modern international terrorist groups? The discussion is open to different interpretations, each of them bringing political consequences. However, if we look at the current reality, I would certainly say yes, as "traditional organized groups" and "terrorist groups" concepts narrowed down over the last 10 years, so that, in my opinion, they can be now considered completely overlapping (common elements: structured group composed of more individuals with a view to committing serious crimes, normally punished with more than four years of imprisonment; criminal activity conducted by criminal groups in more countries, with a relevant international profile; profit-oriented crimes, with ideological component progressively fading or straight inconsistent).

Of course, these are politically sensitive themes that involve different sensibilities, histories, cultures and legal traditions, having great consequences on the economic order of whole regions.

V. THE PROCESS TOWARD THE ESTABLISHMENT OF THE REVIEW MECHANISM (ART. 32 PARAGRAPHS 3, D) OF THE CONVENTION

As stated in art 32 of the Convention, the Conference of States Parties to the Convention shall adopt, among others, a mechanism for the periodic revision of the implementation of the Convention.

It is a provision similar to the one contained in other multilateral instruments (for instance UNCAC or the Convention of the Council of Europe against corruption), but the history of the UNTOC has been extremely difficult ever since the entry into force of the Convention. Negotiations on the review mechanism failed twice, in 2010 and in 2012, and only in 2014 (Resolution 7/1, adopted upon initiative of Italy) the process re-started with the establishment of a group of intergovernmental experts mandated to find out a practicable and consensual solution. Further, the Conference of the Parties in Resolution 8/2 adopted in October 2016 the fundamental lines and the structure of the review mechanism, together with the multiyear workplan and the clusters of articles to be reviewed in the different steps of the process. Now the procedural rules of the mechanism remain to be finalized, and a new intergovernmental expert group has been convened in Vienna for this purpose.

Every existing review mechanism of multilateral instruments is based on three fundamental pillars: 1. Collection of information; 2. analysis of information provided by States Parties; 3. a timetable for the review of

the implementation of the provision of the legal instrument. Controversial issues for the UNTOC review mechanism include:

a) characteristics and purposes of the review mechanism (intergovernmental/political or technical process) – identification of challenges and gaps in national legislation and needs of technical assistance;

b) level of participation of civil society in the exercise;

c) financing and costs (regular budget or voluntary contributions?).

Many States, as Italy, are strongly supporting the adoption of the mechanism for the review of the implementation of the Convention and its Protocols. These are the main reasons:

1) it provides an evaluation of the state of implementation of the instrument in all States Parties; it is the only way to identify possible gaps in our national legislation, thus allowing States to adopt the most appropriate measures (legislative or administrative). As you might understand, filling gaps in the implementation of the Convention is an obligation for every Party of a binding instrument;

2) the mechanism is the only "scientific" tool available to identify technical assistance need of developing countries. The review mechanism may definitely help UN agencies and donors to direct their efforts in the right direction;

3) the mechanism produces an asset of information on all the aspects regulated by the Convention and the Protocols, which States can reasonably rely on to take steps forward, especially from the political side, and to improvement international cooperation among countries;

Some practical examples (from my personal experience as a Public Prosecutor, as complete information in this respect will be not available until the launch of the review mechanism):

- Regulation of the joint investigative teams in Italy (this important tool has been introduced in our legal system many years too late);

- the use of the home searches at night - as an essential investigation tool against serious crime;

- criminalization and definition of crime of migrant smuggling (still lacking in many countries);

- financial investigation powers and strong limitation to access banking accounts and banking records (in some countries these information can be available to law enforcement agencies and prosecutors only when investigating on crimes punishable with very high levels of imprisonment, thus hampering the fruitful collection of evidence on "serious crimes", due to the fact that complex investigations on organized crime usually represent the development of investigations on lower-case crimes, such as a robbery or a mere financial infringement);

- the functioning of the "dual criminality" clause with regard to extradition, mutual legal assistance and transfer of criminal proceedings. As you know, these are two fundamental tools in the area of judicial assistance, but they normally work only when the requisite of the double incrimination is satisfied.

As you might see, here we have factors that involve fundamental aspects of the legal systems of States, or aspects related to their sovereignty, but that play at the same time a key role in the concrete functioning of the international cooperation tools.

For these reasons negotiations on the establishment of the review mechanism will probably take some more time, be hard and complex, and the final results could not perhaps correspond to our expectations. We must be ready to accept a compromise, as it very often happens in the multilateral trials, but its establishment will represent an impressive step forward of the international community in preventing and combating transnational organized crime worldwide.

INTERNATIONAL COOPERATION FOR THE DETECTION OF CORRUPTION OFFENCES AND FOR IDENTIFICATION, FREEZING AND CONFISCATION OF ASSETS: THE ITALIAN SYSTEM OF NON-CONVICTION-BASED CONFISCATION

*Dr. Francesco Testa**

I. FOREWORD

Confiscation of proceeds of crime plays a crucial role in the fight against any form of profit-making crime whatsoever. This has been repeatedly observed within the international community, and it is definitely agreed that confiscation prevents criminals from making use of their illicit wealth to finance other criminal activities, including organized crime and corruption.

In order to combat organized crime and other serious crimes, Italy, either in accordance to its ancient tradition and as follow up of international inputs, has shaped a comprehensive system that is the result of a strategy conceived for mafia-based organizations, according to which as mafias are in the end profit-oriented illicit associations, it is crucial not only to prosecute its main actors (leaders and supporters), but also to tackle those assets which were obtained through criminal acts.

After almost thirty years of experience, which has led to the confiscation of a significant amount of highly valuable assets, Italian legislation is now based on a multiple approach, based on various kinds of confiscation with the correspondent freezing measures.

This system may be sketched out by mentioning the following main instruments:

a) *Ordinary confiscation*, aimed at confiscating assets linked to a specific crime, following a criminal conviction for that crime;

b) *Value confiscation*, so that assets of equivalent valve can be confiscated as well, where specific criminal assets are outside the reach of investigators;

c) The so called *"extended" confiscation*, which can be ordered within a criminal proceeding, or as a consequence of a conviction for serious economic crimes, especially when organized crime is involved; that is the case when a criminal conviction is followed by the confiscation not only of the assets associated with the specific crime, but of additional assets which the court determines are the proceeds of other, unspecified crime. Confiscation may be based on circumstantial evidence, e.g. balance between a person's assets and the lawful source of income;

d) *Third party confiscation*, so that assets can be confiscated from third parties to whom they have been transferred.

e) ***Non-conviction-based confiscation*, ordered through a separate proceeding aimed at recovering illicit assets, removing the need for a criminal conviction;**

In the Italian experience, extended confiscation and especially "preventive confiscation" (otherwise called non-conviction-based confiscation) do play a pivotal role.

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II. AN OVERVIEW OF THE ITALIAN LEGISLATION ON NON-CONVICTION-BASED CONFISCATION

Italy introduced in 1982 the so-called "preventive measures on assets", that now are regulated by Legislative Decree n. 159/2011. The rationale behind their introduction was that the most effective way to combat criminals and criminal groups is to affect their finances and to recover the proceeds of their activities. In 1982 it was already clear that the quick accumulation of enormous assets is the common objective of any kind of criminal anywhere in the world (drug traffickers, corrupt persons, criminal organizations, traffickers in arms and human beings etc..), and that in some cases it is more appropriate to affect all those people accumulating illegal assets at the economic level, rather than starting lengthy criminal proceedings (i.e. the personal level).

In other words, it became evident that it is more effective to tackle the criminals' assets rather than temporarily affecting their liberty, and that shifting the focus from the criminals to their assets is necessary. This led to the introduction of non-conviction-based confiscation in the Italian legal system, which allows every year for the confiscation of a significant amount of highly valuable assets.

Confiscation normally follows a criminal verdict, finding a person guilty of certain offences and, thus, making his/her assets suitable for confiscation. In addition, Italian law provides for a particular form of forfeiture and confiscation, working as non-conviction-based confiscation or *actio in rem* ("action against the asset itself"), which can be applied even in the absence of a criminal conviction. As said before, these instruments are called "*Misure di prevenzione patrimoniali*" ("Preventive measures on assets").

Therefore, the Italian legislation regarding confiscation is based on a two-fold approach, whereas non-conviction-based confiscation represents one of the two tools employed to combat all forms of profit-oriented crimes, especially organized crime. The "preventive" measures (forfeiture and confiscation) are ordered and enforced through a specific proceeding, managed by the criminal Court in each district.

They can be applied, under certain conditions, to the assets of the following:

1) those suspected of belonging to mafia organizations;

2) those suspected of having committed one of the serious crimes listed by law (money-laundering, trafficking in human beings, smuggling of migrants, drug trafficking, kidnapping for ransom, organized trafficking in hazardous waste etc...);

3) those usually devoted to illegal dealings or usually living with proceeds from criminal activities (including corruption);

4) those who have committed preparatory acts of subversion or of terrorism;

5) natural and legal persons reported by the United Nations Sanctions Committee or any other international organization which is competent to freeze economic resources when they might be dissolved, concealed or used to support international terrorist organizations or activities.

The status of "suspected" implies (first condition), the considerable probability of guilt. In the Italian "preventive" proceedings, criminal offences must be established on a balance of probabilities standard of proof, as the judge must ascertain the existence of "sufficient clues" of one of the above-mentioned crimes. Criminal lifestyle and criminal relationships, previous convictions, information provided by cooperative defendant, interceptions and documents from criminal proceedings and trials may all constitute a reasonable ground for the application of the preventive measures.

The same will happen when the indicted person has been acquitted in a criminal proceeding because he/she was not found guilty "beyond any reasonable doubt", when the proceeding has been terminated because the defendant has died, or the statute of limitations has been applied.

Towards the aforementioned groups of people (second condition), the Court may order seizure and

confiscation of those assets which the suspect, directly or indirectly, is found to own or have at his disposal for whatever purpose, when their value appears to be out of all proportion to his income, as reported in the income tax return, or to his own economic activity, or when it can be reasonably argued, based on the available evidence, that said assets are the proceeds of unlawful activities or the use thereof.

It is also possible to seize and confiscate assets from third parties when it is proved that they belong to suspected persons. The illicit purchase of assets also justifies the seizure and confiscation of those goods which are passed to the heirs when the suspected person dies either during the confiscation proceedings or if such proceedings have been initiated within five years from his or her death.

III. ITALIAN NON-CONVICTION BASED-CONFISCATION AND THE PRINCIPLE OF DUE PROCESS

The criminal proceedings/trials follow the usual procedure, but the Italian prevention proceedings also ensure the highest standard of guarantees and fully respect the principle of *due process*, as the Italian Constitutional Court and the European Court of Human Rights have often recognized.

Hereinafter is a brief overview of the main features of the preventive confiscation process:

a) Even though the person might have already received a criminal conviction for a related offence, the competent Court has to ascertain itself the degree of danger posed by the same person and, in particular, the high probability of being found guilty through a new fact-based inquiry. Hence, even a previous conviction for a related offence may not suffice to order the confiscation of his/her assets;

b) Asset seizure/confiscation is decided, upon request of the public prosecutor, by a panel of three judges belonging to the criminal Court in each district;

c) After the asset seizure, all involved actors (the suspected person and third parties) may file a complaint before the Court, should they consider their rights breached;

d) In any case, a hearing is scheduled shortly after the seizure, and on that occasion (which, upon request, is public) cross-examination between the public prosecutor and third parties is ensured before the Court; in this hearing a wide range of requests and evidence can be presented by the parties;

e) The Judges' panel provides written ruling of its decision, similar to that provided in criminal proceedings, and the decision can be challenged before the Court of Appeal;

f) The Court of Appeal, consisting of a panel of three judges, decides after cross-examination and releases the explanation of its decision as for any other judgment;

g) The decision of the Court of Appeal can be appealed before the Court of Cassation, which decides through one of its criminal sections;

h) In case new and unknown elements are brought up after the final decision is released, the parties can also submit a request for revocation of the confiscation order;

i) Since the seizure and confiscation of assets does not entail prison-related criminal sanctions, the proceedings against property can continue independently from the outcome of the criminal proceedings (e.g. in case the latter cannot continue because of the statute of limitations or the defendant's death).

The non-conviction-based confiscation seeks to remove from the legal economy those assets which were acquired illegally. The owner is not punished at the personal level since the objective is to prevent him/her from using the illicitly gained assets to commit further crimes or affect the market. Hence, **as established by the Italian Court of Cassation and by the European Court of Human Rights in several judgments**, confiscation is a preventive measure against criminal assets and does not aim at sanctioning the individuals themselves, thus not all the guarantees accorded to individuals are necessary.

To sum up, the proceedings fully ensure the respect of judicial guarantees to the parties, which can oppose the prosecution in a regime of cross-examination: a) third parties may put forward elements regarding the effective ownership of an asset and thus about his/her lack of involvement with the suspected person; b) the suspected person may prove the legitimate purchase of the seized assets.

It is also worth noting that the Italian non-conviction-based confiscation fits exactly, both in form and substance, to the provisions of articles 12 paragraph 7 of UNTOC and articles 53 and 54 of UNCAC.

According to article **12 paragraph 8 of UNTOC**, in fact, *"States Parties may consider the possibility of requiring that an offender demonstrate the lawful origin of alleged proceeds of crime or other property liable to confiscation, to the extent that such a requirement is consistent with the principles of their domestic law and with the nature of the judicial and other proceedings"* (allows for the reversal of the burden of proof).

Article **54 paragraph 1 of UNCAC** (mechanisms for recovery of property through international cooperation in confiscation) states: "1. Each State Party, in order to provide mutual legal assistance pursuant to article 55 of this Convention with respect to property acquired through or involved in the commission of an offence established in accordance with this Convention, shall, in accordance with its domestic law: [.....] (c) Consider taking such measures as may be necessary to allow confiscation of such property without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases."

In Italy, the success of non-conviction-based confiscation can be explained because it requires a lower standard of proof (although fully ensuring the respect for the principle of due process) and is particularly effective for those areas of contiguity with criminal organizations, where a verdict at the end of a criminal proceeding is very difficult to achieve.

Due to the above-mentioned features, non-conviction-based confiscation can be seen as a facilitated (and facilitating) form of asset recovery which eases the burden of proof. Hence its legitimacy has been therefore repeatedly challenged in the relevant countries, assuming its inconsistency to the principle of due process and other fundamental rights.

It must be highlighted, on the contrary, **that the Italian non-conviction-based system has been always declared consistent with the presumption of innocence and the fundamental property rights, both from the European Court of Human Rights and from the supreme courts of Italy**. In particular, the reversal of the burden of proof (and the possible violation of the presumption of innocence) and the interference with property rights have been repeatedly considered **consistent with the provisions of European Convention on Human Rights (article 6, right to a fair trial) and to those of Article 1 of the First Protocol of the same Convention (protection of property)**.

IV. THE NEW EU DIRECTIVE 2014/42

At the European level, the new EU Directive (2014/42) on the freezing and confiscation of instrumentalities and proceeds of crime was adopted on 3 April 2014. The Directive establishes minimum rules on the freezing of property with a view to its subsequent confiscation for the serious crimes listed in Article 83 (1) of the Treaty on the Functioning of the European Union. It maintains conviction-based confiscation as a general rule, but introduces non-conviction-based confiscation, even though as a residual hypothesis. Thus, non-conviction-based confiscations shall be introduced in the EU Member States' national legislation, but the scope of application of such confiscation is limited in the Directive to the cases in which a final conviction could not be obtained as a result, *inter alia*, of illness or flight of the suspected or accused person. It is also requested that a criminal proceeding be initiated for a criminal offence which is liable to give rise to economic benefit, and that such proceeding could have led to a criminal conviction.

V. INTERNATIONAL COOPERATION ON NON-CONVICTION-BASED CONFISCATION: THE ITALIAN EXPERIENCE

Italy can report a number of successful experiences on international judicial cooperation in the field of asset recovery. Some of the following cases are related to the execution of non-conviction-based confiscation

and have been managed through case-by-case agreements with the requesting/requested State.

A. Switzerland

Three agreements have been signed with Switzerland in order to share in equal parts assets confiscated by Swiss authorities in response to requests made by Italian judicial authorities.

a. The first case concerns the confiscation order issued by the Court of Appeal of Turin against an Italian citizen convicted of drug trafficking. Italy and Switzerland have shared equally assets amounting to **EUR 550.462,00.**

b. The second case concerns a non-conviction-based confiscation order issued by the Court for Preventive Measures in Santa Maria Capua Vetere (Caserta) in the course of the preventive proceedings against an individual suspected of money laundering and of financing the illegal activities of the criminal organization called "*Camorra*". Italy and Switzerland have shared in equal parts assets amounting to **13.8 million EUR.**

c. The third case concerns the execution of a confiscation order of sums issued by the Court of Milan on 12.10. 2009, against an individual convicted of money laundering. Italy and Switzerland signed in August 2015 an agreement for the division of values confiscated in Switzerland, for an amount of **5.195.660,85 Swiss francs**. These sums have not been transferred to Italy yet.

B. United States of America

The United States of America transferred to Italy assets seized in execution of an order issued by the Court of Appeal of Bologna, at the request of the Attorney General's Office at Court of Appeal of Bologna, in the criminal proceedings against an Italian citizen. The total amount of the sums is **EUR 1.898.928,42**.

In a different case, the United States of America also transferred to Italy an amount of **USD 1.500.000,00** recognizing that the confiscation in the United States was made possible as a result of the wide cooperation given by the Italian authorities in connection with a criminal proceeding of the Anti-Mafia Prosecutor's Office of Rome.

C. France

In execution of a non-conviction-based confiscation order issued by the Court for Preventive Measures in Milan, France seized an apartment in Cap d'Antibes. Italy and France have agreed on the sale of the property and the allotment between the two States of amounts obtained through such sale.

It is worth noting that, in granting the enforcement of the confiscation order, the French Court of Cassation clearly valued the parallel criminal conviction, finding: that the Italian non-conviction-based confiscation could «in this context be seen as a criminal verdict»; that it was widely proved the illicit origin of the confiscated apartment; and that it would be confiscated under the French law (criminal confiscation).

D. Spain

In execution of a non-conviction-based confiscation order issued by the Court of Rome, Preventive Measures Section, within the prevention proceeding against an Italian citizen, the "Audiencia Nacional" ordered the registration in the "Register of corresponding Properties" of the prohibition of sale of a property in Spain. It was proposed by the Italian Ministry of Justice to the Spanish authorities to proceed with the sale of the property seized and the allotment of sums obtained through the sale.

In a different case, the Spanish authorities have also transferred to Italy amounts seized in execution of a seizure order issued by the Court of Rome in a criminal proceeding.

E. Austria

Italy has recently forwarded to the Austrian authorities a request for international cooperation, requesting the execution of a non-conviction-based confiscation order issued by the Court of Reggio Calabria, related to a prestigious property in Baden.

U.S. LAW ENFORCEMENT TECHNIQUES AGAINST ORGANIZED CRIME GROUPS

*Joseph K. Wheatley**

I. INTRODUCTION

Over decades of experience, the United States and other countries have acquired and developed techniques to disrupt and dismantle domestic and transnational organized crime groups. U.S. efforts against organized crime groups rely on the investigative and prosecutorial tools that were first developed in the long struggles against the Italian-American Mafia, and augmented and adapted for use against various kinds of organized crime groups. In surveying the most important law enforcement tools available to U.S. law enforcement authorities, this article will begin with three tools used by investigative agencies with the assistance and under the oversight of prosecutors: electronic surveillance, undercover operations and the use of confidential informants. Following that, this article will discuss certain tools used by U.S. federal prosecutors against organized crime groups: the Racketeer Influenced and Corrupt Organizations statute, compelled and voluntary testimony, witness protection, and financial tools such as forfeiture.

The United States Department of Justice coordinates its prosecution efforts against organized crime and gangs through the Criminal Division's Organized Crime and Gang Section ("OCGS"). OCGS is a specialized group of prosecutors charged with developing and implementing strategies to disrupt and dismantle the most significant regional, national and international gangs and organized crime groups. OCGS prosecutors work with other federal prosecutors, who are known as Assistant United States Attorneys and are located in U.S. Attorney's Offices around the country. In these cases, the investigators working with the prosecutors are drawn from local, state, and federal agencies, including the Federal Bureau of Investigation, the Bureau of Alcohol, Tobacco, Firearms, and Explosives, and Homeland Security Investigations.

Federal prosecutors and agents also cooperate with their foreign counterparts to disrupt and dismantle organized crime groups. Cooperation with foreign law enforcement authorities continues to be essential to U.S. efforts against organized crime groups. This cooperation comes in various forms, such as information sharing, extraditions/expulsions, and stationing U.S. law enforcement officials in other countries. Information sharing depends on the type of information and the technique through which it was obtained. Information may be shared informally in ways that are fully consistent with the laws of the countries involved or through formal channels, such as multilateral conventions and Mutual Legal Assistance Treaty requests. U.S. law enforcement officials stationed abroad work side-by-side with their foreign counterparts to investigate crimes against United States nationals committed overseas. Where offenders are identified, these officials also work to locate, apprehend, and return the perpetrators of such crimes through extradition, expulsion or other lawful means. They also facilitate the arrest and extradition of international fugitives located in the United States and wanted abroad.

II. ELECTRONIC SURVEILLANCE

Electronic surveillance is a highly effective law enforcement tool against organized crime groups. Such surveillance may occur live and real-time or occur after-the-fact. In proving a crime, nothing is more effective than the use of the defendant's own words, as those words generally provide reliable, objective evidence of crime. Electronic surveillance also enables law enforcement agencies to learn about crimes before they occur by surveilling criminal activities, such as conspirators making plans to meet or deliver contraband, or disrupting activities, where appropriate. Such surveillance is also helpful against transnational groups

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because it enables law enforcement agencies to intercept conspirators in the United States discussing future crimes with associates outside the country, which is evidence that would otherwise be difficult to obtain.

Electronic surveillance has moved beyond the more traditional telephone surveillance, oral eavesdropping devices, and video surveillance. Now, electronic surveillance also includes a variety of content and other data, including live and stored electronic communications, social media activity, computer keystrokes, and cell-site locations.

A. Stored Electronic Communications and Records

Stored electronic communications, retained by a service provider, such as e-mail or social media messages, may be obtained pursuant to search warrants under a probable cause standard, but more general information, such as subscriber records and billing records, may be obtained with only a subpoena. While not as helpful as live, real-time electronic surveillance, stored electronic communications nonetheless show the inside of organized crime groups, including their membership and leadership, structure, common purpose, continuity, and the offences that the groups commit. For instance, gangs in the United States have used social media sites, such as Facebook and Twitter, to arrange meetings, threaten rivals, issue orders to members, and plan attacks against rivals.

B. Live, Real-time Electronic Surveillance

The remainder of this section discusses live, real-time electronic surveillance. While very helpful, electronic surveillance is a sensitive tool due to privacy interests, and there are burdens of proof that the government has to satisfy to obtain permission to use the technique. The standard applied by the judge varies depending on the type of electronic surveillance sought. For pen registers, and trap and trace devices, which identify outgoing telephone calls and incoming telephone calls, respectively, the surveillance must merely be relevant and material to the investigation. However, intercepting live communications requires an even higher showing than the normal probable cause standard: there must be very little doubt in the judge's mind that the device is being used for criminal activities.

For live electronic surveillance, there are substantial restrictions on its use that are designed to protect an individual's privacy interests. For example, electronic surveillance can only be used to obtain evidence of specific serious offences that are listed in the governing statute.[1] The government must first request and receive the permission of a neutral, independent judge for the surveillance. To request and receive the authorization, a law enforcement agent must submit an affidavit to a U.S. district judge that contains specific facts establishing probable cause to believe: 1) that the subject of the surveillance is committing certain specified offences, and 2) that it is likely that evidence of such crimes will be obtained through the electronic surveillance.[2] In a requirement known as "necessity", the government must also establish that other investigative methods have been attempted and failed to obtain the desired evidence, or establish why other techniques would be unlikely to succeed or are too dangerous to attempt. U.S. Department of Justice policy also requires that the suspect has recently used the method of communication, such as the telephone or text messages that will be intercepted.

1. Wiretaps

While conducting a wiretap of a telephone, emails, text messaging or other real-time communication, the government must attempt to minimize the interception of innocent conversations by taking reasonable steps to assure that only conversations relevant to a crime are captured.[3] Thus, monitors must turn off the interception equipment when conversations stray from matters relevant to the crimes under investigation. The U.S. Department of Justice also has policies for situations when the surveillance records privileged or confidential information, such as attorney-client communications. In the event that such communications are intercepted, the recordings are immediately sealed, the judge and supervising attorney are informed and no other investigative officers may learn the content of the conversations.

Electronic surveillance also has statutory time limits. Court-authorized electronic surveillance orders are limited to thirty days, but may be extended for additional thirty-day periods as long as the requirements are

[1] *See* 18 U.S.C.A. § 2516 (West).
[2] *See* 18 U.S.C.A. § 2518 (West).
[3] *See* 18 U.S.C.A. § § 2511, 2518 (West).

met every thirty days and approved by the judge.[4] Courts have ruled that, if the surveillance is being used to aid in a good faith prosecutorial effort, the surveillance may be extended indefinitely. At the end of the electronic surveillance, the intercepted individuals must be informed of the surveillance within ninety days, unless the court authorizes delayed notification due to the government's showing that it would impair an ongoing investigation. Immediately at the end of the surveillance, the recordings must be sealed in order to preserve the integrity of the evidence.

In recent years, criminals have grown more aware of the likelihood that law enforcement is surveilling their communications, and have begun to take proactive steps to elude surveillance. This includes frequently changing telephones or using encrypted communication. In response, law enforcement officials may obtain authorization to "spin-off", which adds more telephones to the court authorizations as they become necessary to monitor the subjects. A "roving" interception is also allowed in cases where individuals frequently change their methods of communication in order to avoid detection by authorities.

One of the greatest challenges in using electronic surveillance to investigate transnational organized crime is the variety of languages that are intercepted. Real-time minimization of personal conversations is not always possible, especially when the monitoring agents are unfamiliar with the language being spoken or the participants are speaking in code. When that occurs, "after the fact" minimization is permitted by the law. In such situations, an interpreter or expert listens to the conversation as soon as is reasonably possible after the recording is made, and turns over only the relevant portions of the recording to the investigators. Privacy concerns under the U.S. Constitution are also not invoked when the parties are not American citizens and have no attachment to the United States, although interceptions may be excluded if they were not reasonable under the laws of the country in which they occurred.[5]

2. Consensual Recording

Judicial authorization is required only when neither party to the conversation has consented to make a recording. If one party makes his or her own recording, or agrees to be recorded by the government, which is known as a "consensual recording", privacy concerns are no longer implicated. Also, because prison inmates are aware that they have a diminished expectation of privacy in custody, their conversations may be recorded without obtaining an electronic surveillance order.

III. UNDERCOVER OPERATIONS

An undercover operation is another significant technique against organized crime groups, and often complements electronic surveillance efforts. Undercover operations allow law enforcement agents to infiltrate the highest levels of organized crime groups by posing as criminals while real criminals meet to discuss their plans and seek assistance in committing crimes. The scope of undercover operations varies greatly. Such operations can be short, lasting only a few hours, or quite lengthy, lasting years. They may investigate a single criminal incident, or a complex criminal enterprise that commits various crimes. The types of crimes investigated by undercover operations also vary. For instance, undercover operations may involve the purchase of contraband such as drugs, stolen property or illegal firearms, or they may involve the operation of an undercover business where criminals meet and discuss their activities with undercover officers or informers.

In such operations, agents often succeed in gaining the confidence of suspects and induce them to reveal past criminal activities or to unwittingly plot with the agents in ongoing criminal endeavours. Especially when done in conjunction with electronic surveillance, undercover operations provide comprehensive coverage of suspects' daily activities. Inherently, going undercover is a dangerous and sensitive process. It also poses the risk of luring otherwise innocent individuals into criminal activity. Accordingly, such operations require exceptional preparation and oversight.

Crucially, law enforcement officials must always protect the physical safety of the undercover agent. To prevent a premature disclosure of his or her identity, the agent is given a substantiated past history (referred

[4] *See* 18 U.S.C.A. § § 2518, 2519 (West).
[5] *See* U.S. v. Verdugo-Urquidez, 494 U.S. 259 (1990); U.S. v. Barona, 56 F.3d 1087 (9th Cir. 1995).

to as "backstopping"). Also critical are careful briefings of the target's patterns, habits and modes of operation. Before a lengthy or particularly dangerous undercover investigation may occur, the Special Agent in Charge ("SAC"), as well as the prosecutors involved, must consent. As sensitive circumstances develop in the investigation, the level of review escalates. The general concerns of approving any investigation look to: 1) the risk of injury to individuals or property, both civilian and governmental; 2) privacy concerns, particularly where an undercover operation might intrude upon privileged or confidential discussions; 3) and the risk that the undercover operative may have to participate in illegal activities. An undercover operation may not last longer than is necessary to achieve the objective nor last longer than six months, unless there is renewed authorization to proceed.

If the duration of the undercover operation is relatively brief, such as the single purchase of narcotics, a first line investigative agency supervisor and first line prosecutor must approve the activity after having been informed of all the facts of the investigation. An operation of longer duration, with an undercover agent and informant engaging in what would otherwise be ongoing violations of law, requires the approval of a higher level supervisor, such as a local lead investigative agent, and a supervisory prosecutor must be informed of all the facts before giving approval. Long-term operations are crucial to infiltrating entrenched organized crime groups that commit their illegal activity over an extended period of time.

If the situation is one of extreme sensitivity, such as a risk to innocent third parties, or if there is extensive criminal activity of a serious nature, then investigative headquarters and Justice Department prosecutors must review and approve the undercover investigation. To balance prosecutorial concerns with the safety of the undercover operative and the public, the Department of Justice created the Undercover Review Committee, composed of senior prosecutors and investigators. The Committee is responsible for reviewing, approving and controlling all sensitive undercover operations. The request for approval must be in writing, contain a full factual description of the suspected criminal activity and the participants, and adequately detail the undercover scenario, the expertise of the undercover team, the duration of the project, the foreseeable legal issues, and risks to the agents and public.

Finally, law enforcement officials must avoid, at all costs, entrapment. Entrapment is inducing a person to commit an offence that he or she otherwise would not commit. Accordingly, there are restrictions to limit undercover operations and avoid this potential entrapment mishap. Law enforcement personnel are also required to take steps to prevent violence from occurring if they learn of potential violent crimes. This may include warning a potential victim, arresting suspects who pose a threat, or ceasing an undercover investigation altogether.

IV. INFORMANTS

Another critical law enforcement technique is the use of confidential informants. In the U. S. law enforcement community, a confidential informant is someone who provides information or assistance to the authorities in return for a promise that the authorities will try to keep his or her identity confidential. Some confidential informants are willing to testify, while others are not. In the event that a confidential informant is not willing to testify, law enforcement authorities cannot absolutely guarantee the informant's confidentiality, because in relatively rare circumstances courts may decide that due process, or concerns of fundamental fairness, require that a confidential informant's identity be disclosed to a defendant charged with a crime where the informant can provide evidence that could exculpate the defendant. However, those situations are rare. In most cases, law enforcement authorities are able to keep an informant's identity confidential.

Confidential informants are typically motivated to provide information to the authorities in exchange for money or lenient treatment regarding charges pending against them or likely to be brought against them. In many cases, confidential informants are themselves engaged in criminal activities, which enables them to provide valuable direct evidence of criminal activities by their criminal associates. Confidential informants frequently provide the information that enables law enforcement officials to obtain judicial warrants authorizing electronic surveillance. Many successful prosecutions of the leadership of organized crime groups, including the Italian-American Mafia, have involved information supplied by confidential informants who provided information for many years about the leadership of the organized crime groups; indeed some of the informants have been "made members" of the Italian-American Mafia. Incriminating evidence by informants who deal directly with the leadership of organized crime groups is simply invaluable to break

through the layers of insulation that the leadership uses to conceal their activities.

However, there are significant risks associated with the use of informants. Sometimes, informants do not fully disclose their own criminal activities, or they falsely implicate their enemies in crimes, or they engage in unauthorized criminal activities. In that latter respect, under U.S. law, law enforcement authorities may authorize informants to participate in some forms of non-violent criminal behavior that would otherwise be illegal if they were not acting as informants with authority to engage in the activities. For example, depending on the circumstances, in order to protect an informant's cover and to enable him to be in a position to obtain incriminating evidence against others, informants may be authorized to participate in illegal gambling, trafficking in stolen property, and other non-violent crimes. Therefore, it is important for law enforcement authorities to closely monitor the activities of informants to minimize the danger that the informant would use his association with law enforcement to shield his own unauthorized criminal activities.

These three techniques, electronic surveillance, undercover operations, and use of informants are the most important tools that have assisted investigative agencies against domestic and transnational organized crime groups. Next, this article will discuss the tools used by U.S. federal prosecutors against organized crime groups.

V. RACKETEER INFLUENCED AND CORRUPT ORGANIZATION STATUTE

In every organized crime case, the objective is always to find and convict the highest levels of a criminal organization, in an effort to disrupt and dismantle the group. Accomplishing this goal requires special prosecutorial tools, including a statute that explicitly prohibits participation in a crime group through specified unlawful activity. The most common antiracketeering law is the Racketeer Influenced and Corrupt Organizations Statute ("RICO"), passed in 1970. RICO provides heavy penalties when a defendant conducts, or conspires to conduct, the affairs of an enterprise through a pattern of specified acts, also known as "predicate crimes." An enterprise can be anything from an ostensibly legitimate entity, such as a corporation or labour union, to a group of individuals working together to commit a crime, such as the MS-13 gang or the Italian-American Mafia.

Despite RICO's broad power, there were only a handful prosecutions against organized crime in the statute's first 15 years. The shortage of prosecutions was mainly because it took time for federal prosecutors to feel comfortable with such a complex statute to make it the focus of organized crime prosecutions. Additionally, the investigative techniques, such as electronic surveillance and undercover operations, necessary to build a convincing RICO cases, were not routinely used against organized crime bosses in the 1970's.

RICO has proven to be an effective tool in helping to prosecute organized crime in the United States. RICO's power, however, also means that there is oversight and approval for its use. To protect against potential misuse, the U.S. Department of Justice's Organized Crime and Gang Section ("OCGS") has a specialized unit of attorneys who carefully review all proposed RICO indictments for legal and factual sufficiency, which ensures that RICO is only used when necessary. Further, OCGS staffs its own prosecutors on RICO cases around the country and provides advice to other prosecutors on their RICO cases after indictment.

Disrupting and dismantling organized crime groups without RICO would be inconceivable. RICO is not used solely for organized crime cases; it has been used in official misconduct cases, against hundreds of police officers, judges, and public officials, as well as against terrorist groups, hate groups, stock manipulators, and drug cartels.

A. Basic RICO Features

It is important to note that all of RICO's original 46 predicate offences, such as murder, arson, and extortion, were criminalized well before 1970. RICO represented a significant legislative initiative because it permitted many different crimes to be charged within a single indictment. Under RICO, these different crimes could be charged in a single count against a defendant, provided that the crimes were part of the defendant's pattern of acts that related to the enterprise. Essentially, RICO criminalized participating in or conducting a business of crime.

RICO is particularly useful for organized crime cases because it allows prosecutors to detail the complete criminal activity of one person or a group of criminals. Significantly, RICO contains a reach-back provision, which allows prosecutors to demonstrate a pattern of racketeering activity. Since indictments cannot usually allege crimes that occurred more than five years prior to the date of the indictment, evidence of past criminal activity is often outside the period for which a person could be prosecuted. However, under RICO, as long as one of the predicate crimes alleged occurred within five years of when the indictment was first brought, the next previous crime in the pattern of racketeering is only required to be within ten years of the most recent crime. Similarly, the third most recent crime must have only occurred within ten years of the second act. In this fashion, the reach-back feature allows this process to extend back as long as twenty years in the past, in some cases, making RICO particularly useful in organized crime cases involving systematic criminal activity stretching across decades. RICO also allows prosecutors to present evidence of criminal activity from earlier prosecutions, which would ordinarily be prohibited due to constitutional rules against successive prosecution of the same conduct.

The reach of RICO is quite broad, as its predicate crimes cover various forms of criminal activities. Most judges would ordinarily prohibit the prosecution of such diverse crimes in a single case and seek to break it up into a series of smaller trials, especially if it involves many defendants. Splintered adjudication in this fashion, where no single jury can see the entire picture of criminal activities, generally benefits organized crime groups, as their crimes are often composed of many crimes linked by a single chain of command. Thus, effective prosecution of crime groups requires proof of many crimes in a single trial. RICO permits this, allowing the jury to see an entire pattern of crimes.

B. Extraterritorial Application of RICO

RICO is useful against transnational organized crime groups because it can reach some extraterritorial activity. Generally, statutes have been found applicable to conduct outside of the United States where inherent powers of the United States as a sovereign are threatened, or where its impact is on a substantial number of U.S. citizens. It is settled U.S. law that Congress has the authority to enforce its laws beyond the territorial boundaries of the United States when Congress expresses its intent that a particular statute has such extraterritorial application.[6]

RICO's legislative history reflects Congressional intent that the RICO statute be liberally construed to effectuate its remedial purpose. Its broad goals of eliminating organized crime and effects of organized crime warrant extraterritorial application. The language of the statute itself addresses racketeering enterprises "engaged in or the activities of which affect interstate or foreign commerce."[7] Moreover, Congress has added new offences to the list of crimes which can be predicates for RICO that clearly apply to conduct outside of the United States. These include alien smuggling violations which were added in 1994, and terrorism offences which were added in 2001. The extraterritorial application of RICO in a given case must satisfy the Principles of International Law as set for the in the Restatement of Foreign Relations, Section 402. These include the objective territorial principle, nationality of the defendant, the passive personality principle, the protective principle, and the universality principle.

VI. COMPELLED AND VOLUNTARY TESTIMONY

A. Immunity System

The ability to grant immunity to an individual allows the U.S. government to compel testimony from a reluctant witness who would otherwise invoke the Fifth Amendment privilege against compulsory self-incrimination.[8] This authority is derived from the principle that compelling its citizens to testify is one of the government's most important powers to assure effective functioning.[9] Because a witness may not refuse to comply with such a court order, the testimony, and any other information compelled by the order, cannot be used against the witness in any subsequent criminal case.

Until 1970, there were many federal immunity statutes which provided transactional immunity, which is

[6] *See* Equal Employment Opportunity Comm'n v. Arabian Am. Oil Co., 499 US, 244, 248 (1991).
[7] 18 U.S.C.A. § 1962(c) (West).
[8] *See* 18 U.S.C.A. § 6002 (West); Kastigar v. United States, 406 U.S. 441 (1972).
[9] *See* Murphy v. Waterfront Comm'n378 U.S. 52, 93 (1964) (White, J., concurring).

providing immunity to witnesses from future prosecutions as to any transactions or matters about which he or she testified. Currently, however, the federal system has replaced transactional immunity with use immunity. In 1970, Congress enacted use immunity statutes which proscribed the use in any criminal case of testimony compelled under court-ordered immunity grants. Thus, use immunity only provides protection for the witness from his or her own testimony. It does not immunize a witness from matters about which he or she testified before a grand jury. While not providing as broad coverage as transactional immunity, use immunity is nevertheless consistent with Fifth Amendment principles because it "prohibits the prosecutorial authorities from using the compelled testimony in any respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness."[10]

Federal prosecutors, with the approval of the Attorney General, the Deputy Attorney General, or a designated Assistant Attorney General, may seek a court order granting immunity when, in the government's judgment, the testimony or other information is necessary in the public interest and the individual has asserted, or is likely to assert, his or her privilege against self-incrimination. Non-exhaustive factors in invoking the public interest include 1) the importance of the prosecution to effective enforcement of the law, 2) the value of the person's testimony, and 3) the person's relative culpability in relation to the offence being prosecuted. Finally, there is a "close family exception," in which the Department refrains from compelling the testimony of a close family relative of the defendant on trial.

B. Non-Prosecution Agreements and Cooperation Agreements

In addition to the immunity system, there is also an "agreement" system which, while not contained in the U.S. Code, is a widespread, valid practice in obtaining witnesses. There are two kinds of agreements that the government can enter into with witnesses: non-prosecution agreements and cooperation agreements.

Non-prosecution agreements are generally used when the witness plays a minor role in a crime.[11] Essentially, non-prosecution agreements grant immunity from prosecution from the case at bar in return for full, truthful cooperation. However, in practice, they are rarely used.

Cooperation agreements, meanwhile, are the most commonly-used tool to gain truthful testimony from a culpable witness. These agreements require some liability for the witness's criminal conduct; the defendant agrees to fully and truthfully cooperate, testify in any court proceeding concerning matters asked of him or her, and enter a guilty plea on other charges. In exchange for this cooperation, the government files a motion giving the judge special discretion in determining the defendant's sentence.[12] Often the sentencing judge will reduce an otherwise fixed sentence. This creates an incentive to cooperate, and often assists in prosecuting organized crime groups.

During a trial which includes a witness testifying under immunity or under a non-prosecution or cooperation agreement, the prosecutor anticipates that the lawyer who represents the accused may attack the witness's credibility. The defence attorney may try to convince the jury that the witness will say whatever the government wants him or her to say in order to receive the benefit of the deal negotiated in the cooperation agreement. To ensure credibility of these witnesses, prosecutors usually present additional evidence which corroborates the testimony of the cooperators. Documentary evidence, forensic evidence, surveillance, and the testimony of other witnesses are all used to bolster the jury's confidence in the truth of cooperator testimony.

VII. WITNESS PROTECTION

Another valuable tool that assists the government in prosecuting organized crime groups is witness protection. Because organized crime groups can often be violent, witness intimidation can pose a substantial obstacle to successful prosecution. While the Witness Security Program, discussed below, is the most famous witness protection system, police departments and federal agents also provide protection to witnesses as needed. These ad hoc witness protection services remove obstacles to testimony by witnesses that may otherwise be harmed before testifying or refuse to testify out of fear.

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[10] *See* Kastigar, 406 U.S. at 453.
[11] U.S. Department of Justice, United States Attorney's Manual, ch. 9, § 27.600 (B)(1)(c).
[12] U.S. Sentencing Guidelines Manual, § 5K1.1 (2005).

Separately, there are other witness programs that, while not providing protection, nonetheless remove obstacles to witnesses testifying. The Emergency Witness Assistance Program ("EWAP"), for instance, provides temporary funding for threatened witnesses, including transportation, housing and moving expenses, subsistence, telephones, and child or elder care.

A. Witness Security Program

The Department of Justice created the Federal Witness Security Program in 1970. Subsequently, the Witness Security Reform Act, passed in 1984, expanded the authority of the Attorney General to provide security through relocation for witnesses in cases involving organized crime or other serious offences where a violent crime against the witness is likely to occur.

Requests for witness protection are made when it is clear that a candidate will be an essential witness, and will require relocation from the danger area. Due to the safety concerns of a witness and his or her family, a witness's participation in the Program is not disclosed unless the Department of Justice's Office of Enforcement Operations authorizes it. For a witness to be admitted into the Program, he or she must supply significant evidence in important cases, and must show that there is a perceived threat to his or her security.

Before approval for entry, the United States Marshals Service ("USMS") must conduct procedures to minimize disruption to both government agencies and witnesses. First, the USMS will interview the applicant so as to determine that the witness is essential to the prosecution, is endangered, and requires entry into the Program. The witness is also provided with an overview of the Program and what he or she can, and cannot, expect to receive through it. Next, the USMS will arrange for psychological testing and evaluation for each prospective witness and adult member of the witness's household who are also to be protected. This test will attempt to determine if the individuals will pose a safety risk to their relocation communities. Potential participants who are incarcerated are required to undergo a polygraph examination to ensure that they do not intend to harm or disclose other protected witnesses.

In order to ensure that the witness's testimony will be available at trial, it is recommended that the witness either testify before a grand jury or otherwise commit to providing the requested testimony at trial. Once in the Program, the witness and his or her family are relocated to a less dangerous area, and are given new identities and financial assistance until the witness can obtain secure employment.

Transnational organized crime groups presents a new challenge since the Witness Security Program operates only in the United States. However, aliens can be eligible for the Program following appropriate immigration authorization allowing the witness and family members to remain in the United States. Despite its costs, the Witness Security Program has proven to be effective in the prosecution of organized crime groups.

VIII. FINANCIAL TOOLS, INCLUDING FORFEITURE

A. Financial Tools

There are two primary reasons why a government may choose to follow the money and assets of organized crime groups using financial tools. First, many people commit crime for the money and assets it gives them. Accordingly, the government can catch criminals through their money and assets, by following the paper trails and digital trails left by the criminal networks. Once the government has found the money and assets, it can forfeit the money and the assets, and provide restitution to any victims. Second, money also helps pay for more crimes. By cutting off the flow of money and forfeiting it, the government can help prevent future crimes from being committed.

Financial tools can help many different kinds of investigations. Financial tools are not only used for investigations of financial crimes, such as money laundering and fraud. For instance, financial tools can also be used to investigate organized crime groups, violent crimes, human trafficking/smuggling, narcotics, child exploitation, terrorism, cybercrime, and public corruption.

There are different kinds of kinds of financial information that government investigators can obtain, including:

1) Ordinary records from financial institutions, such as records about checks, credit cards, savings, loans, investments, and safe deposit boxes.

2) Due diligence records, also known as "Know Your Customer" records. These are account opening records and account monitoring records that financial institutions maintain about their customers, such as corporate history, signature cards, references, and taxes.

3) Records that financial institutions are required by law to create and maintain, such as Currency Transaction Reports ("CTRs") and Suspicious Activity Reports ("SARs").

4) Electronic fund transfers, including international wire transfers through SWIFT.

5) Nonbank financial records, such as hawala and hundi.

In most countries, including the United States, domestic financial information is available through legal process, such as subpoenas or court orders. In some countries, domestic financial records are available to government investigators automatically, without the need for legal process. There are different ways to obtain foreign financial information, including:

1) Treaty requests, which are official requests for information through bilateral Mutual Legal Assistance Treaties or international legal conventions.

2) Law enforcement agency contacts, in which a government's law enforcement agency requests and obtains information from a law enforcement agency in another country.

3) Requests through the Egmont Group.

The Egmont Group is composed of government Financial Intelligence Units ("FIUs") from more than 150 countries. The Egmont Group focuses on fighting money laundering, terrorist financing, and other financial crimes. It is open to new member countries, at www.egmontgroup.org/membership. The Egmont Group helps member states share financial information with each other.

B. Forfeiture

With the exception of organized crime groups that commit violence for the sake of power and dominance, such as certain gangs, organized crime groups are primarily motivated by material gain. Therefore, it is essential to take the profit out of crime. Strong forfeiture laws aid in that mission. Forfeiture is a criminal penalty for many offences in the United States.

Generally speaking, upon conviction for an offence that carries forfeiture as a penalty, a defendant may be ordered to forfeit all profits or proceeds derived from the criminal activity, any property, real or personnel, involved in the offence, or property traceable to the offence such as property acquired with proceeds of criminal activity. For example, if a defendant uses a residence or car to distribute drugs, that property is subject to forfeiture. Thus, a convicted defendant may be ordered to forfeit all proceeds of his or her criminal activity including money and other forms of property.

In addition to criminal forfeiture, civil forfeiture laws also allow the government to obtain property used in criminal activities. The principal difference between criminal and civil forfeiture is that criminal forfeiture is limited to a convicted defendant's personal interest in property subject to forfeiture, whereas civil forfeiture focuses on the property itself.

For example, suppose a defendant repeatedly used a house to sell drugs, but he did not have an ownership interest in the house. If he is convicted of drug dealing, that house is not subject to criminal forfeiture because the defendant did not own the house. However, a civil forfeiture law suit could be brought against the house itself as a defendant, even if the owner of the house was not engaged in criminal activity. The house, nonetheless, is subject to civil forfeiture because it was repeatedly used to facilitate criminal activities, and the owner did not take adequate steps to prevent his house from being used for criminal activities. There are various defenses to such civil forfeiture, such as the "innocent owner defense", but those are beyond the scope

of this article.

Criminal and civil forfeiture laws are powerful weapons in the prosecutor's arsenal to take the profit out of crime.

IX. CONCLUSION

Organized crime groups operate all over the world, whether they take the shape of the Mafia, gangs, cybercrime groups, or a variety of other forms. Likewise, they pose a variety of dangers, including murders, child exploitation, human trafficking, robbery, frauds, narcotics, identity theft, and extortion. In recent years, these dangers have been amplified by advances in technology and globalization. Capitalizing on these advances, organized crime groups communicate faster, hide their money in more locations, travel more cheaply, and may conceal their activities through encryption. The tools discussed in this article are essential to the U.S. government's efforts against such organized crime groups. Electronic surveillance, undercover operations, informants, RICO, compelled and cooperating witness testimony, witness protection, and financial tools such as forfeiture all help the U.S. government pierce the secretive and violent world of organized crime groups and bring those groups to justice.

CASE STUDIES OF U.S. LAW ENFORCEMENT TECHNIQUES AGAINST ORGANIZED CRIME GROUPS

*Joseph K. Wheatley**

I. INTRODUCTION

U.S. law enforcement authorities face a variety of domestic and transnational organized crime groups. Those groups run the gamut in the types of crimes committed; structure and unifying purposes; from small to large in size; and from local to regional to national and transnational in scope. While not statutorily binding, there are several major definitions of organized crime in the United States, including the following two definitions, which may aid decision-makers in setting priorities and focusing resources as new criminal threats are identified and prosecuted.

In 1986, the President's Commission on Organized Crime released a report, which listed six characteristics of organized crime groups:

> The criminal group is a continuing, structured collectivity of persons who utilize criminality, violence, and a willingness to corrupt in order to gain and maintain power and profit. The characteristics of the criminal group, which must be evidenced concurrently, are: [1] continuity, [2] structure, [3] criminality, [4] violence, [5] membership based on a common denominator, [6] a willingness to corrupt and a power/profit goal.[1]

In 2008, *the Law Enforcement Strategy to Combat International Organized Crime* defined international organized crime groups as:

> [T]hose self-perpetuating associations of individuals who operate internationally for the purpose of obtaining power, influence, monetary and/or commercial gains, wholly or in part by illegal means, while protecting their activities through a pattern of corruption and/or violence. There is no single structure under which international organized criminals operate; they vary from hierarchies to clans, networks and cells, and may evolve to other structures. The crimes they commit also vary.[2]

The 2008 *Strategy's* definition shares terms in common with the 1986 President's Commission on Organized Crime's six characteristics, such as continuity, structure, and pursuit of power as a goal; and shares terms in common with the *United Nations Convention Against Transnational Organized Crime*. These definitions are not limited to a particular organization, such as the Mafia, leaving room for various types of organizations to qualify as an organized crime group, such as gangs and cybercrime groups.

This article examines three different forms of organized crime groups in the United States, which also operate transnationally in some cases—the Mafia, gangs, and cybercrime groups. In doing so, this article offers case studies of how various types of law enforcement tools have been used successfully against those three forms of organized crime groups. By no means are those three organized crime groups an exhaustive list of the groups which operate in the United States or elsewhere. However, as they are each distinctive forms of organized crime groups, with varying predicate offences, structures, modes of operations, and unifying purposes, they serve as helpful examples about law enforcement tools which may be successful

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[1] President's Commission on Organized Crime, *Report to the President and the Attorney General, The Impact: Organized Crime Today* (1986), pp. 25–29 [hereinafter *President's Commission Report*].

[2] United States Department of Justice, *The Law Enforcement Strategy to Combat International Organized Crime* (23 April 2008), p. 2.

against different types of organized crime groups.

II. THE AMERICAN MAFIA

The Mafia holds a prominent place in American popular conceptions of organized crime. The terms of "Mafia" and "organized crime" even tend to be treated as one and the same. Congressional investigations in the 1950's and 1960's increased the government's knowledge about the Mafia, also known as "La Cosa Nostra," commonly translated into English as "Our Thing".[3] Until that time, the Mafia as an institution was largely unknown to the U.S. Congress. Investigations by the U.S. Congress' Kefauver and McClellan Committees helped reveal, to the public and legislators, the Mafia's infrastructure, rules, and leadership.[4]

The Mafia is a hierarchical organization, composed of career criminals, that requires its members to show loyalty and obedience.[5] Mafia groups, also known as "families," operate in a given city or region.[6] A "boss" serves as the leader of a Mafia family and receives a large fraction of the family's earnings.[7] An "underboss" manages the daily operations of a Mafia family and represents the boss when necessary.[8] "Captains" manage the "soldiers," the low-level members who carry out most of the Mafia family's activities, at times using uninitiated associates of the family.[9]

The Mafia earns money from various crimes. In the 1950's, the Mafia derived most of its revenue from loan-sharking and gambling.[10] The Mafia has also earned money from prostitution, labor racketeering, and sales of black market goods.[11] Starting in the 1980's, narcotics trafficking became the most significant source of revenue for the Mafia.[12] Using legitimate businesses as money laundering fronts, the Mafia hides the sources of its finances.[13]

The Mafia is just one example of the large, hierarchical organized crime groups that operate in the United States. For instance, U.S. law enforcement agencies face Russian organized crime groups and gangs, such as MS-13 and others described below, that are also large and hierarchical.

A. Successful Methods against the Mafia

Various methods have been used successfully against the Mafia, including electronic surveillance and informants. While various methods have been used successfully, this section offers examples of the use of the Racketeer Influenced and Corrupt Organizations statute and undercover operations against the Mafia.

1. Racketeer Influenced and Corrupt Organizations Statute ("RICO")

In 1970, the U. S. Congress enacted the Organized Crime Control Act, which included Racketeer Influenced and Corrupt Organizations, a landmark law commonly known as "RICO". RICO represented a new approach by the United States for conceptualizing and targeting organized crime.[14] RICO treats organized crime groups as they really are, criminal enterprises to be dismantled, whether they are traditional groups that prey upon their victims face-or-face, or cybercrime groups that prey upon their victims from thousands of miles away. To paraphrase, RICO criminalizes a pattern of conduct performed as part of a criminal enterprise, such as owning, participating in, or funding such enterprises, or conspiracies to commit such

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[3] *See* United States Congress, *Senate Report No. 617* (1969), pp. 36–43.
[4] *See generally* United States Congress, *Organized Crime and Illicit Traffic in Narcotics: Hearings Before the Permanent Subcommittee on Investigations of the Senate Committee on Government Operations* (1963), p. 80 [hereinafter *McClellan Committee Hearings*]; United States Congress, *Report of the Senate Special Committee to Investigate Organized Crime in Interstate Commerce*, S. Rep. No. 307 (1951) [hereinafter *Kefauver Committee Report*].
[5] *McClellan Committee Hearings*, p. 2 (remarks of Senator John McClellan).
[6] President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Organized Crime* (1967), p. 7 [hereinafter *Task Force Report*].
[7] *President's Commission Report*, p. 39.
[8] *Id.*; *Task Force Report*, p. 7.
[9] *President's Commission Report*, p. 39; *Task Force Report*, pp. 7–8.
[10] *Task Force Report*, pp. 2, 4; *Kefauver Committee Report*, p. 2.
[11] *Kefauver Committee Report*, p. 1.
[12] *President's Commission Report*, p. 11.
[13] *Task Force Report*, p. 4.
[14] 18 U.S.C.A. § § 1961–1968 (West).

conduct.[15] In its focus on criminal enterprises, RICO distinguishes itself from the various laws targeting organized crime that preceded it. RICO possesses considerable flexibility to target new criminal groups that arise, since it names no particular criminal group as liable for prosecution.

In 1980, ten years after enacting RICO, the federal government used the statute to prosecute a leader of the Mafia. On November 21, 1980, Frank "Funzi" Tieri, the head of the Genovese organized crime family, one of the Mafia's five families in New York City, became the first Mafia boss convicted under RICO. He was sentenced to ten years' imprisonment on January 23, 1981.[16]

By the mid-1980's, the federal government's RICO prosecutions of organized crime figures had expanded considerably. On February 25, 1985, in the "Commission Case," a federal grand jury in New York City indicted the bosses, and some major subordinates, of the city's five Mafia organized crime families, for various racketeering offences, including murder.[17] The Commission Case targeted not only the five Mafia families in New York, but also the "Commission", the governing board created by the families to oversee Mafia operations in the United States.[18] The trial made extensive use of electronic surveillance, including recordings of Mafia headquarters, phones, and vehicles. On November 19, 1986, a jury convicted the eight defendants of nearly all the charges against them.[19] On January 13, 1987, a federal judge sentenced each defendant to one-hundred years' imprisonment, except for one defendant, who received a forty-year prison sentence.[20]

In the years following the Commission Case, Mafia leaders, members, and associates around the country were convicted, including the heads of the New York, Boston, and Philadelphia Mafia families, which further weakened the Mafia families. In another blow to the Mafia, on January 20, 2011, the U.S. Department of Justice announced charges in three cities against more than 100 alleged Mafia leaders, members, and associates, including RICO and related crimes, such as murder and extortion. This was the largest day of Mafia arrests in U.S. history.[21]

Cases such as the Commission Case and the indictments in 2011 are merely a few examples of the large RICO prosecutions of Mafia families. Around the United States, law enforcement authorities continue to undermine the Mafia crime families using RICO and other methods. Such prosecutions attack the structure and the chains of command of the Mafia families by impeding the recruitment and retention of their leaders and members. In turn, these prosecutions diminish the Mafia families as institutions and limit their capacity to commit crimes.

2. Undercover Operations

One prominent example of the effectiveness of undercover operations against the Mafia is Joseph Pistone, a Special Agent of the Federal Bureau of Investigation ("FBI"), who infiltrated the Bonanno and Colombo Mafia crime families.[22] From 1976 through 1981, Pistone worked undercover as Mafia associate "Donnie Brasco." By using an undercover agent, the FBI did not have to rely for evidence on informants inside of the crime families.

Posing as a jewel thief providing his skills to the Mafia, Pistone earned the trust of leading members of the crime families, who discussed various crimes in his presence, including murders of rival Mafia members, hijackings of delivery trucks, and the sale of stolen property. Some of those conversations were recorded by Pistone, which further corroborated the events that Pistone observed. Because those conversations were recorded, prosecutors could rely on both Pistone's testimony and the voices of the Mafia members themselves as evidence.

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[15] 18 U.S.C.A. § 1962 (West).
[16] Les Ledbetter, "Frank Tieri, 77, Convicted New York Crime Leader", *New York Times*, 31 March 1981.
[17] Michael Arena, et al., "Raising the Curtain on Organized Crime", *Newsday*, 9 July 1986.
[18] Ed Magnuson, "A jury convicts eight Mobsters", *Time*, 1 December 1986.
[19] Arnold H. Lubasch, "Judge Sentences 8 Mafia Leaders to Prison Terms", *New York Times*, 14 January 1987, p. A1.
[20] *Id*.
[21] William K. Rashbaum, "Nearly 125 Arrested in Sweeping Mob Roundup", *New York Times*, 20 January 2011, p. A21.
[22] Federal Bureau of Investigation, "Joe Pistone, Undercover Agent". Available from https://www.fbi.gov/history/famous-cases/joe-pistone-undercover-agent (accessed 25 April 2017).

Pistone became such a trusted associate of the Mafia that the Bonanno crime family considered making him a full member of the organization. However, the FBI decided to conclude the undercover operation before Pistone became a member, because of the risk of violence. After the Pistone's true identity was revealed, chaos erupted within the Mafia world, with leaders and members concerned about future infiltration by government investigators and informants. Evidence collected by Pistone contributed to the convictions of more than 100 Mafia members and associates. The prosecutions particularly depleted the leadership and membership of the Bonanno crime family and damaged the crime family as an institution, which was shunned for a period of time by the Mafia's ruling Commission.

III. GANGS

In recent years, the federal government has engaged in a crackdown on gangs, many of which are large organizations that operate internationally, nationally, or regionally. While gangs commit a variety of crimes, including white-collar offences such as fraud and identity theft, they tend to focus on drug crimes and violent crimes, such as murder, shootings, and robberies. Certain gangs may resemble or eventually resemble a traditional organized crime group, such as the Mafia. The primary author of the RICO statute, G. Robert Blakey, has remarked that the Mafia was once less sophisticated and gradually morphed over time into an organized crime group: "[Gangs are] in the process of growing into Mafias … The Mafia started out as a gang."[23]

While there is a no single definition for gangs, a report by the U.S. Department of Justice's Bureau of Justice Assistance remarked that most of the gang definitions include a portion, or all, of the following factors:

> [1] Three or more individuals associate periodically as an ongoing criminal group or organization, whether loosely or tightly structured.
>
> [2] The group or organization has identifiable leaders, although the leader for one type of criminal activity may be different than the leader for another.
>
> [3] The group has a name or identifying symbol
>
> [4] The organization's members, individually or collectively, currently engage in, or have engaged in, violent or other criminal activity[.]
>
> [5] The group frequently identifies itself with or claims control over specific territory (turf) in the community, wears distinctive dress and colors, and communicates through graffiti and handsigns among other means.[24]

One example of a prominent gang in the United States is Mara Salvatrucha 13, commonly known as MS-13. U.S. Attorney General Jeff Sessions has named MS-13 and other violent groups as major threats, and committed significant federal resources to prosecuting them.[25] MS-13, which is composed primarily of Salvadorans and other Central Americans, has thousands of members in various states around the United States, and reputedly tens of thousands of members in Central America.[26] Prosecutions in cities across the country, such as Atlanta, Dallas, Los Angeles, New York, and Washington, D.C., have shown coordination between MS-13 chapters domestically and internationally, including coordination of violent crime between Central American MS-13 leaders and MS-13 chapters operating in U.S. cities. Among the gang's crimes are murder, armed assaults, robbery, transportation and distribution of drugs, and alien smuggling.

Another prominent gang in the United States is the Vice Lords, which has thousands of members nationwide. As shown in court, the gang engages in a variety of crimes, including murder, shootings, robbery,

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[23] John Gibeaut, "Gang Busters", *ABA Journal*, January 1998, p. 65.
[24] United States Department of Justice, Bureau of Justice Assistance, *Urban Street Gang Enforcement* (January 1997), p. 30.
[25] Jake Pearson, "Trump, top officials take aim at brutal MS-13 street gang", *New York Daily News*, 19 April 2017. Available from http: //www. nydailynews. com/newswires/new-york/trump-top-officials-aim-brutal-ms-13-street-gang-article-1.3069112 (accessed on 27 April 2017).
[26] *Id*.

narcotics trafficking and witness intimidation. The Vice Lords' leaders are located in Chicago and Detroit and the gang is broken down into various "branches," with names such as the "Traveling Vice Lords" and "Insane Vice Lords." Members who seek to leave the gang oftentimes endure a physical beating by multiple Vice Lord members or are targeted for killing. The Vice Lords also has a biker gang affiliate known as the Phantom Outlaw Motorcycle Club ("Phantoms"), which emerged from the Vice Lords and was led in part by Vice Lords. The Phantoms are headquartered in Detroit and have sub-groups, known as "chapters" in at least ten states, as well as a chapter of "Nomads" that travel at will. As shown in court, the Phantoms and its members were involved in a range of criminal activity, including conspiracy to commit murder, shootings, robbery, extortion, and the possession and sale of stolen vehicles and motorcycles.

A. Successful Methods against Gangs

Various methods have been used successfully against gangs across the country, including RICO. For instance, the U.S. Department of Justice's Organized Crime and Gang Section ("OCGS") and U.S. Attorney's Offices have prosecuted the MS-13 gang using RICO in various U.S. states, including Maryland, Georgia, Virginia, New Jersey, North Carolina, and California.[27] In another example, OCGS and the Detroit U.S. Attorney's Office have pursued RICO and other charges against the Vice Lords and Phantoms over several years, resulting in seven indictments and the convictions of 27 leaders, members, and associates. RICO indictments, such as these and others, have aided the government in undermining gangs as organizations and preventing further violence.

While various methods have been used successfully against gangs, such as the RICO prosecutions described above, this section offers specific examples of the use of informants, electronic surveillance, and testimony under cooperation agreements.

1. Informants and Electronic Surveillance

In Detroit in 2013, the government's use of an informant and electronic surveillance helped prevent large-scale violence, and assisted in the prosecution of the Vice Lords and Phantoms. As shown in court, a member of the Phantoms agreed to become an informant for the government, following his arrest on a firearms charge in 2013. Once he agreed to cooperate with the government, the informant began providing information to investigators about the historical and ongoing activities of Vice Lords and Phantoms. Further, the informant began recording his in-person conversations with other Vice Lords and Phantoms members, as well as his phone calls with members. In total, the informant recorded dozens of conversations, with some lasting more than an hour. Given the informant's former role as National President of the Phantoms and his long association with its members, he was well-placed within the organization to gather information, including recorded conversations with Antonio Johnson, the "Three-Star General" over all Vice Lords in Michigan and the National President of the Phantoms.

The informant made recordings and told law enforcement investigators about various crimes by the Vice Lords and Phantoms, including shootings, extortion of rival groups, robberies, assaults, and motorcycle thefts. For instance, recordings entered into evidence showed Vice Lords and Phantoms talking about shooting a member of a rival group in September 2013, including the identity of the Phantom/Vice Lord who fired the gun. Other recordings show Antonio Johnson telling the informant before the shooting took place, "I don't burn buildings. At all. I burn bodies", and after the shooting, "I think they gonna want to talk with once we kill like ten of them".

However, there was one particular crime to which the informant alerted law enforcement, which helped the government prevent large-scale violence by the Vice Lords and Phantoms in 2013. Recordings made by the informant and other evidence showed that the Vice Lords and Phantoms developed a three-phase mass murder plot against a rival group that was interrupted by law enforcement as phase one was just about to begin. In the first phase, the Vice Lords and Phantoms were to murder at least three members of a rival group in Detroit, in order to lure additional victims to Michigan for the funeral. In the second phase, the Vice Lords and Phantoms were to murder all members of the rival group who would be at the rival's Detroit headquarters following the funeral of the three victims murdered in the first phase. In the third phase, the Vice Lords and Phantoms were to kill rivals in other cities throughout the country where the Phantoms had

[27] *Id.*

chapters.

Acting on the recordings from the informant and other evidence, law enforcement officers from the Bureau of Alcohol, Tobacco, Firearms, and Explosives, FBI, and Detroit Police Department were able to interrupt the mass murder plot before it could happen by executing search warrants and arresting Vice Lords and Phantoms members in October 2013. During the execution of one of the search warrants, a Phantoms leader shot at federal agents. The informant's recordings and other evidence showed at trial that, at the time of the search warrants and arrests, the Vice Lords and Phantoms were preparing for the first phase of the murder plot, including stockpiling firearms, hiring a thief to steal a van to be used in the murders, conducting research and surveillance of their intended victims, and assigning Phantom members and Vice Lords members to stalk and murder the intended victims.

Using these recordings and the informant, the government was able to avert the mass murder plot, and build a prosecution of the Phantoms and Vice Lords. In a series of indictments in 2013 and 2014, fourteen alleged leaders and members of the Vice Lords and Phantoms were charged with RICO, the mass murder plot, several shootings, and other offences. Among the defendants was Antonio Johnson, the "Three-Star General" over all Vice Lords in Michigan and the National President of the Phantoms.

2. Testimony under Cooperation Agreements

Another example of an effective method against gangs is the use of witness testimony under cooperation agreements. Following the indictment of Vice Lords and Phantoms members, the government continued to build its prosecution of the criminal groups. As was shown in court, several Vice Lords and Phantoms agreed to cooperate with the government's prosecution after being charged for their offences. Testimony by these cooperating witnesses contributed significantly to the prosecution of the criminal groups.

Such agreements are commonly known as "cooperation agreements." They require some liability for a defendant's criminal conduct; in which a defendant agrees to fully and truthfully cooperate, testify in any court proceeding concerning matters asked of him or her, and enter a guilty plea on other charges. In exchange for this cooperation, the government files a motion giving the judge special discretion in determining the defendant's sentence. Often the sentencing judge will reduce the defendant's sentence. This opportunity for a sentence reduction creates an incentive to cooperate.

Testimony by witnesses under cooperation agreements is effective against organized crime groups, and defendants in general, for a variety of reasons. First, insider witness testimony can be more effective at explaining the internal operations of a criminal organization than undercover operations or electronic surveillance. Second, insiders are already well placed within the criminal groups, compared to undercover officers. If undercover officers are able to penetrate a criminal organization, it is very difficult and they are rarely able to penetrate deep within the organization. Third, insider witnesses are able to interpret coded or confusing language that is recorded on electronic surveillance, and explain those conversations in court.

In court during two trials, several cooperating witnesses testified against the Vice Lords and Phantoms, and demonstrated the effectiveness of insider testimony. Witnesses explained to the jury how the criminal groups worked from the inside, such as the groups' leadership, membership, chain of command, rules, history, and rivals. Further, they described crimes involving the two groups, and identified who committed each of those crimes. This testimony included details and context about the Vice Lords and Phantoms organizations and their crimes that other methods would not necessarily have uncovered. For instance, insider witnesses testified about private conversations with other members of the organizations, the organizations' private meetings, and crimes that were not observed by the police, such as shootings, assaults, robberies, and motorcycle theft.

This testimony by witnesses using cooperation agreements was powerful evidence against the Vice Lords and Phantoms, especially when combined with other evidence, such as audio recordings made by the informant. Through guilty pleas and two trials, thirteen of the fourteen alleged Vice Lords and Phantoms described above were convicted for various crimes connected to the groups, including RICO, the mass murder plot, shootings, and robberies. The highest prison sentence was for 40 years, imposed on Marvin Nicholson, a Vice Lord and the National Enforcer of the Phantoms; followed by 35 years in prison for Antonio Johnson, the "Three-Star General" over all Vice Lords in Michigan and the National President of the

Phantoms.

In total, the methods described above, such as RICO, electronic surveillance, informants, and cooperating witness testimony, contributed to seven indictments and the convictions of 27 leaders, members, and associates of the Vice Lords and Phantoms. The convictions were for a variety of additional crimes, including armed home invasions, the disclosure of private medical information that was taken from a hospital database, and the shooting of a family of four with a machine gun, after two of the family members had left or attempted to leave the gang.

Various methods, such as RICO, informants, electronic surveillance, and witness testimony under cooperation agreements, continue to be used effectively against gangs. The methods are effective against large gangs, such as MS-13 and the Vice Lords, but also smaller gangs that commit violence and other crimes in communities around the country.

IV. CYBERCRIME GROUPS

The traditional conception of organized crime, typified by the Mafia and gangs, has been upended, in part, by the Internet and other communications technologies that cybercrime groups use. Compared to the Mafia and gangs, cybercrime groups may have opaque and fluid command structures, and they appear to avoid using violence as a means of asserting control and discipline. Their offences are magnified by, or almost entirely dependent upon, the use of the Internet and other communications technologies, such as identity theft, online banking theft, and fraud schemes.

On April 23, 2008, in a speech before the Center for Strategic and International Studies in Washington, DC, then-U.S. Attorney General Michael Mukasey announced the release of *The Law Enforcement Strategy to Combat International Organized Crime* (the "*Strategy*"),[28] which identified cybercrime groups, among other international groups, as an organized crime threat.

Cybercrime, perpetrated by organized crime groups and others, presents a major threat to the United States and other countries. In addition to human suffering and other harms of such crime, cybercrime imposes significant costs upon people around the world. Estimates vary of the annual costs imposed by cybercrime, but they number in the hundreds of billions of dollars. For instance, the Center for Strategic and International Studies has estimated, in 2014, that the "likely annual cost to the global economy is more than $400 billion",[29] and that the costs account for about 0.8% of global GDP and about 0.64% of the United States' GDP.[30] Further, PwC's 2014 survey of organizations indicated that, in 2014, 19% of U.S. organizations each lost between $50,000 and $1 million, and 7% of U.S. organizations each lost more than $1 million.[31]

Although cybercrime has been a matter of concern for decades, sophisticated cyberattacks have occurred in recent years, and been committed on a far grander scale than before. For instance, in January 2014, Target, a large U.S. retailer, announced that cybercriminals had stolen the credit card information of 40 million shoppers, and the personal information of 70 million shoppers. Between 1 and 3 million of those credit cards were reportedly sold, yielding an estimated $53.7 million for the perpetrators. The cyberattack cost Target an estimated $148 million, and cost financial institutions an estimated $200 million.

While there are ways for U.S. law enforcement authorities to respond to such threats, the 2008 *Strategy* recognized the challenges facing them by cybercrime groups and other international organized crime groups. As then-Attorney General Michael Mukasey stated upon the release of the *Strategy*: "International organized crime poses a greater challenge to law enforcement than did the traditional mafia, in many respects. And the geographical source of the threat is not the only difference. The degree of sophistication is almost markedly different".[32] By their nature, organized crime groups may cross various jurisdictions, which complicates national law enforcement authorities' efforts to obtain evidence and prosecute members and associates of

[28] The *Strategy* drew upon a threat assessment of international organized crime to which various agencies contributed.
[29] Center for Strategic and International Studies, *Net Losses: Estimating the Global Cost of Cybercrime* (June 2014), p. 1.
[30] *Id.* at 9, 11. *See also generally*, KPMG International, *Issues Monitor: Cyber Crime—A Growing Challenge for Governments* (July 2011).
[31] PricewaterhouseCoopers, *Global Economic Crime Survey—US Supplement*, 2014, p. 14.

groups. Groups move across national borders with less difficulty, in comparison to law enforcement authorities, which are confined to their domestic jurisdictions and which must cooperate with foreign authorities to investigate crimes occurring beyond their borders. Additionally, international groups' elaborate financial and personnel structures, and prosecuting such groups, is time-consuming and expensive.

A. Successful Methods against Cybercrime Groups

The *Strategy* identifies four priority areas for the federal government to address against cybercrime groups and other international organized crime groups: 1) gathering and making use of information and intelligence; 2) setting priorities and targeting the most significant threats; 3) using the resources of the government in partnership with foreign authorities; and 4) using the enterprise model in investigating and prosecuting criminal enterprises to dismantle them.[33]

While various methods have been used successfully, this section offers examples of the use of an undercover operation, an informant, and RICO against cybercrime groups.

1. Undercover Operations

One prominent example of the effectiveness of undercover operations against cybercrime groups is the FBI's and U.S. Secret Service's investigation from 2006 through 2008 of DarkMarket, an Internet forum for buying and selling personal data used in perpetrating fraud. The forum, which *The Guardian* newspaper called the "top English language cybercrime site in the world", cost the banking industry tens of millions of dollars.[34] As news articles reflect, FBI Special Agent J. Keith Mularski spent roughly two years undercover on DarkMarket, posing as a cybercriminal, and infiltrating the forum. Mularksi, operating under the nickname "Master Splynter", inserted himself into DarkMarket's shadowy world of cybercrime, and gradually gathered information about the organization and the individuals buying and selling personal data over it. Eventually, Mularski earned the trust of DarkMarket's founder, later revealed to be Renukanth Subramaniam, nickname "JiLsi," who was then living in London. In an interview with *CNet News*, Mularski explained how he capitalized on that relationship to obtain greater access to the forum and its participants:

> I had good relations with the administrator whose alias was "Jilsi." He wasn't a very technical guy and was having problems running the site because it was getting attacked by a rival group. So I told him about my background as a spammer and told him how good I was at setting up sites. I did some demonstrations and set up some test sites to show him I had the skills. Then there was just a lot of talk and rapport building. One night when DarkMarket was getting attacked by a rival group I said I was ready and that I could secure the server for him and he said "let's move." That gave me full access to everyone using it and what they were doing.[35]

Thanks to Mularski's penetration of the criminal organization, he was ultimately able to control and monitor the forum from an FBI computer in Pittsburgh, Pennsylvania. In 2008, law enforcement authorities dismantled DarkMarket and began arresting alleged members of the forum around the world. Eventually, 60 alleged members were arrested in the United States, the United Kingdom, Germany, and Turkey, including DarkMarket founder Subramaniam, who pleaded guilty to charges in January 2010 in London.

2. Informants

The government's prosecution of Shadowcrew shows both the advantages and risks of using an informant. With the help of an informant, identified in court documents and media reports as Albert Gonzalez, the government investigated and prosecuted Shadowcrew, an Internet forum that allegedly facilitated computer hacking and the distribution of stolen credit card, debit card, and bank account numbers, as well as counterfeit identification documents. Gonzalez, who had been working as a "moderator" on Shadowcrew,

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[32] United States Attorney General Michael Mukasey, *Remarks Prepared for Delivery by Attorney General Michael B. Mukasey on International Organized Crime at the Center for Strategic and International Studies* (23 April 2008). Available at https://www.justice.gov/archive/criminal/icitap/2008/04-23-08-mukasey-speech.pdf (accessed on 1 May 2017).

[33] United States Department of Justice, *The Law Enforcement Strategy to Combat International Organized Crime*, p. 1.

[34] Caroline Davies, "Welcome to DarkMarket – global one-stop shop for cybercrime and banking fraud", *The Guardian*, 14 January 2010.

[35] Elinor Mills, "Q&A: FBI agent looks back on time posing as a cybercriminal", CNet, 29 June 2009. Available from https://www.cnet.com/news/q-a-fbi-agent-looks-back-on-time-posing-as-a-cybercriminal/ (accessed on 25 April 2017).

agreed to become an informant for the government after his arrest in July 2003, and provided assistance to the investigation. *The New York Times* described his work as an informant:

> After he agreed in 2003 to become an informant, Gonzalez helped the Justice Department and the Secret Service build, over the course of a year, an ingenious trap for Shadowcrew. Called Operation Firewall, it was run out of a makeshift office in an Army repair garage in Jersey City. Gonzalez was its linchpin. Through him, the government came to, in hacker lingo, own Shadowcrew, as undercover buyers infiltrated the network and traced its users around the world; eventually, officials even managed to transfer the site onto a server controlled by the Secret Service. Meanwhile, Gonzalez patiently worked his way up the Shadowcrew ranks. He persuaded its users to communicate through a virtual private network, or VPN, a secure channel that sends encrypted messages between computers, that he introduced onto the site. This VPN, designed by the Secret Service, came with a special feature: a court-ordered wiretap.[36]

In October 2004, 19 of Shadowcrew's alleged members and associates were charged federally in New Jersey for various cybercrimes stretching from 2002 to 2004.

The indictment alleged that Shadowcrew crossed the United States and at least six other countries, and involved approximately 4,000 people.[37] Further, the indictment held the defendants responsible for trafficking in at least 1.5 million stolen credit and bank card numbers, and losses in excess of $4 million.[38] Law enforcement authorities estimate that, if Shadowcrew had not been stopped, the credit card industry may have faced losses totaling hundreds of millions of dollars.[39] To date, except for two fugitives, all of the Shadowcrew defendants located in the United States have pleaded guilty and received sentences, ranging from probation up to 90 months in prison.[40]

However, the government's successful use of Gonzalez as an informant demonstrates the risks of using informants. As news reports show, the government later learned that Gonzalez committed crimes behind the government's back while he worked as an informant. At the time Gonzalez was aiding the government's investigation of Shadowcrew, and after he ceased working as an informant, Gonzalez worked with other cybercriminals to obtain access to payment card accounts in the computer databases of large corporations. In total, Gonzalez and others gained access to roughly 180 million accounts, including accounts in the databases of large U.S. companies, such as OfficeMax and the T.J. Maxx and Marshalls clothing chains. According to the government, the loss exposure for the victim companies for the data breaches was more than $400 million in reimbursements and forensic and legal fees. In March 2010, Gonzalez was sentenced to two concurrent 20-year prison terms, which he is currently serving. At one of his sentencing hearings, the judge stated: "What I found most devastating was the fact that you two-timed the government agency that you were cooperating with, and you were essentially like a double agent."[41]

3. RICO

While the use of RICO is new in cybercrime cases, it has also proven to be an effective method. On December 6, 2013, a federal trial jury in Las Vegas, Nevada reached the first RICO conviction of a defendant for cybercrime offences. At trial, the government presented evidence that the defendant, David Ray Camez, and others participated in an organization known as "Carder.su", an alleged marketplace for the distribution and sale of stolen personal and financial information, that reportedly had an estimated 5,500 members in July 2011. On May 15, 2014, a federal judge sentenced Camez to 20 years in prison for his offences, and ordered him to pay $20 million in restitution.[42] In total, 56 defendants were charged in four indictments, as part of

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[36] James Verini, "The Great Cyberheist", *The New York Times Magazine*, 10 November 2010. Available from https://mobile.nytimes.com/2010/11/14/magazine/14Hacker-t.html (accessed on 25 April 2017).
[37] United States Department of Justice, *Nineteen Individuals Indicted in 'Carding' Conspiracy* (28 October 2004). Available from https://www.justice.gov/archive/criminal/cybercrime/press-releases/2004/mantovaniIndict.htm (accessed on 26 April 2017).
[38] United States District Court for the District of New Jersey, *United States v. Mantovani, et al.* (28 October 2004).
[39] United States Secret Service, *U.S. Secret Service's Operation Firewall Nets 28 Arrests* (28 October 2004). Available from https://www.scribd.com/document/1220697/US-Treasury-pub2304 (accessed on 26 April 2017).
[40] *See* United States Department of Justice, *Houston Man Sentenced to 90 Months for Identity Theft* (11 July 2006). Available from http://www.usdoj.gov/opa/pr/2006/July/06_crm_424.html (accessed on 26 April 2017); U.S. Attorney's Office, District of New Jersey, *'Shadowcrew' Identity Theft Ringleader Gets 32 Months in Prison* (29 June 2006).
[41] Verini, "The Great Cyberheist".

Operation Open Market, which targeted the Carder.su organization. As of December 2015, 33 individuals have been convicted, with the remaining defendants being either fugitives or awaiting trial.[43]

V. CONCLUSION

This article has examined three forms of organized crime groups—the Mafia, gangs, and cybercrime groups—and offered case studies of effective law enforcement tools against each group. While these three groups and the case studies about them are not an exhaustive survey, they serve as an introduction to helpful law enforcement tools. These tools may be used effectively against various types of organized crime groups, even as groups differ in their predicate offences, structures, modes of operations, and unifying purposes. As organized crime groups constantly evolve, so must the methods used against them. Each organized crime group has a weakness, whether it is a violent gang operating openly on the streets of a city, or a secretive cybercrime group that stretches across the world. Law enforcement agencies, working collaboratively within and across countries, must constantly search for new ways to capitalize on such weaknesses, use investigative and prosecutorial tools that befit each situation, and bring those organized crime groups to justice.

[42] United States Department of Justice, *Member of Organization That Operated Online Marketplace for Stolen Personal Information Sentenced to 20 Years in Prison* (15 May 2014).
[43] United States Department of Justice, *Member of Organized Cybercrime Ring Sentenced to 150 Months in Prison for Selling Stolen and Counterfeit Credit Cards* (9 April 2015).

PARTICIPANTS' PAPERS

FIGHTING ORGANIZED CRIME IN EL SALVADOR: CHALLENGES

*Ena Isabel Amaya Soto**

I. THE LEGAL SYSTEM IN EL SALVADOR

In 1983 the Constituent Assembly in El Salvador decided to create a new Constitution, and they decided that the power of the State should not be vested in just one person; therefore with this new Constitution they divided the power of the State into three main Organs: Legislative, Executive and Judicial. Since then, it has been the Judicial Organ that has dedicated some of their efforts to preparing the courts that had already been created by the Legislative Organ.

With that having been said, it is important to point out that the Legislative Organ not only creates the courts, but also brings to life those specific laws to fight common and organized crime, and without these laws there is no way for these courts to exist. If you take a look to some of the special laws in El Salvador, you may find that there is a specific chapter that orders the creation of that specific court; for example, nowadays with the Special Law for a Life free of violence against women, the Legislative Organ reserved a chapter in this specific law that talks about the necessity to create a unique court that will only handle these kinds of crimes.

Between the years of 1995 to 2005, the amount of complaints relating to kidnaping, extortions, and drug trafficking started to increase, and the Legislative Organ decided to create the Special Law against Organized Crime and crimes of complex realization. Consequently in 2007 some new courts were born, and these were known as Anti-Mafia courts. To confront this kind of crime, the District Attorney's Office also created Special Units to investigate these crimes committed by the organized groups such as gangs, drug lords, auto-theft rings, etc.

The legal system in El Salvador has evolved so much in response to the needs of society, just as the society and the ways of committing crime have changed, so it has changed the legal system, just to accord to the reality that El Salvador is living especially when it comes to organized crime.

Before the year of 1998 it was the judge who investigated every case that was presented in court, and the job of the prosecutor was only to review the evidence and confirm the investigation that had already been made by the judge; however, in 1998 a new Penal and Procedure Penal Code were enacted, changing the way that the cases are investigated, making the District Attorney's Office responsible for the investigation with the help of the Police Department.

This new Penal Code was made for common crimes, so when the crime evolved from a simple offender to organized crime, the Executive Organ asked the Legislative Organ to create special laws to fight organized crime. Since then, the Legislative Organ has been reforming some of this common and special laws, just to make it easier to fight organized crime; however, it is important to recognize that a country not only needs laws, it also needs all the resources to put this law to work and get the results expected since the creation of these special laws.

A. Entities Responsible for Investigating Organized Crime and for Adjudication

El Salvador's Constitution separates the two institutions that investigate organized crime: one of them depends on the Executive Organ (President of the Republic and Ministers), this entity is call the Policia Nacional Civil (Police Department), where all the investigators and policemen can only investigate if the other entity orders them to do so; this other entity or institution is the Fiscalia General de la Republica (District

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Attorney's Office), and it is this enterprise that has the duty by express command of the Constitution to investigate all crimes, to defend and represent the interests of the State.

The District Attorney's Office directs the investigation in accordance with the provision of article 74 of the Code of Criminal Procedure; therefore, it has a monopoly on the investigation because the police department cannot investigate on their own or by initiative because they will always need direction of the District Attorney's Office by one of the prosecutors.

Because of the way that the investigation has been designed, the investigators are limited to work under the orders of a prosecutor. In El Salvador, this represents a big problem because of the number of cases that enter each day, making it difficult for just one prosecutor to be able to have control over all of the cases that are assigned in one day.

In my personal experience, back in November of 2010 when I became a prosecutor, I was given 1,973 cases, which implies around 1,973 possible victims and the same number of investigated persons (only if by chance you have just one victim and one person to investigate), and for the same number of cases there were only around four or six investigators to work with more than fifteen prosecutors, making the investigation pretty slow and difficult to achieve a good result by the time the prosecutor wants to take the case to the court.

El Salvador is made up of 14 Departments, and according to recent studies the population is 6.098 million, and for that amount of population you have in the whole country just four anti-mafia courts that are responsible to sentence the cases that are brought to them by the prosecutors. In these anti-mafia courts, there is only one judge for each one of them, and sometimes a judge takes around four or five months to finish a sentence because of the number of persons that are being judged, or the amount of felonies or proof presented in these courts.

B. Problems Facing the Investigation on Organized Crime.

Even though the legislature has given the District Attorney the authority to investigate and pursue all crimes, that does not mean that the prosecutor has all the tools to do so; sometimes you will find sub-regional offices that only have thirteen prosecutors for a whole department in El Salvador.

When in it comes to organized crime, this type of investigation is done by a Special Unit, depending on the crime being investigated, so it will be the Special Unit that responds to investigate. There are 10 Special Units at the Districts Attorney's Office, and each one of them has around 10 or 14 prosecutors for the whole country. Thus, there are sometimes hearings that are not covered due to insufficient personal in that Special Unit or even in the Common Units.

Despite the lack of human resources and vehicles, the District Attorney's Office has been able to work on big cases to fight organized crime, not only on topics of drugs and firearms, but also taking on big structures of corruption, gangs, economic crimes and some others that are currently affecting the country.

Nowadays in El Salvador, the Constitution orders that from the General Budget of the Nation, only 2% goes to the District Attorney's Office; as a result you may find the lack of resources in some offices, and even worse the lack of human resources to pursue all the crimes committed in El Salvador. The prime solution for this would be that the Legislative Organ decides to change the law, precisely the part of the Constitution that regulates the distribution of the General Budget of the Nation. Another solution can be that some of the public servants reduce their salaries and use part of that money to strengthen the police departments and the District Attorney's Office.

Even though it is sometimes quite difficult to conclude some investigations, the DA's Office has decided to establish certain criteria to prioritize the investigation of some cases. Right now, the new District Attorney has decided to prioritize the investigation of those cases that involves organized crime–gang members, corruption, drug trafficking, money laundering, etc. The reason is that these types of crimes directly affect the economy of the country, they lead to lower foreign investment, less jobs, and finally lower tax collection. The authorities in El Salvador are now applying a special law called Extinction of Dominion, and with this law the DA's Office goes after the properties of those persons who are being investigated for any kind of crimes,

especially if they are committed by organized crime groups; the consequence here is that all those properties that cannot be justified by the accused are confiscated by the State, and some of them go to auction and the money is divided between the Ministry of Justice and the DA's Office.

C. Current Situation Concerning Organized Crime in El Salvador

Currently in El Salvador organized crime has increased, mostly because there are not sufficient resources, but despite that, most of the judges, prosecutors and investigators are making great efforts to fight these kinds of crimes, especially because they are affecting directly the economic situation of the country. One of the biggest problems right now with organized crime is that the small and medium sized enterprises are constantly being extorted by gang members; these gangs are so well structured that they work only by direct orders of the chief of the gang; this chief is call *palabrero*, and it has not made any difference in the number of extortions, even though the palabrero is in prison and condemned to a life sentence; it is as if he was outside giving orders to the other gang members.

Despite of all the efforts that are being made by the institutions in El Salvador, and despite the new laws created by the Legislative Organ, or the creation of new courts, it will be almost impossible to fight back against organized crime as should be done if you are expecting to achieve success.

Organized crime nowadays has centred all their efforts in trading contraband of drugs and firearms: some of those groups focus on human trafficking, and some of these groups had been able to corrupt the legal system, sometimes by paying just employees of a specific court, but other times they pay directly to the judge who has the case under his command.

Some of the criminals that are involved in organized crime still leave on regular or poor conditions, but for several years, a few of these criminals have begun to increase their assets, and now the District Attorney's Office is going after those assets that cannot be justified by any document or testimony that prove it has been acquired in a legal way or with legal money.

D. International Cooperation

El Salvador has engaged in mutual legal assistance with other countries on the basis of international treaties; some of these international treaties allow El Salvador to ask for information while there is an open investigation for a specific crime; therefore, the country that has subscribed to this treaty has the obligation to help obtain the information that is been requested. To do so the country needs to know the facts that have been investigated and who is being investigated as well.

When information sought from the responding country is in relation to the organized crime, the responding countries have always tried to respond as soon as possible, bearing in mind that the all information they need to do the necessary search has already been sent to them in the beginning. Still, it can sometimes take around five months for the prosecutor to receive the answer sent by the responding country, and this excessive amount of time is just the reflection of the bureaucratic design made by the Legislative Organ. This bureaucratic design involves so many authorities that are not under the direct orders of the District Attorney's Office in El Salvador, so the only logical response or idea that comes to mind when you see so many authorities involved in this procedure is that the government always wants to know what is being investigated and especially who is being investigated.

This excessive amount of time that it takes to receive a document leads to a bigger problem, and there are direct consequences on those organized crime cases that are being investigated, and sometimes these cases have already been taken to court, making it hard to probe the felonies accused.

Right now the authorities involved in the procedure of mutual assistance are: first, the prosecutor, who has to make a request that goes to a Special Unit called the Unity of International Legal Affairs, where the document is checked to ensure that it has all the necessary information; the second step is to send this request to the Judicial Organ where it is checked once again; the third step is where the Judicial Organ sends the document to the Ministry of Justice (part of the Executive Organ) where the document is checked again; finally, the document gets to the Ministry of Foreign Affairs, and of course again the document has to be checked.

When the answer is finally sent to El Salvador, it goes through the same process in reverse to get into the hands of the prosecutor, so by this time, the investigation that is being conducted is practically public: no matter how many envelopes you send the document in, the central authority always opens them.

In the case of extradition it is almost the same way as mutual assistance, and involves the same agencies; the only difference is that when the General District Attorney asks for extradition, this is required to go to the Supreme Court, and all the 15 magistrates decide if this request can be made to the country where it is supposed to be a specific person; if the Supreme Court decides that is appropriate to make this request, they send the document to the Ministry of Justice and then to the Ministry of Foreign Affairs.

There are just a few cases of organized crime where El Salvador had asked for extradition, and most of them had been related with corruption, and some others with drugs; this has also been true when another country had asked El Salvador to extradite someone who was in Salvadorian territory.

As it has been said before, the legal basis for mutual legal assistance is a treaty, a multilateral or bilateral agreement, and the same goes for extradition, but with the only difference that extradition is regulated by the Constitution of El Salvador and also in the different treaties that had already been signed by the representatives. The reasons why extradition can be denied by the authorities in El Salvador depends on the considerations made by the Magistrates of the Supreme Court. They decide if the extradition is in accordance with the laws in El Salvador, if all the requirements of the treaty have been satisfied, and if there is another case open, or if a conviction has already been obtained in El Salvador against this person.

II. CONCLUSION

El Salvador has been struggling with organized crime for around 15 to 17 years. Since then the Legislative Organ has enacted several special laws with the belief that legislation is only what is necessary to fight this type of crime, but it seems to forget that no matter how many special laws you have in one country, lacking the necessary resources to put that law into action renders the law as just a simple piece of paper with letters on it, and it has no consequence on the society.

Organized crime in El Salvador is increasing, but the human resources to fight back are not, and the same is true regarding the sufficiency of tools needed by prosecutors. They are not enough. The State, i.e. the government and the Legislative Organ, need to understand that they have to invest in those agencies in charge of investigating, prosecuting and adjudicating organized crime. Of course, special laws are necessary, but these agencies need to have all the tools to bring this special law to life, to make it work, so the society can see in the not-so-distant future, that all efforts are being made, and that there is an interest in eradicating organized crime once and for all.

INTERNATIONAL CRIMINAL JUSTICE FOCUS ON INVESTIGATION, PROSECUTION AND ADJUDICATION—A ZAMBIAN PERSPECTIVE

*Mr. Maybin Mulenga**

I. INTRODUCTION

Like any other country in the World, Zambia is not exempted from organized crime. There are offences such as theft of motor vehicles, drug trafficking, human trafficking, and consenting to be smuggled into the country. Money laundering is equally on the increase in Zambia. The need to disrupt these organized crimes is imperative. This paper therefore seeks to highlight the scope of organized crimes in Zambia with reference to investigations, prosecution and adjudicating. The paper will also bring out the aspects of extradition and mutual legal assistance in organized criminal matters.

II. SCOPE OF ORGANIZED CRIME

Money laundering is prevalent in Zambia. This entails earning money from prohibited business activities, which is then methodically invested in genuine businesses, thereby concealing its real origin. Such activities can be disrupted with effective investigations and the judicial system.

Further, human trafficking is a global problem, and Zambia is affected by human trafficking as a designated country of origin, transit and destination of trafficked victims. With regard to human trafficking, Zambia has ratified the United Nations Convention Against Transnational Organized Crime and other Protocols. The Anti-Human Trafficking Act No 11 of 2008 Provides for the prohibition, prevention and prosecution of human trafficking. Trafficking is defined as "the recruitment, transportation, transfer, harboring or receipt of a person within or across a Zambian border by abducting, threatening coercion, fraud or deception, illegally adopting children, destroying or denying access to identity or travel documents or threatening to use abuse of the legal system or some other form of power, or giving or receiving payments to achieve consent for the purpose of exploitation."[1]

A foreigner may consent to be smuggled into Zambia. Most often trucks which ordinarily are supposed to ferry goods are used in commissioning of such well-coordinated and organized offences. Recently, 19 persons suspected to be Ethiopians suffocated in a truck and died due to lack of air. The same were being transported by a suspected trafficking syndicate in Chembe District in Luapula Province of Zambia.

Lastly, both foreigners and Zambians have often been nabbed within the confines of Zambia for drug trafficking and accordingly have been prosecuted in the courts of law. On 24th February, 2016,[2] The Drug Enforcement Commission (DEC) arrested two Zambians and a Tanzanian national for allegedly trafficking in 24.1kgs of cocaine. It was the highest seizure of cocaine recorded in Zambia. The three suspects were arrested in three different locations, the Intercity Bus Terminus, Matero in Lusaka and Chirundu, with the help of the Zambia Police Service. Arresting the perpetrator is one way of disrupting organized crimes.

It is clear from the foregoing that these offences have no boundary limitations and as such the impact is massive. An offence can be planned by locals with the help of foreigners thereby making it very difficult to fully deal with the consequences. The Zambian government through Parliament has established different institutions aimed at combating and disrupting organized crime, thereby enhancing criminal justice. Criminal Justice is a very vital component of law as it is anchored on the administration of justice through different established institutions of government. The criminal justice system ensures that persons who offend the law

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[1] Anti-Human Trafficking Act, 2008.

[2] Daily Mail Newspaper.

are punished, thereby deterring would-be offenders. This, in principle, leads to law and order.

III. INSTITUTIONS FOR COMBATING OR DISRUPTING ORGANIZED CRIME IN ZAMBIA: THE POLICE

The Police Service is the creation of an Act of Parliament.[3] Like elsewhere, the police in Zambia are charged with the responsibility of ensuring that law and order prevail. The police also play the investigative role in offences of human trafficking. The police upon receipt of a complaint or receiving information regarding transnational crime, institute their investigations. The police do not work in isolation but with other countries and institutions of government. The police, after exhausting investigation, would as a matter of law charge and arrest the accused person with the subject offence. After the accused person has been charged, the docket is transmitted to the National Prosecution Authority for perusal, issuance of instructions and possible prosecution depending on the availability of evidence. It is clear from the foregoing that the police are crucial for disrupting organized crime.

IV. DRUG ENFORCEMENT COMMISSION

The Drug Enforcement Commission (DEC) was created by an Act of Parliament. The mission of the Drug Enforcement Commission is to prevent and control illegal cultivation, production, trafficking and abuse of narcotic drugs, psychotropic substances and money laundering activities in order to contribute to socio-economic development.

In December 2016 it was reported that the Drug Enforcement Commission had apprehended a Bolivian National and three Zambians. Nelson Guzman Baldivieso, 52, an office assistant in Bolivia with three Zambian women, trafficked and imported into Zambia over one kilogramme of cocaine, a banned and highly intoxicating substance. The drugs were hidden in the metal tubes of three suitcases while travelling from Bolivia to Lusaka using an Ethiopian Airlines flight. However, Drug Enforcement Commission officers intercepted him at Kenneth Kaunda International Airport. After thorough investigation, the accused persons were accordingly charged and prosecuted. The Subordinate Court convicted the Bolivian upon his plea of guilty and sentenced him to three years imprisonment with hard labour. This is an example of combating and disrupting organized crime.

The Drug Enforcement Commission (DEC) also investigates the organized crime of money laundering. This is done in the Money Laundering Unit within the precincts of the Drug Enforcement Commission. "Money laundering" means[4]: (a) engaging, directly or indirectly, in a business transaction that involves property acquired with proceeds of crime; (b) receiving, possessing, concealing, disguising, disposing of or bringing into Zambia, any property derived or realized directly or indirectly from illegal activity; or (c) the retention or acquisition of property knowing that the property is derived or realized, directly or indirectly, from illegal activity. Once DEC is alerted, it investigates and submits the case to National Prosecution Authority for prosecution.

V. THE NATIONAL PROSECUTION AUTHORITY OF ZAMBIA

The National Prosecution Authority (NPA) is an autonomous body established by the National Prosecution Authority Act No. 34 of 2010. The Authority is in charge of prosecuting people charged with criminal offences including organized crime. Its mission is to provide an effective and efficient prosecution service to the public in an accountable and transparent manner, in order to uphold the rule of law, justice and human rights.

Article 180(1) of the Constitution[5] provides that there shall be a Director of Public Prosecution who shall be appointed by the President, subject to ratification by the Parliament. The Director of Public Prosecution is the chief prosecutor for the Government and head of the National Prosecution Authority.

[3] Chapter 107 of the Laws of Zambia.
[4] Prohibition and Prevention of (No. 14 of 2001 Money Laundering).
[5] Amended Constitution Act No 2 of 2016.

Article 180(4) of the Constitution provides for the powers of the Director of Public Prosecution. It states that the Director of Public Prosecution may—

(a) Institute and undertake criminal proceedings against a person before a court, other than a court-martial, for an offence alleged to have been committed by that person;

(b) Take over and continue criminal proceedings instituted or undertaken by another person or authority; and

(c) Discontinue, at any stage before judgment is delivered, criminal proceedings instituted or undertaken by the Director of Public Prosecution or another person or authority.

In order to effectively prosecute cases, the National Prosecution Authority has established units. One of them is the Taxation and Financial Crimes Unit. It is a notorious fact that any form of economic activity is coupled with criminal activity. However, the effects and prevalence of crime can be curbed by an efficient and effective criminal justice system. In response to this need, the Taxation and Financial Crimes Unit has been set up in the National Prosecution Authority to contribute to the nation's fight against serious economic crimes. The unit operates closely with law enforcement agencies that are tasked with the responsibility of investigating cases of a financial and economic nature such as the Anti-Corruption Commission (ACC), the Drug Enforcement Commission—specifically the Anti-Money Laundering Unit—and the Zambia Police Service.

Due to the trans-jurisdictional nature of economic crimes and the advent of cybercrime the unit also offers assistance and guidance to law enforcement agencies on issues of Mutual Legal Assistance. This involves engaging foreign governments in order to facilitate investigations and the gathering of evidence for use in the Courts of the Law of Zambia. Once the accused persons have been successfully prosecuted, the National Prosecution Authority may apply to have the proceeds of crime forfeited to the state.

It is clear from the foregoing that the power to prosecute all criminal cases in Zambia is vested in the Director of Public Prosecution who by law also delegates said authority to State Advocates. It follows that the existence of the National Prosecution Authority is fundamental in curbing organized crime such as human trafficking and money laundering activities.

VI. ADJUDICATIVE POWER

Article 118(1)[6] provides that the judicial authority of the Republic derives from the people of Zambia and shall be exercised in a just manner and such exercise shall promote accountability. Judicial authority vests in the courts and shall be exercised by the courts in accordance with this Constitution and other laws. The Judiciary consists of 1) the superior courts and the following courts: *(a)* subordinate courts; *(b)* small claims courts; *(c)* local courts; and *(d)* courts, as prescribed.

The entry point for most criminal cases in Zambia including organized crime is the Subordinate Court. Though created by the constitution the enabling Act is the Subordinate Court Act Chapter 28 of the Laws of Zambia. The *Subordinate Courts Act* and the *Criminal Procedure Code* gives magistrates jurisdiction appropriate to their classes. The procedure followed in the Subordinate Court is as laid out in the *Subordinate Court's Act*, the *Criminal Procedure Code* and in default of any direction, in substantial conformity with the law and practice for the time being observed in England in the County Courts and the Courts of summary jurisdiction. Though the High Court has unlimited and original jurisdiction to hear civil and criminal matters, most organized crimes are heard and determined by the Subordinate Court.

Under section 5 of the Penal Code, Zambian courts have jurisdiction to hear cases where offences are committed within the boundaries of the country. This is the General Principle. However, under section 6, the jurisdiction is extended in two situations: where a Zambian citizen commits an offence under the Criminal Procedure Code outside of Zambia. *Ngati & Others v People* (2003); further, *where a foreigner commits an*

[6] Constitution of Zambia (Amendment Act no 2 of 2016).

offence under the Criminal Procedure Code partially outside and partially within Zambia. Roxburgh v People [1972]. Due process of law is imperative in disrupting organized crime. As a matter of law, the courts upon receiving evidence through witnesses will reach a conclusion which may result in a conviction or an acquittal.

VII. NATIONAL LEGAL FRAMEWORK RELATING TO EXTRADITION LAW AND MUTUAL LEGAL ASSISTANCE

The central authority for both extradition and mutual legal assistance is the Office of the Attorney-General. Entities responsible are the Ministry of Home Affairs and the Ministry of Justice.

A. Mutual Legal Assistance in Criminal Matters

When it comes to mutual legal assistance, Parliament enacted the Mutual Legal Assistance in Criminal Matters Act, Chapter 98 of the Laws of Zambia. The Act is intended to provide for the implementation of treaties for mutual legal assistance in criminal matters. The Act defines "treaty", which means a treaty, convention or other international agreement that is in force and to which Zambia is a party, the primary purpose of which is to provide for mutual legal assistance in criminal matters.

Section 7 (1) of the Mutual Legal Assistance in Criminal Matters Act provides for administrative procedures. It states that where there is no treaty between Zambia and another state, the Minister responsible for home affairs may, with the agreement of the Minister, enter into an administrative arrangement with that other state providing for legal assistance with respect to an investigation specified therein relating to an act that, if committed in Zambia, would be an indictable offence.

Where a treaty expressly states that legal assistance may be provided with respect to acts that do not constitute an offence within the meaning of the treaty, the Minister responsible for home affairs may, in exceptional circumstances and with the agreement of the Minister, enter into an administrative arrangement with the foreign state concerned, providing for legal assistance with respect to an investigation specified therein relating to an act that, if committed in Zambia, would be in contravention of an Act of Parliament.

A request by Zambia for international assistance in a criminal matter may be made by the Attorney-General. A request by a foreign state for international assistance in a criminal matter may be made to the Attorney-General or a person authorized by the Attorney-General, in writing, to receive requests by foreign states under this Act.

A request under subsection (1) shall be accompanied by:

i. the name of the authority concerned with the criminal matter to which the request relates;

ii. a description of the nature of the criminal matter and a statement setting out a summary of the relevant facts and laws;

iii. a description of the purpose of the request and the nature of the assistance being sought;

iv. details of the manner and form in which any information, document or thing is to be supplied to the foreign state pursuant to the request;

v. details of the period within which the foreign state wishes the request be complied with.

B. Extradition

Extradition issues are governed by the Extradition Act, Chapter 94 of the Laws of Zambia. It is an Act to amend and consolidate the law relating to extradition to and from foreign and Commonwealth countries; to provide for the reciprocal backing of warrants.

1. Procedures Applicable to Extradition

Section 4[7] provides for extraditable offences. It provides that (1) subject to subsection (2), extradition under this Part shall be granted only in respect of an offence which is punishable under the laws of the requesting country and of the Republic by imprisonment for a maximum period of not less than one year or

by a more severe penalty or for which, if there has been a conviction and sentence in the requesting country, imprisonment for a period of not less than four months or a more severe penalty has been imposed.

If a request is made for extradition in respect of an offence to which subsection (1) applies and the request includes also any other offence which is punishable under the laws of the requesting country and of the Republic but does not comply with the conditions as to the period of imprisonment which may be, or have been, imposed, then extradition may, subject to the provisions of this Part, be granted also in respect of the latter offence.

The evidence adduced should disclose a prima facie case that would warrant and justify committal for trial. This position is provided for in section 10 of the above Act. It provides that (1) Where a person claimed is before a magistrate pursuant to section *eight* or *nine* and- (*a*) there is adduced before such magistrate- (i) in the case of a person who is accused of an extraditable offence, such evidence as would, in the opinion of the magistrate, according to the law, justify the committal for trial of the person if the act constituting that offence had taken place in the Republic.

2. Existence of a Treaty

It is imperative to note that the existence of a treaty is a necessary requirement for extradition. Suffice to mention that where there is no treaty the Minister of Home Affairs can enter into an agreement with the Minister of Justice, called an administrative arrangement, with the requesting state to provide legal assistance with respect to the specific request. The Magistrate seized with the conduct of the matter may issue a search warrant for the search and seizure of any property which may be deemed vital to help with investigation and prosecution of the case.

3. What Should the Extradition Request Include?

i. Original or an authenticated copy of the conviction and sentence or external warrant or other order;

ii. Statement of each offence for which extradition is requested specifying, as accurately as possible, the time and place of commission, its legal description and a reference to the relevant provisions of the law;

iii. Copy of the relevant enactments of the requesting country or, where this is not possible, a statement of the relevant law;

iv. As accurate a description as possible of the person claimed, together with any other information which will help to establish his identity and nationality.

It is important to note that requests are addressed to the competent authority, who is the Attorney General. When it comes to conducting a search and seizure, the Criminal Procedure Code[8] comes into play. Once the request has been successfully received, the Attorney General notifies the Magistrate to issue a warrant of arrest. Section 8 provides that the Warrant of Arrest can be executed in any part of Zambia.

4. Grounds for Refusal

i. Extradition shall not be granted where a prosecution is pending in the Republic against the person claimed for the offence for which extradition is requested (Section 36)

ii. Extradition shall not be granted where the offence for which it is requested is regarded under the law of the Republic as having been committed in the Republic (Section 35)

iii. Extradition shall not be granted where a person claimed is a citizen of the Republic, unless the relevant extradition provisions otherwise provide (Section 34)

iv. Extradition shall not be granted for offences under military law which are not offences under ordinary criminal law (Section 33)

[7] Extradition Act Chapter 94 of the Laws of Zambia.
[8] Chapter 88 of the Laws of Zambia.

v. Extradition shall not be granted if there are substantial grounds for believing that a request for extradition has been made for the purpose of prosecuting or punishing the person claimed on account of his race, religion or nationality or that the position of the person claimed may be prejudiced for any of these reasons (Section 32)

vi. If the alleged offence is a political offence or an offence connected with a political offence, the Attorney-General shall refuse extradition

5. Refusal of Mutual Legal Assistance in Criminal Matters

i. The request relates to the prosecution or punishment of a person for an offence that is, or is by reason of the circumstances in which it is alleged to have been committed or was committed, an offence of a political character

ii. There are substantial grounds for believing that the request has been made with a view to prosecuting or punishing a person for an offence of a political character;

iii. There are substantial grounds for believing that the request was made for the purpose of prosecuting, punishing or otherwise causing prejudice to a person on account of the person's race, sex, religion, nationality or political opinions;

iv. The request relates to the prosecution or punishment of a person in respect of an act or omission that if it had occurred in Zambia would have constituted an offence under the military law of Zambia but not also under circumstances in which it is alleged to have been committed or was committed, an offence of a political character;

v. The granting of the request would prejudice the sovereignty, security or the national interest of Zambia;

vi. The request relates to the prosecution of a person for an offence in a case where the person has been acquitted or pardoned by a competent tribunal or authority in the foreign state, or has undergone the punishment provided for by the law of that country, in respect of that offence or of another offence constituted by the same act or omission as that offence;

vii. The foreign state is not a state to which this Act applies; or

viii. The request relates to the prosecution or punishment of a person in respect of an act or omission that, if it had occurred in Zambia would not have constituted an offence.

VIII. CONCLUSION

This paper has endeavoured to highlight some of the procedures for disrupting organized crime. It is has brought to the fore the scope of organized crime in Zambia, the role of investigations, prosecution and adjudicative power in dealing with the organized crime.

REPORTS OF THE COURSE

GROUP 1
DISRUPTING CRIMINAL ORGANIZATIONS ENGAGED IN DRUG TRAFFICKING

Rapporteur: Mr. Shanaka WIJESINGHE (Sri Lanka)
Co-Rapporteurs: Mr. Nurali JAVLIEV (Uzbekistan)
Ms. Ikuko TAKATA (Japan)

Chairperson	Mr. Wasawat CHAWALITTHAMRONG	(Thailand)
Co-Chairperson	Mr. Gevorg MELIKYAN	(Armenia)
Members	Mr. Md. Mahfuzul ISLAM	(Bangladesh)
	Mr. Lhendrup GYELTSHEN	(Bhutan)
	Mr. Willy NANSHAKALE	(DR Congo)
	Mr. Koji OHASHI	(Japan)
	Mr. Masaru KONDO	(Japan)
Advisers	Prof. Masahiro YAMADA	(UNAFEI)
	Prof. Takeshi MATSUMOTO	(UNAFEI)

I. INTRODUCTION

This group workshop commenced on the 23rd May 2017 under the guidance and advice of Prof. Masahiro YAMADA and Prof. Takeshi MATSUMOTO. Mr. Wasawat CHAWALITTHAMRONG was appointed the chairperson and Mr. Shanaka WIJESINGHE as the Rapporteur. The rest of the members of the group are stated above. This report is the result of the collaboration of all the members of the group. The topics and the subtopics of this group were selected in collaboration with the views of all the participating members and also using the guidelines given by UNAFEI.

II. BACKGROUND

Globally, drug trafficking is a serious issue. The involvement of criminal groups engaged in drug trafficking has caused a serious threat to the entire globe. Therefore, the need to focus on successfully controlling this threat, and also to investigate and prosecute the criminal organizations engaged in drug trafficking and disrupting them has arisen. To fight this threat which has now spread across all nations, international cooperation across borders is needed. Some countries have ratified conventions and agreements to tackle this issue.

Since a successful investigation is paramount for obfaining a conviction of the members of criminal organizations, the group agreed to focus on the subject of investigation and related matters pertaining to it.

III. EFFICIENT COLLECTION AND HANDLING OF INFORMATION

A. Collecting Information Efficiently

The group agreed that the gathering of proper information and intelligence plays a vital role when it comes to tackling the problem of drug trafficking and discussed the following sources and the means of collecting efficient information.

- Human sources – through people, agents, and decoys.
- Through police stations and other agencies.
- Information received through suspects – this source of information is vital as it will always give the investigator first-hand information about a particular crime. Therefore, gathering information promptly from the suspects, soon after arrest and at the time of interrogation was seen as paramount

However, it was observed that information of such nature is dangerous and unreliable as the suspects could always go back on their statements, and therefore the investigators should be very cautious when obtaining information through the suspects. Therefore, it is the duty of the investigator to scrutinize the background of the suspects and to confirm whether the information obtained was genuine or not.

At this point it was pointed out that the information received from the family members of the suspects too could assist the investigators.

- From informants – The investigators should obtain information from informants at the grassroots level such as from village chiefs etc. In some jurisdictions it was highlighted that some informants were even paid for the services they provided as this source has become highly successful in obtaining positive information. Using plain clothes policemen as informants is important and this has brought good results in many jurisdictions. The concept of community policing was also discussed, and this method has brought positive results in some jurisdictions to obtain information. In some jurisdictions like the Congo, even the prosecutors have informants who collect information through their informants.

- Information received at the border has become a very vital source of obtaining information especially in former Soviet Union countries. Therefore, the investigators should take necessary steps to plant informants in all the vital points, like the points of entry.

- Information obtained through cooperating witnesses at the investigation stage is important and this has led to positive results in countries like Armenia and Congo

- Through undercover operations – undercover operations done by the investigators have brought in good results in many jurisdictions, but it was observed that this cannot be put in to operation without the assistance of decoys and agents

- Through the Internet by detecting online activities of criminal groups

- Information received through official sources

- Information received from other countries

B. Handling Information Collected

The view of the group was that the collected information should be handled in secrecy, and the information gathered from different sources should not be contaminated. However, it was agreed that in view of successful investigation and prosecution, the collected information should be exchanged with utmost secrecy among other agencies who are engaged in investigations.

C. Accumulating and Analysing Information

The group observed that the collected information should be analysed with experience, patience and also using digital software. However, the information gathered should be cross checked for its truthfulness and reliability. The information also should be analysed pertaining to the location the drug was seized (e.g. at the border, at the point of entry) and the past criminal records of the suspects.

D. How to Share Information with other Agencies, Including Foreign Agencies

The view of the group was that the information received should be shared promptly locally and with the foreign agencies who are involved in fighting drug trafficking. This should be done through a focal point. However, this is subject to treaties and agreements in force between the countries. The group also observed the importance of sharing information through informal networks and on an ad hoc basis.

E. Issues in Using Information in the Criminal Justice System

There are a number of constraints in using the collected information. Whether the information are collected formally or informally, they have to be obtained according to the accepted legal procedure and norms. The collected information should be admissible in a court of law as per the rules pertaining to evidence and procedure. Further it was noted that the investigator should be also cautious about the double

standards adopted by the suspects.

IV. EFFICIENT INVESTIGATION MEASURES BASED ON CURRENT LAWS AND PRACTICES

A. Effective Search and Seizure

The group unanimously agreed that effective search and seizure should lead to a successful investigation, and therefore the investigators should take all possible steps to bring not only the members but even the leaders of the criminal organizations dealing with drugs before the legal process. They were also of the view that the search and the seizures have to be carried out according to the prevailing laws of the jurisdictions, and steps should always be taken to account for the searches and seizures.

There was a division of opinion about arresting and searching of a suspect with or without a warrant obtained either from a judicial officer or a prosecutor. Some members of the group were of the view that arresting a suspect and seizing the property without a warrant could be a violation of fundamental rights. However, it was also suggested that due to the urgency of the matter such as detecting and seizing drugs, arrest could be made without a warrant and the investigators should subsequently complete all the legal formalities as early as possible.

The following points were discussed, and methods were suggested, to improve the quality of search and seizure of suspects:

- Searches should be done before an independent witness to give more weight to the conduct of the investigators
- To have two search parties at the same time so there could be more accountability
- The items seized should be itemized and a list of the items should be prepared in the presence of two independent witnesses.
- Video recording of the arrest and the seizures was recommended subject to its admissibility in a court of law
- To use only reasonable force for the purpose of arresting and then seizing of property.
- To transfer the items seized as soon as possible out of the police stations to authorities such as to the court or to the analyst or to the pharmacist etc.
- To obtain the services of a female police officer when searching and arresting a female suspect.

B. Observation and Interview

The investigators after arresting a suspect should be very vigilant and should observe all the aspects of the suspects such as his behaviour and his past record. The investigators through observation should gather information pertaining to the modus operandi of the suspect or the group that he is working with.

The common concession agreed to was that the interviews of the suspect should be done early without delay and that it should be done only with the suspect and without anyone else being present along with the suspect.

C. Investigations Pertaining to Financial Agencies

It was discussed at length that in view of disrupting criminal organizations engaged in drug trafficking it is necessary to investigate financial agencies, as the drug dealers use these agencies to deal with the illicit money they earned. There was a division of views on this aspect as in some jurisdictions prosecutors themselves could get information directly from banks while in other jurisdictions information could be gathered only through a central authority such as the central bank. In some jurisdictions, information could be obtained only through a court warrant.

D. Investigations of Telecommunications

Call detail records (CDR) are vital to investigations in order to curtail organizations engaged in drug trafficking. However, it was observed that a warrant is required to obtain these records, and when it comes to the trial stage notice with sufficient time should be given to the accused or his attorney regarding the usage of these pieces of evidence against the accused. The call detail reports are a vital clue as to the entire group of drug dealers as it will highlight all the calls taken and received by them.

E. Controlled Delivery

The concept of controlled delivery was also discussed. Some members were of the view that this is the best method to track the suspects and bring them within the legal framework. This could be a method to detect the real suspects operating locally or even internationally. However, the participants also discussed the constraints this could have when dealing internationally with other investigators who are operating in other jurisdictions.

F. Electronic Surveillance

Methods such as wiretapping, bugging, video surveillance (CCTV cameras) GPS and cybertracking were discussed at length. Cybertracking, though comprehensively expensive, is a very successful method of tracking suspects through social media networks such as Facebook, Viber, etc. In Japan, use of GPS evidence is now restrained due to a court ruling as this could intrude on the personal life of a person. The participants also raised concerns about the constraints of using these methods and the admissibility of its evidence and observed that these methods should be developed in the future for successful investigations to disrupt criminal organizations engaged in drug trafficking.

G. Wiretapping

Wiretapping is an efficient tool of investigation and is being used in most of jurisdictions. However, the method of obtaining it was the subject matter of discussion. In Bhutan, due to the urgency of the matter, wiretapping could be done even without a warrant while in Bangladesh this is an executive order and in Uzbekistan a judicial warrant is needed to obtain evidence through wiretapping.

V. EFFICIENT PROSECUTION MEASURES BASED ON CURRENT LAWS AND PRACTICES

A. Measures to Fully Use the Law, Including Administrative Regulations

The group unanimously agreed that all the laws, conventions and agreements, nationally and internationally should be adopted for the successful prosecution and conviction of the suspects engaged in drug dealing. They also agreed that all the administrative methods and regulations to support the laws should be in place and should be forcefully used to prosecute the offenders. They also agreed that laws and regulations should be adopted to enhance the punishment of offenders.

B. Plea Agreements

As for plea bargaining the members of the group confirmed that there is no plea-bargaining system in their respective jurisdictions pertaining to drug cases. However, it was observed during the discussions that even for cases pertaining to drugs, this method could be adopted to bring down the charges in view of saving time of the investigators and the prosecutors. However, it was observed that this should be done subject to tight supervision and scrutiny.

C. Issues in Disclosures

All the participants agreed that all the material pertaining to the case should be fully disclosed to the defence to have a fair trial against the accused person. If the prosecution does not disclose the full particulars, it was observed that there will be obstacles and delays in the entire process and that this will consume a lot of time. However, it was also observed that only the items needed for trial should be disclosed, as the disclosure of unrelated items will hamper the investigation process.

VI. ADJUDICATION

A. Protection of Witnesses

1. Physical Protection

It was unanimously agreed that the protection of witnesses is vital in any criminal trial. After a successful investigation when an accused person is brought before a court of law the witnesses are vital and they need to be protected for the conclusion of a successful trial. Except in Sri Lanka and Thailand, the other countries in the group did not have a witness protection system. In Thailand, a witness protection system has been in place since 2003, and once a request is made to the investigator and upon a decision being made by him, the witnesses are protected throughout their lives (e.g., in their jobs, households etc.); each protected witness is even issued with a new identity card and given a new life. In Sri Lanka the witness protection Act No 4 of 2015 has given a conducive environment where the witnesses will be protected and assisted. This act has even established a national authority to protect witnesses. However, in countries like Bangladesh and Bhutan though there is no formal witness protection law, after making an assessment, protection is given to the witnesses when the need arises.

2. Suppression of Identity

The Group observed that this method of protection of witnesses was not in force in any jurisdiction except in Japan where it was possible and legally provided. The group deliberated at length regarding the consequences of this method, as the accused person will not know the real person who is testifying against him. It was also observed that the element of corruption could creep in as the investigators and the prosecutors will do anything to secure a conviction at any cost.

3. Testimony behind Screens

Participants from all countries except Japan indicated that in their respective jurisdictions trials are conducted in open court, which is open to the public. Japan has a system of testifying behind a screen. But it was observed that the judge, prosecutor and the defence attorney could see the witness and the defence attorney needs to give his consent for this system to be used. However, this system, too, could lead to corruption, and it could violate the rights of the accused person.

4. Testimony through Video Link

It was noted that except in Japan and Thailand none of the other countries was familiar with this system. In Japan the witness is located in a separate room, and he can give evidence through a video link, which will be shown in court. In Thailand, a witness can give evidence even based from their embassy in another country. It was agreed that this system could be a very effective tool to protect the witness and that it will make a witness comfortable when giving evidence.

5. Use of Voice Distortion and Facial Disguise

None of the countries in the group adopt this method. All the counties in the group have systems where trials are held in open court and in public, except in extreme cases like treason and sexual offences where the judge uses his discretion to have closed trials. In Japan, Sri Lanka and in Congo, the constitution provides for an open trial. The group discussed this concept at length and observed that this may be even a far fledged method and that there has to be a legal backing to proceed with this method. It was observed that this system may violate the concept of a fair trial and may raise many objections from the defence.

B. Methods to Ensure the Presence of Witnesses

The participants observed the following methods and tools to ensure that the presence of the witnesses would be useful:

- Obtain a warrant through court
- Through video link as observed above
- Observing the reasons for the witness for not appearing in court and using positive methods to counter them.
- Using motivational methods like providing the witness with security and paying him for his passage

(if he is abroad) etc.

It was observed that the authorities concerned should do whatever possible to bring the witness to court. If the witnesses are subsequently punished for not appearing before court, the witness will never give evidence against the accused persons who will be subsequently be discharged due to lack of evidence.

C. Measures to Protect Other Trial Participants

1. Protection of Judges and Members of Juries

It was interesting to note that different methods were adopted to protect judges in different jurisdictions. In Sri Lanka, judges are provided with a police officer while in Bangladesh this facility is given only to the senior judges and only after a threat assessment. In Japan and in Thailand, judges are not provided with security. In Congo and Uzbekistan, judges have the right to protect themselves with a gun in case of a threat. However, the common agreement of the group was that the judges should be provided with sufficient security to carry out their duties successfully. Most of the participants disclosed that their jurisdiction did not have a jury system, but some jurisdictions like in Japan has a system where lay judges work in harmony with professional judges. It was observed that they, too, should be given security to a certain extent.

2. Protection of Prosecutors

In countries like Congo, Uzbekistan, Thailand and Armenia, prosecutors have the right to carry a gun, and it lies with their discretion to use them or not. The general agreement of the participants was that since the prosecutors are dealing with the criminals, they should be provided with security.

3. Protection of the Accused and Defence Attorneys

Protection for the accused is not needed as they are protected by the law enforcement agencies and the prison authorities. It was also observed that if the accused persons had a threat to their lives, they would prefer staying in remand and they would not canvass for bail. It was also observed that in a case of a member of a drug organization incarcerated in remand, he should be kept in a separate cell as he would have threats from inmates belonging to rival organizations.

Regarding protection of defence attorneys, some participants raised the concern that they too should be protected as they will have threats from rival groups of the accused person that they are defending. But it was decided that the threat should be assessed on case-by-case basis, and protection should be then provided accordingly.

VII. HOW TO FINANCIALLY WEAKEN CRIMINAL ORGANIZATIONS ENGAGED IN DRUG TRAFFICKING

The main purpose of a criminal organization engaged in drug trafficking is to make a profit out of their illicit activities. Therefore, identifying the assets and subsequently tracing them and then freezing the said illicit proceeds are vital steps of fighting against the criminal organizations engaged in drug trafficking. These topics were deliberated at length by the group, and the following topics were discussed by the participants.

A. Identifying the Proceeds of Crime

The group unanimously agreed that the monies earned out of drug dealing, commonly known as black money, are never kept with the members of the group. The leaders of the group will never possess and deal with the money, and the members of the group will never have any money in their accounts or possess any property which would raise any suspicion about their illicit activities.

The criminal groups engaged in drug trafficking always will make an attempt to legalize the illicit proceeds so that they won't be easily detected by law enforcement authorities. The difficult task of identifying the said proceeds of crime therefore falls on the investigators.

The group observed that the illicit proceeds could be easily transferred by the drug dealers to the accounts of relatives, family members or friends. The property acquired will definitely be in the name of a third party. Some illicit proceeds would be transferred to another country, preferably to a country which has tax concessions. The criminal groups dealing with drugs are always ahead of the law enforcement authorities, and therefore identifying the illicit proceeds is a difficult but not an impossible task. The group observed the

following methods of identifying the illicit proceeds of crimes.

- Unusual life styles of a person who lives an extravagant life far above his basic income
- The earnings and properties which could not be justified
- Information acquired through an arrested member of a group – This information is vital as this will be an initial step to break into the activities of the other members of the group.
- From telephone call details – This information can be obtained after receiving information from an arrested member of a criminal organization dealing in drugs. This will lead to clues regarding the rest of the members of the criminal organization.
- Through joint investigations with foreign jurisdictions.

B. Tracing Proceeds of Crimes

At this stage it was observed that before steps are taken to freeze the assets identified as illegally acquired, the law enforcement officers should have identified the layering of those assets. This is where the illicit assets acquired in a particular country are moved mainly to a foreign jurisdiction. This is a very complex situation and definitely needs international cooperation.

C. Freezing Assets

The participants discussed the freezing of assets, and it was observed that in their jurisdictions confiscation takes place only after a conviction. In Sri Lanka and in Bangladesh freezing of assets could be done through the police by making an application in court, but this is done only for a specific period of time. In Japan, banks also can take steps to freeze property through the police, and the activities of the frozen accounts are restricted except for taxation purposes.

In Thailand, the police can freeze assets immediately as swift action is needed to freeze the illicit proceeds before they are transferred out of the banks to a foreign jurisdiction. In Armenia, Uzbekistan and in the Congo, freezing can be done only through a warrant obtained from court. In Japan, it was observed that banks could seize property, but the banks are very cautious as they could be sued in a court of law subsequently.

D. Confiscating Property

The participants observed that in most of their jurisdictions, confiscation could be done only after conviction.

E. Non-conviction-based Confiscation

None of the countries except Thailand adopted the method of non-conviction-based confiscation. It was observed that since the properties are seized prior to conviction and the activities of those properties are restricted, the need to confiscate the properties would not arise. However, it was deliberated with much interest about the benefits of non-conviction-based confiscation. It was discussed at length about the possibility of having non-conviction-based confiscation in a case where a suspect is convicted and his assets are confiscated, but the lack of evidence to confiscate the rest of the assets becomes an issue. It was observed that even in a non-conviction-based confiscation, the trial judge has to look for evidence in order to confiscate property.

VIII. INTERNATIONAL COOPERATION

Due to the globalization of the criminal activities of the organizations engaged in drug trafficking and due to its transnational nature, working jointly with the law enforcement authorities from other nations is very important. It was pointed out that treaties and agreements signed between countries become operational and admissible when dealing between two countries. However, in Japan certain difficulties have arisen in jointly working with some African nations. All the participants agreed that to keep pace with cooperation in combating criminal organizations at the international level, harmonization of the law, international training and even establishing a common database are vital.

IX. CONCLUSION AND RECOMMENDATIONS

From the extensive discussions the group had, it was noted that criminal organizations dealing with drugs operate and spread across borders. The illicit proceeds acquired by these organizations also cross borders, and this working group apart from the observations and suggestions made during the time of deliberations, suggests the following tools which will hopefully contribute to combating this ever-growing problem:

- To introduce a non-cash-basis transaction system, such as using ATM cards, as this will easily detect suspicious transactions,
- One person, one account system – Where an individual could open only a single account,
- Imposing severe tax penalties and better administration of a taxation system,
- A clause to impose severe liability on a guarantor when opening a bank account,
- More stringent laws with severe punishments should be implemented for persons dealing with drugs,
- More joint investigations with other countries,
- More awareness among the public in dealing with illicit drugs.

GROUP 2
TRAFFICKING IN PERSONS: FOCUS ON SEX TRAFFICKING

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Co-Chairperson	Ms. Masami SUZUK	(Japan)
Members	Mr. Jules Nea HOUEYE	(Cote d'Ivoire)
	Mr. Moe Thant ZIN	(Myanmar)
	Mr. Bishwanath BHATTARAI	(Nepal)
	Ms. Nhung Thi NGUYEN	(Viet Nam)
	Mr. Tsuyoshi KIMURA	(Japan)
	Mr. Kenichi WAKABAYASHI	(Japan)
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	Professor Tsuyoshi YUKAWA	(UNAFEI)

I. INTRODUCTION

The theme of the 166th International Training course was "Criminal Justice Procedures and Practices to Disrupt Criminal Organizations". The course was held at the United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders (UNAFEI) from May 10, 2017 to June 15, 2017.

During the training course, 30 participants from 20 countries enjoyed the opportunity to attend the lectures by the UNAFEI professors and visiting experts. UNAFEI arranged several short trips to shrines and historical places that enabled the participants to learn about ancient Japan. UNAFEI also arranged a four-day study tour to Hiroshima, Kobe and Kyoto where participants learned about various subjects. The study tour included visits to the Public Prosecutors Office, Customs Office, and Regional Coast Guard Headquarters, where participants gathered relevant knowledge on the respective subjects. Visits to Fuchu Prison and the Yokohama District Court provided practical details on offender management, prosecution, and the trial system. All the participants prepared Individual Presentations (IP) with relevant information from each country on the above theme and presented it before all the participants.

All participants were divided into three groups and each group was tasked to engage in 14 group discussions and one individual report. For formulating the report, a Chairman, Co-chairman, Rapporteur and Co-Rapporteur were selected upon the vote of the group members. Here, the Chairman conducted the session and the Rapporteur took notes from the discussion and drafted the report. This report is the outcome of Group 2, which consisted of participants from Bangladesh, Cote d'Ivoire, Japan, Maldives, Myanmar, Nepal, Thailand, and Viet Nam. The purpose of this report is to: a) share knowledge on the unique investigation systems of each country; b) to look for a better prosecution system; c) to explain the adjudication system, and d) to mention the countermeasures for combating human trafficking cases focused on sex trafficking among the participating countries.

Group members were specifically devoted to understanding the common and different legal systems of each country. All participants of this group expressed their opinions on their criminal laws, including whether their legal systems are either adversarial or inquisitorial. These recommendations are divided into four main topics composed of investigation, prosecution, adjudication and countermeasures.

This group concentrated on the importance of the rights of sex trafficking victims, laws to protect them from being trafficked, a fair investigation system for bringing the perpetrators to justice, an unbiased prosecution system and reasonable adjudication system where victims will find justice. This group also suggested countermeasures to tackle sex trafficking, which should be similar in all participating countries. The main mission of this group was to look for an effective Criminal Justice System where victims have easy access to file a case and ultimately obtain justice. Through enforcement of the law, such crime should no

longer remain in society.

II. CURRENT SCENARIO OF SEX TRAFFICKING AROUND THE WORLD

Human trafficking is one of those issues that makes people troubled even if they do not understand its actual nature and its aftermath. Over the past few decades it has been producing the horrors of sex trafficking, a gruesome practice of enslavement and perversion affecting millions of girls over the world. Human trafficking includes global trafficking of all of kinds. Sometimes it becomes forced-labour trafficking as victims are taken abroad after being promised legitimate work. There are five kinds of trafficking that have been seen so far. These are trafficking of children, sex trafficking, forced marriage, labour trafficking, and trafficking for organ trade. Of them, sex trafficking is now the hottest issue. Most of the victims are women, especially girls. They are promised work as domestic help, but the victims are forced to work in brothels or are sexually abused in private homes. Many people are affected by sex trafficking around the world. Though girls and women are employed in sex work, they do not find their way home when they escape from that vicious trap. They are ultimately neglected by their relatives as well as society. Once they step into the profession against their will in the name of employment abroad, they lose their dignity and honour in society.

The scale of sex trafficking is increasing in those areas where tourists frequently visit. As girl victims are used for sex workers and sometimes their organs are sold after they are no longer marketable in the sex industry. Nowadays victims are recruited with promises of jobs abroad or within their own countries but once in the grip of the traffickers they are essentially slaves and trafficked out of their countries. Many causes behind the various forms of subjugation are involved, such as debt bondage resulting from poverty. Globalization and political turmoil are also responsible for such inhuman business. Among the 10 top destinations, Thailand and Dubai are in the queue. Mostly developing countries are victimized by such crime. People from developing countries try to change their fate and eventually fall victim to sex trafficking. They have no way to get back once they depart from their homes. As of today, the common perception of trafficking tends to focus on sexual exploitation. Girl victims are used mainly for household labour, agriculture, food and care services, and in the garment industry. They are housed in substandard quarters. They even are not paid as promised as they remain detained by traffickers. The social and financial status of the victims compels them to be victims.

For instance, Bangladesh experienced 677 cases concerning human trafficking in 2016. A total of 770 victims were trafficked and 523 victims were recovered, and 1361 traffickers were arrested. A total number of 4221 cases were recorded, 9204 victims were trafficked, and 7387 victims were recovered from 15 June 2004 to 15 April 2017. Out of 9204 trafficked victims, 2333 were women and 1459 were child victims over the course of 13 years. By this time Bangladesh has tried few perpetrators, sentencing them to the death sentence, life imprisonment and corporal punishment for human trafficking. In Viet Nam, according to reports of local authorities, from 2011 to 2014 there were 1917 cases of humans trading, with 2861 subjects and 3717 victims. Regarding Cote d'Ivoire, from 24 to 26 April 2017 in Vienna, Austria, at the headquarters of the United Nations Office on Drugs and Crime (UNODC), the Ivorian Minister for Women, Child Welfare and Solidarity said that between 2015 and 2016, 895 nationals from Côte d'Ivoire have been repatriated often by special flight from Saudi Arabia, Burkina Faso, Ghana, Libya, Gabon and Angola. In the same period, a total of 204 persons from Burkina Faso, Mali, Ghana, Togo, Benin, Nigeria, Niger, Sierra Leone, and Guinea, aged between 12 and 30 years, who were victims of trafficking in persons and other abuses, have been returned to their countries.

Most of the developing countries are suffering from human trafficking in various ways. Most of the countries bordering the ocean are facing trafficking either as victim or destination countries. Recently, a mass graveyard found in Thailand has shown the gruesome tragedy of illegal human trafficking. Thailand is facing a crucial situation sometimes as destination of sex trafficking victims but also as a transit point.

III. INVESTIGATION

Participants of this group agreed that investigation of human trafficking as well as sex trafficking cases must be recorded and investigated in a just manner. In the developing countries, investigating officers and prosecutors are not sensitized in such manner as they do not know the ultimate consequences of sex trafficking. Their response might endanger the victim's right to justice in time. A proper response to

incidents and victims will help reducing such crime. All participants also agreed that investigations of criminal cases have become relatively complicated compared to the way they were in the past as criminals are using the latest technology now to commit crimes. New challenges are seen every day in investigating criminal cases. Some new challenges are even out of reach for some law enforcement agencies.

In a criminal investigation, there are two important things to be considered. These are the investigation and investigator. Both play an equal role in proving a case. A bad investigation will result in negative consequences in the respective society. The prime function of the criminal investigation is to unearth the facts through collection of legally obtained evidence. For a credible investigation, information regarding the facts is very important for the fate of the investigation. Any concocted information may lead the investigation on a path to injustice. As sex trafficking is a transnational crime, it must be investigated in a holistic way so that the transnational traffickers may be brought to justice. Below, the group suggests some efficient tools for collecting information on sex trafficking.

A. Collection of Information

a) News from electronic and print media can be good sources of information.

b) News feeds in Social Networks such as Facebook, Twitter, etc., advertisements and news from linked media may be major sources.

c) Collection of dailies, effective monitoring of the TV and radio bulletins by law enforcement agencies and other related organs of the Government.

d) Phone calls from victims or victims' relatives or well-wishers, open letters and mail from the victims can be considered authentic information.

e) Establishment of call centers for 24X7, toll free hotline numbers, or even fixed numbers displayed in a public place and information collected from such sources can be utilized after verification.

f) Complainant box in a police station, police box or police outpost can be arranged, and such information can be verified promptly. Upon satisfactory response the police will respond accordingly.

g) INGOs, NGOs and Government social service offices can play vital roles. Written or verbal complaints by such organizations can be recorded upon any recovery of victims.

h) Direct complaint by victims to the police, prosecutor or any other law enforcement agencies can be termed as primary information.

i) Frequent overseeing of manpower recruiting agencies and their activities. Monitoring their registers for manpower sent abroad can be a good source of information.

j) Engaging ordinary citizens of the community results in public awareness in the society and their specific information should be brought into consideration.

k) Engaging paid or volunteer public informants to counter check the status.

l) Other government agencies such as coast guard, customs, border guards, immigration, forest guards and embassies deputed in the foreign countries can inform the Government.

m) Information collected through interrogation of suspects.

n) Information from brothels.

o) Information from refugee camps (victims may remain at home or go abroad).

p) Information gathered through interrogation of the primary witness.

q) Victim can complain to the District Administrative Officer if the police refuses to register the case, and the police are directed by the District Administrative Officer in Nepal to record the case.

This information should be handled with care as it contains the secret information of a victim and any premature disclosure of information may amount to interfering with the victim's privacy. For such information, the victim's right to secrecy should come ahead of other legal priorities.

B. Sharing of Information

Information derived from investigation is a vital tool for detecting a case and needs to be shared with relevant authorities. Few standards must be maintained during sharing of investigated information. Only examined and determined information can be shared which has specific objectivity, impartiality and fairness throughout the investigative process. The result of investigation must be based on facts and related analysis which includes reasonable inferences. This group agreed that the following information can be shared with relevant authorities.

a) Appointment of a focal point that will receive and distribute information from all relevant sources.

b) This information sharing shall be disclosed in the legal treaties, agreements, or Mutual Legal Assistance.

c) Sharing of information may be discussed on an ad hoc basis. It shall be an informal network.

d) Sometimes information may be shared informally with other authorities despite the lack of official agreements. It should be based on the principle of reciprocity.

e) Information may be shared with NGOs and INGOs that exclusively work on such matters. Only effective organizations can receive the information.

f) Few countries of this group have special divisions. Information can be shared when such divisions work in the same area. Cote d'Ivoire has a specific division for combating Transnational Organized Crime such as Human Trafficking, namely the UCT (Unit for Combating Transnational Organized Crime). Any state organization working on human trafficking crimes can receive assistance from the UCT to get information. Usually Law Enforcement Agencies like the police and gendarmerie seek assistance from such division for combating organized crime.

g) Interpol can be an effective information host for all member states.

h) Extradition treaties are the major tools for sharing information though it is a time consuming process.

i) Countries like Japan share the primary information of such crime with the police, immigration department, coast guard, etc. The Japan Coast Guard has an International Criminal Investigation Division that conducts criminal investigations into transnational crimes. This is an ideal example for sharing information for collection and dissemination of information.

j) There are Parliamentary Standing Committees in a few countries like Bangladesh and Viet Nam. Nepal has National and District committees for this job. This information can be shared with such committees as those which arrange monthly or quarterly meetings with other ministries, like the Ministry of Justice, the Ministry of Labour, the Ministry of Social Welfare, the Department of Passports and Immigration, and the Ministry of Home Affairs.

k) Information can be shared with the embassies or High Commissions deputed in respective foreign countries.

l) If sex trafficking offences are not covered under any treaties, both parties need to come up with separate agreements with the countries for the purpose of sharing information.

C. Issues in Using Information in the Criminal Justice System

The criminal justice system deals with disputes involving criminal activities. It involves activities relating to the detection, apprehension, detention, pre-trial release, post-trial release, prosecution, adjudication, correctional supervision of accused persons or criminal offenders. The administration of criminal justice includes criminal identification activities and the collection, storage and dissemination of criminal history records. Information used in the criminal justice system must cope with legal instruments. The group identified a few inputs for use in the criminal justice system.

a) Issues to be placed before the legal authorities must be through legal procedures.

b) All the information cannot be used as evidence. Some information is used as a policy. Policy and evidence have a sharp distinction. Evidence has judicial value.

c) The information must be supported by the local laws. Even if the information is not supported by the local law, it must be supported by international law.

d) The statement of the victim is one of the primary documents if such statement is certified by the competent court. Such information can be used as a judicial document.

e) Interview reports of the victims or witnesses by the police or prosecutor can be used as evidence. If the victim is not present for due causes, the statement will be used as his/her testimony during trial. The Evidence Act of few countries allows the dying declaration of the victim as a conclusive proof. Such statement can also be used during trial.

f) Some countries may arrange visas and other facilities for the victim if the victim's presence in the court during trial is mandatory.

D. Traditional and Special Investigative Measures

Investigation is the main tool for entering the criminal justice system. Many developing countries still use the traditional method of investigation and few use the latest developments of technology. Traditional investigative measures have to be done by hand or manually. It takes long hours to compile a document and has the potential risk of spoiling the evidence. On the other hand, investigation using modern technology consumes less time and bears potential evidence. Here, the group analyzed a few traditional and special investigative measures in the following discussion.

E. Traditional Investigative Methods

a) Interviewing witnesses and victims by the police or prosecutors.

b) Interrogation of the accused or suspect by the police or prosecutors.

c) Statement by the victim before the judge or statement given before the police needs to be certified by the judge.

d) Statement by accused before the judge.

e) Collection of fingerprints and footprints.

f) Collection of video footage and audio records.

g) Collection of exhibits such as various stains, clothes, passports, tickets and immigration registers.

h) Physical surveillance.

i) Collection of arms and ammunition used in the incident.

j) Face-to-face interviews with witnesses, victims, and suspects.

k) Test Identification Parade of a suspect or Physical Identification of a suspect by a witness or victim.

l) Search and seizure.

m) Bank statements.

n) Laboratory reports.

o) Inquest Report, Post Mortem Report and Viscera Report.

p) Report from the Narcotics Control Department.

q) Any other expert opinion on forged documents.

r) Engaging informants for the identification of witnesses or collection of evidence.

F. Special Investigative Methods

a) Wiretapping.

b) Video surveillance.

c) Mobile phone tracking.

d) Data from computer, laptops, mobile or any electronic devices that store data.

e) Internet based tools like Facebook, Twitter, Email and others.

f) DNA profiling.

g) Digital face recognition of the suspect.

h) Undercover operations.

i) Suspicious Transaction Reports (STR).

j) Cash Transaction Reports (CTR).

k) Specific data from relevant authorities.

l) Using GPS to detect the suspect or suspect's movement.

IV. PROSECUTION

Prosecution has a great role in proving the case against the accused. A prosecution with insufficient evidence may result in acquittal of the accused and victims will suffer. Prosecution requires highly developed professional skills. In order to achieve the objective of perfect prosecution, investigators and prosecutors need to work together. A concentrated prosecution is required for a sex trafficking case as it is a heinous crime. The group suggested the following techniques for a successful prosecution.

A. Measures to Be Fully Used Including Administrative Law

a) Police investigation report or police report.

b) Public prosecutor investigation report.

c) Investigation by investigating judge.

d) Victim can apply to the court directly by his/her appointed private prosecutors.

e) Non-prosecution report by the police.

f) Non-prosecution by the prosecutor.

g) Recommendations for perfect police report for prosecution.

h) In some countries, the government can withdraw the case from the court before a verdict.

B. Plea Agreements

In criminal prosecutions in many countries, plea agreements between defendants and prosecutors end the case without trial. The defendants agree to plead guilty to some or all of the charges against the accused in exchange for the confession of the accused in the relevant case. Such plea agreements allow prosecutors to detect the case with detailed information. There judges need to check the status of the agreement according to the existing law.

In order to detect the case, prosecutors use the plea agreement to reduce defendants' punishment. In some countries judges allow the testimony of the accused to help arrest more accused and recover contraband items. In some countries prosecutors and defendants work together while detecting a case and the judge is informed after the detection of the case. Here group members agreed on some points of plea agreements though they have different systems in plea agreement in their respective countries.

a) The accused is exempted from penalty with a condition to disclose the important information relating to the case during the investigation. In the United States of America, only prosecutors and defendants are involved in the plea agreement or plea bargain on detection of the case followed by reduction of sentence or exemption from sentencing.

b) In some systems, the court must evaluate the agreement between prosecutor and the defendant. In Japan, the prosecutor negotiates with the defence counsel while the accused provides authentic information about the crimes though prosecutors have no authority to render the sentence. The prosecutor recommends immunity, rescinding prosecution, instituting prosecution on a specific lighter charge, or stating an opinion that a specific punishment is imposed on the accused. Such agreement should be examined by the court and such statement may not be used as evidence disadvantageous to the witness in the witness's criminal case. This new tool of immunity will come into force on 3 June 2018 in Japan.

c) The plea bargaining must abide by the law.

d) In Bangladesh, Thailand, Myanmar and Nepal, a provision for approval is established by the law. If any accused other than the principal accused provides any authentic information about the crime and upon the information provided by the accused, police or prosecutors can detect the case, such accused person is recommended for reduction of sentence or exemption from sentencing. The trial court consents to such agreement if it is conducted according to law. In Thailand, the accused is given reduction of sentence if the accused helps the law enforcement authorities to identify the other accused of the case. Human Trafficking Procedure Law of Thailand approves such provision.

V. ADJUDICATION

Adjudication is the legal process of resolving a dispute through hearing by a court, after notice, of legal evidence on the factual issues involved. The requirements of full adjudication include notice to the defendant and accused. It allows an equal opportunity for both parties to present evidence and arguments. The adjudicative process is governed by rules of evidence and procedure. After a reasonable hearing and arguments, a verdict is rendered by an impartial judge, jury, or administrative tribunal. During fair adjudication, administrative acts need to be ensured for the witnesses and victims. Article 24 of UNTOC speaks about the protection of witnesses. This includes the physical protection, relocation, non-disclosure or limitations on the disclosure of information concerning the identity and whereabouts of the witness. It is suggested that witness testimony be allowed using communications technology such as video link or other adequate means. In the group discussion, many ways of giving protection to the witness and victim were

revealed. Irrespective of system, witnesses and victims are being given protection in all cases or at least in sensational cases like sex trafficking, human trafficking, and drug trafficking. In some countries, protection of witnesses is not generally provided for according to the existing law. All information is to be disclosed in the case docket and before the court during the trial in open court. Such a trial system may endanger the witness and victim. Bangladesh has special provisions to provide victim and witness protection in human trafficking cases. Most of the countries now have the provision of protection of witnesses in general cases, like Japan. Maldives has a practice of protection of witnesses at the discretion of court. In Nepal, protection for the witness is rendered in human trafficking cases, terrorism cases, corruption cases and money laundering cases. In Viet Nam, if a witness feels insecure, he/she is to ask the police for protection. At trial, the police provide protection for the whole court premises. The group members shared a few tools for the protection of witnesses and victims.

A. Protection of Witnesses and Victims

a) Use of a screen between the witness and observer as well as between witness and accused in the courtroom.

b) Witness statements through video conference.

c) Obscured voice of the witness or victim.

d) Conceal the name, identity, and character of the witness or victim.

e) Using nicknames or symbolic name in the First Information Report, which defendant can get. The original name, address and other issues are written in the original copy of the First Information Report which is given to the trial judges.

f) Providing physical protection to important witnesses and victims.

g) Active police inside the courtroom during organized crime trials.

h) Prohibition of witness in the courtroom while the trial goes on. This only happens when there is a possibility of harm to the witness.

i) Punishment for the publication of any information relating to the name, character, or identity of the victim by the media.

j) Keeping the witness or victim under police protection for a certain period.

k) Rehabilitation for the witness.

l) In camera court proceedings. Only defence counsel, court personal and prosecutors can be present at such trials. The victim is not allowed to be present before the court during such trials as a protection measure. In such cases, the defence counsel must take an oath not to reveal any information relating to the witness.

m) In any crime committed by an organized crime group, the accused has no right to directly question the witness or victim.

B. Issues in Disclosure

In Commonwealth tradition countries, there is the practice of the First Information Report (FIR). It is the first public document relating to the case. In other countries, it is the victim's complaint or any complaint by an informant. Bangladesh, Myanmar, Nepal and Sri Lanka utilize the First Information Report. An FIR is the first document to open a case. In Japan, there is no such FIR system; rather a complaint by the victim is made to the police. In Thailand, the complaint statement of the victim or witness is not disclosed to the defence counsel. It is disclosed after testimony of the witness or victim before the court to avoid any contradiction with the initial statement, which would result in a charge for perjury. Almost all countries submit all documents relating to the case before the court. The judge or public prosecutor decides on the disclosure of

the documents. In Bangladesh, Myanmar and Nepal, it is mandatory to disclose the all documents before the court. In Cote d'Ivoire, all documents are sent to the court by the Public Prosecutor. Only the judge can disclose all the documents to the defence. The defence counsel gets the notes of the investigator's report. Usually no copy of other documents is provided. Instead, the defence lawyer can review the file (such as medical reports and bank reports) in court during the trial. In Japan, the victim first goes to the police and gives a primary statement. The police write a report on this statement. The police and prosecutor interview the victim. The prosecutor chooses the documents to be disclosed. If the prosecutor allows, the documents such as the statement recorded by the police and prosecutor can be disclosed. There are cautious measures taken with respect to mentioning the witness's information in such reports. Any unnecessary information about the witness and victim that may reveal the identity of the witness is avoided. Documents like seizure lists, photos and material documents, medical reports and charge sheets are always disclosed. The investigator's report is not disclosed because it is an opinion. In Viet Nam, all documents of a case are submitted to the court by the prosecutor. The report includes all the witness and victim statements but during hearing of the case, all documents are not required to be disclosed. The statement of witnesses and victims must be disclosed to the court if they are absent during trial, but it is not mandatory to disclose the statement if the witness/victim is present in the court. Group members found that the following should be disclosed:

a) First Information Report or first complaint to police by victim or any informant, or primary report of the investigator.

b) Seizure list and search form.

c) Medical report of the victim.

d) Expert opinion.

e) Photos and material documents.

f) Any information revealed from the accused.

g) Statement of the accused.

h) Any recovery from the accused relating to the case.

i) Statement of the witness recorded by the police or prosecutors.

j) Charge sheet or police report or indictment of the accused.

k) Any documents seized relating to the case.

l) Statement of witness or victim if absence from trial is mandatory.

m) Forensic report.

n) Criminal record of the accused.

C. Special Jurisdiction Measures

For heinous crimes like sex trafficking under the cover of human trafficking, most of the countries conduct special measures to curb such crimes. Without special measures it can take extra time to dispose of the case. Thailand practices the inquisitorial system for human trafficking cases, but in general cases it practices the adversarial system. For the inquisitorial system, the adjudication process consumes a shorter time than the adversarial system, and the inquisitorial system applies to corruption and consumer protection cases as well. From the prosecution to the final verdict of the case, it takes around 6 months to a maximum of 1 year. For investigation, the timeline is fixed at 84 days if the suspect is arrested and it might take more time if the suspect is not arrested in Thailand. Regarding compensation measures for the victim, there is no requirement to submit a separate application to the civil court. The prosecutor can ask the court to provide compensation for the victim. Punitive damages are also awarded to the victims of human trafficking cases.

The witness does not need to be present in court to testify during trial. This is done through video link. In Nepal, a new law was enacted in 2007 to combat human trafficking. General district courts have jurisdiction to try such cases. There is no special court for human trafficking, but for adjudication of corruption, money laundering, terrorism and economic crime, there are special courts. For human trafficking cases, few special measures are taken into account. In human trafficking cases, the accused has no right to see the victim and witness during trial if there is involvement of an organized criminal group. There are in camera trials and a continuous hearing system for human and sex trafficking cases. Protection of witnesses is provided during the whole administration of the trial. The identity, name and character are concealed so as not to identify the true victim. Nepal provides a rehabilitation process for the victims. A special measure for such cases is that the burden of proof lies on the defendant. The police have the authority to rescue the victims under certain agreements with the respective country if the victim stays in a foreign territory. The relevant court has jurisdiction to serve the order to the police to recover the victim. The compensation is taken from the convict, and if the convict cannot afford to pay the compensation, the state provides compensation for the victim. In Viet Nam, the total juvenile trial process may be conducted in an in camera trial process though there is no special court for human trafficking cases. The defence lawyer must be present during trial. If the defence lawyer wants to be absent during trial, he/she is to write a full statement of his/her client and submit it to the judge. The accused's parents need to be present in the court. In Bangladesh, the human trafficking prevention law was enacted in 2012 and relevant rules were enacted in 2017 to meet the requirement. There is a provision for a special tribunal to conduct human trafficking cases. The investigation time is limited to 90 days; if the investigation by the police is not completed within the said period, the court may approve 30 more days to complete the investigation. Adjudication takes 180 days and more 10 days may be taken for trial followed by a written application showing the causes of delay to the High Court Division of the Supreme Court. The human trafficking tribunal has extraterritorial jurisdiction to bring the culprits to justice. The tribunal may issue a proactive order for such case. The Bangladeshi government has a state fund to mitigate the victim's needs and expenses. It has a national organization on prevention of human trafficking to oversee the matters relating to human trafficking. There is an option to file a civil suit against the accused if the victim thinks that he/she had more damages or legal injuries. The tribunal has jurisdiction to fine the accused and compensate the victim separately up to a reasonable amount. In Myanmar, there is no special court for human trafficking, but if any predicate offence (such as money laundering) is found during the investigation, the chairman of the Central Control Board under the AMLL may freeze all properties of the accused during the investigation. The investigating authority later informs the court of such action. The primary offence and predicate offence are sometimes investigated together. In Cote d'Ivoire, there is no special court for human trafficking. During the trial, the judge can prohibit the appearance of the witness and victim and also can conceal the identity of the witness and victim. In Maldives, there is no special court for human trafficking cases, but witness protection is preserved at the request of the prosecutor. In Japan, the protection of witnesses and victims is provided through using screens and video link. The court allows concealment of the identity of the witness and victim, but there is no special court in this regard. General courts try such cases. There is no system for punitive damages in Japan. Group members suggested the following special jurisdiction measures to combat sex trafficking as well as human trafficking cases.

a) Special courts and tribunal in some countries.

b) General courts with special jurisdiction.

c) Compensation system for the victim either provided by the state or by the accused.

d) Punitive damages.

e) Shorten time-consuming trials such as by implementing a continuous hearing system.

f) Special laws and rules on human trafficking.

g) Special trial system.

h) Trial in camera.

i) Secure testimony system through video link or use of screen around the victim or witness.

j) Protection of witnesses and victims in order to conceal identity.

k) Burden of proof lies on the defendant.

l) Rehabilitation fund from the state.

m) Extraterritorial jurisdiction of the court for human trafficking.

n) National Monitoring Committee.

o) Penalties for threatening a witness or victim.

VI. COUNTERMEASURES

Countermeasures include judicial measures to weaken the criminal and criminal groups. Sometimes they cover identification of financial links, tracing the roots of the crime and criminal group, freezing the assets gained from the criminal activities, and confiscation is ordered followed by the verdict of the case. Most of the countries practice the investigation process through identification and freezing of assets. In Japan, preservation of assets can be requested by the police or the prosecutor to the judge before prosecution. In Viet Nam, confiscation of assets is only allowed by the decision of the judge followed by the court verdict. The request is made from the police to the prosecutor, and the warrant is issued by the prosecutor. During investigation and trial, the accused cannot operate his/her bank account and transfer his/her property. In Cote d'Ivoire, if the offender is guilty the court orders confiscation of the proceeds of crime and also confiscates all property of the offender. The court orders the destruction of travel documents such as passport, tickets etc. if they were used by the offender to commit the crime. In Thailand, frozen, seized and confiscated assets are vested to the Anti-Human-Trafficking Fund. In Bangladesh, the Human Trafficking Tribunal can order confiscation of assets and proceeds of crime of the offender gained by criminal activities. Anybody associated with such crime or who rents any house or apartment for committing such crime will be seized. If any accused owns any property outside the country the court can order to freeze and attach it through diplomatic channels. If the accused denies complying with such order, he/she will be imprisoned for a period of 5 years with a certain financial penalty. For human trafficking cases, there is a provision for preventive search and arrest to be conducted by the police even without a warrant if the crime seems to be imminent. A national organization on prevention of human trafficking works to oversee the human trafficking matters. In absentia trial is also present in Bangladesh according to the Code of Criminal Procedure. In Myanmar, money laundering cases related to human trafficking, drug trafficking, and corruption, the chairman of the Central Control Board under the Anti-Money Laundering Law (AMLL) can order freezing of such property and the investigator later informs the court. The Minister of Home Affairs, who is also the chairman of the Central Control Board can order the FIU to freeze or control almost all of the suspect's possessions depending on his crime and assets gained, which are considered as illegal property. The burden of proof lies on the accused person to establish that the money and property were not obtained by illegal means. In Nepal, the national committee and district committees work to coordinate the activities of rehabilitation and control of the offence. Confiscation is ordered for any movable and immovable property (such as houses, land or vehicles) acquired as a result of the offence after the final verdict of the court. The burden of proof lies on the defendant. Group members raised a few points on countermeasures as described below.

A. Identifying, Tracing, Freezing or Seizing Assets and Confiscation of Proceeds of Crime

a) Freezing, seizing assets and confiscation of proceeds of crime.

b) Tracing the crime roots and criminal organizations.

c) Confiscation only applies to assets obtained from crime and proceeds of crime.

d) All proceeds of crime are to be confiscated except those which are gained or inherited from a legitimate source.

e) The burden of proof lies on the defendant.

f) All properties or the proceeds of crime are to be confiscated if there is no legal source to be disclosed.

g) Any house, apartment or any place or any vehicle that is given rent for prostitution or human trafficking purpose is to be confiscated.

h) Confiscated property must be deposited to the human trafficking fund.

i) Non-conviction-based confiscation system.

B. Compensation for the Victims

In the group discussion, the experience of Thailand revealed that the Ministry of Social Development and Human Security (MSDHS) has the duty to provide assistance as appropriate to the victims. The assistance provided is food, shelter, medical treatment, physical and mental rehabilitation, education, training, legal aid, the safe return to the country of origin or domicile, and assistance with legal proceedings to claim compensation according to regulations. In Myanmar, according to the trafficking in persons law, the judge may order to give compensation for victims from confiscated money and property. The Ministry of Social Welfare provides a daily allowance to victims of human trafficking and arranges for them to go back to their native homes. It also provides professional training to victims. In Nepal, there is a provision in the law for compensation for the victim. The compensation amount should not be less than half of the fine levied as punishment to the offender. In Bangladesh, if the accused is proved guilty, all of his property gained by criminal activities will be confiscated. From the confiscated property, a portion of the amount would be given to the victim. The Government provides funds for the victims of human trafficking. There are shelter homes for victims as a rehabilitation programme. The victim can sue the accused in a civil case if the sufferance and legal injuries are made by such crime. Human trafficking victims may also be given assistance from the Human Trafficking Fund. The amount of assistance to the victim depends on the Government's discretion. Any NGO can help the human trafficking victim under the Legal Assistance Providing Act, 2000. The Human Trafficking Fund is composed of Government funds, funds from local authority, funds from any individual or organization or funds revealed from any source of human trafficking. In recent human trafficking cases, the International Organization of Migration (IOM) helps to bring back Bangladeshi victims from foreign countries. In Viet Nam, victims can ask for compensation in the court though there is no special fund for victims, and they cannot be compensated from confiscated money. Many NGOs assist through the Women's Union, which provides shelter and rehabilitation for the victims. The Women's Union receives funds from foreign donors. In Japan, there is no special fund for victims of human trafficking. The confiscated property goes to the government fund. The police, the Immigration Office and NGOs cooperate to protect victims of human trafficking in shelters for women. An advantage of these shelters is that they provide assistance for all by NGOs, not only for the victims of human trafficking. For foreign victims, the police and IOM cooperate for the safe return to the victim's home country. In Cote d'Ivoire, during the criminal trial before the closing argument of the Public Prosecutor, the judge must ask the victim if he/she wants compensation. The victim must specify how much he/she wants. If the offender is guilty, the court must specify how much is payable to the victim as compensation as the court will confiscate all property of the offender. The victim can participate in the trial and waive the compensation.

The group mentioned the related articles of the Model Law against Trafficking in Persons and the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. Compensation for victims of trafficking in persons has a mandatory provision in the Model Law against Trafficking in Persons.

Article 29 of the Model Law against Trafficking in Persons states that *one way to ensure compensation to the victim for damages caused, independently of a criminal case and whether or not the offender can be identified, sentenced and punished, is the establishment of a victim fund, to which victims can apply for compensation for the damages suffered by them*. Paragraphs 12 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power states that *when compensation is not fully available from the offender or other sources, States should endeavor to provide financial compensation to (a) Victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes; (b) The family, in particular dependents of persons who have died or become physically or mentally incapacitated as a result of such victimization.*

Paragraph 13 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power

states that *the establishment, strengthening and expansion of national funds for compensation to victims should be encouraged. Where appropriate, other funds may also be established for this purpose, including in those cases where the State of which the victim is a national is not in a position to compensate the victim for the harm*.

The group members agreed on the following recommendations for compensation for the victims.

a) Compensation for the victims from the government.

b) Compensation for the victims from the accused.

c) Victims can be brought under the social safety net. This includes rehabilitation programmes through providing income generation where the victim will get preferences.

d) A special fund can be raised where the government, and INGOs, NGOs and individual can participate.

e) Interim compensation can be granted to victims after the first judgement by the court. This compensation will be collected from a government special fund.

f) Extraordinary support for the victim such as shelter, vocational training and education can be provided.

g) In human trafficking cases, the victim can be compensated from the established victim fund for damages suffered whether or not the offender can be identified, sentenced and punished.

VII. CONCLUSION

All participating countries of this group agreed that it is extremely important to curb human trafficking as well as sex trafficking in all parts of the world. Sex trafficking is a crime against humanity. This crime should not be spread out over the world regardless of region, sex, race, caste, colour, and character. Silence of any part of the world against this crime may endanger another part. All countries should take action to eliminate human trafficking, sex trafficking, body organ trade, etc. It must be stopped at any cost.

GROUP 3

EFFECTIVE MEASURES TO COLLECT INFORMATION, CONDUCT INVESTIGATION AND FINANCIALLY WEAKEN CRIMINAL ORGANIZATIONS' MONEY-LAUNDERING ACTIVITIES

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I. INTRODUCTION

The group decided to discuss through knowledge sharing and providing information on legal basis on the topic of *"Effective measures to collect information, conduct investigation and financially weaken criminal organizations' money-landering activities"* based on experiences of the respective jurisdictions. On 23 May 2017, Group 3 organized and began discussions and elected by consensus Mr. Dicko as Chairperson, Ms. Puntarangkul and Mr. Anzai as Co-Chairpersons, Mr. Laule as Rapporteur, and Ms. Amaya Soto as Co-Rapporteur.

The objective of the Group was to identify effective and efficient measures to collect information and to conduct investigations on the topic of money laundering, and to examine how can we financially weaken criminal organizations that commit this kind of crime; to do so, it is important to identify, trace, freeze or seize any kind of assets, and to confiscate them if they are the result of this specific crime, and finally to provide some kind of compensation or restitution to the direct victims or even to society.

At the beginning of the session the group identified several topics: smuggling of firearms, corruption and money laundering; at the end, the group chose to discuss the topic of money laundering. The group came to the conclusion that it is important to discuss things like buying or selling of firearms and even corruption, or other kinds of crimes that are committed by organized crime groups, yet the final conclusion was that it does not matter if all the efforts are made only to fight these crimes as somehow these organizations will always find a way to reorganize if they have the ability to do so by transferring money illegally from one jurisdiction to another. They will find a way to recover and start all over again, probably even stronger than the first time; this is the reason why it is important to conduct special investigation, prosecution and adjudication when it comes to money laundering. If countries can find an effective way to cut their incomes, and disrupt their operations because a big part of this money comes from illegal actions such as selling drugs or firearms, or, even worse, smuggling of migrants, which is then used to commit other crimes. Organized crime occurs beyond borders and indirectly affects economies of countries, and therefore countries need to support each other using efficient techniques and measures to combat organized transnational crimes.

II. SUMMARY OF THE DISCUSSIONS

A. Basic Legal Framework to Address Money Laundering

Each jurisdiction has relevant legislation which defines the term "money laundering" and also provides the legal basis to address money laundering. Interpol defined money laundering as *"an act or attempted act to conceal or disguise the identity of illegally obtained proceeds so that they appear to have originated from a legitimate source"*.[1]

Criminals involved in Transnational Organized Crime (TOC) frequently commit all kinds of crime, but in this report, we focus on money laundering, which is one of the crimes described by the United Nations Convention against Transnational Organized Crime (UNTOC),[2] also referred to as the Palermo Convention. Under Article 3, the Convention calls for member States to prevent, investigate and prosecute the offences established in accordance with Article 6 on laundering of proceeds of crimes. Nowadays relevant domestic legislation criminalizes the act of money laundering, and provides the legal basis for criminal procedure during the investigations, adjudication and punishment, as well as recovery and compensation of proceeds of crime.

B. Efficient Collection and Handling of Information

1. Source of Information

Every country in their domestic laws has already established ways of collecting and handling the information either if it is to open an investigation or if it is during the investigation regarding money laundering. The group has identified the following sources of information from which relevant authorities in each jurisdiction obtain information and data in their investigations on transnational crime.

(a) Community reports

In some jurisdictions, anyone in the community can report crimes related to money laundering; it can be an anonymous call, or someone going directly to the police department or the prosecutor's office and they may say what their concerns are and why they think that someone is committing money laundering. This kind of information is taken just as advice, not a complaint by itself, but at least it can help the authorities to have an idea where or who they should be looking for when it comes to conducting investigations on reported or suspected money laundering.

Sometimes it is very difficult for the police to open a case in some jurisdictions if the information provided by the community is speculative. For example, in Thailand, a Canadian married a Thai woman, and they bought a very huge amount of land, which affected the other community members because they could not gain access to their lands. This couple had just one source of income from a fitness centre, that apparently only had four clients, so the problem here was to find out where the money came from and how this couple managed to buy that land without having sufficient income. In this kind of case, the community might be concerned about the legality of this kind of business, according to experience, most of them are just coverups for illegal operations such as money laundering. In this particular case, the community's concern was not reported to police, but if any member of the public decides to report to the police on money-laundering activities in Thailand, the police can open a file, and according to their domestic law there is a possibility that the Anti-Money Laundering Committee, which is a state agency, will do further investigation.

Somalia has the Audit General Office, which receives information related to corruption and money laundering cases. Under their domestic law, this office can receive information from the community, officials or public offices, and even from other organizations in order to open a case and initiate investigations. There is a particularity: because everyone in the community knows each other, it is easy for the community to keep track of the activities of the other members of the community. It is very easy to know if the asset was bought by legal means or if it was obtained with dirty money from piracy activities or other illegal activities. Therefore, in this situation the information can be obtained from any member in the community by an investigator who is already conducting an investigation related to money laundering.

In other countries such as El Salvador and Brazil, any member of the public can provide information to the police or directly to the prosecutor's office. Depending on the quality and quantity of information in these countries, the prosecutor decides whether to continue with an investigation or to dismiss the case based on the lack of information—for example, when the person does not provide names, directions or specific dates or places.

The domestic law in Papua New Guinea (PNG) allows the police to open a case upon receiving reports from the public and then carries out further investigation, but sometimes as in other countries, people often

[1] https://www.interpol.int/Crime-areas/Financial-crime/Money-laundering

[2] The United Nations Convention against Transnational Organized Crime was adopted by the UN General Assembly resolution 55/25 of 15 November 2000 and it entered into force in 2003.

fear repercussions, and that is one of the main reasons why it is so difficult to start an investigation with such sources of information. Recently PNG has attempted to pass the Whistle Blowers Bill in Parliament to give maximum protection to individuals so they can report on official corruption and matters related to money laundering, but the Parliament never passed the Bill.

In the case of Zambia, the High Court threw a matter saying that when it comes to money laundering, the investigation needs to rely on sufficient evidence and not only on a community report because of the speculative nature of such reports. To prevent this situation the prosecutor and the police need to gather as much information as they can in support of the case. This resolution or saying of the High Court of Zambia, was related to a previous resolution given by a lower court on a case directly related to money laundering.

When it comes to community reports, we can conclude that this source of information is important, and according to some domestic laws, it can help to start an investigation or generate leads or hints regarding persons of interest in the case. It is very important to remember that the community reports must be supported with hard evidence in order to have a well-structured case. Relying only on one source of information may be considered speculative. It is important to find other sources of information to confirm the theory of the case.

(b) Bank transactions records

All participants agreed that bank transactions of suspected persons can be obtained from commercial banks by police or the prosecutor in their respective jurisdictions. Whether or not a warrant is needed depends on the domestic law of each country. The banks have the obligation to provide all information that is requested. The court cannot deny access to the information on the grounds of bank secrecy. This situation has been overcome with the UNTOC under article 12 (6).

For some jurisdictions, Financial Intelligence Units (FIUs) play important roles in obtaining such transaction reports from the commercial banks, and these units can make these records available to the police, prosecutors or any authority that is conducting an investigation related to money laundering. Some countries have established in their domestic laws that all commercial banks are compelled to provide reports to the appropriate authority when the bank detects suspicious transactions. Therefore, they may not wait for the authority to ask them if an unusual transaction has been made. Domestic laws compel the banks to provide all the information that is requested, and for that propose the banks must have appropriate systems to keep all the records and documents safe and available when they are requested.

Some countries have established legal requirements to open a bank account. For example, in Japan, when a person wants to open a bank account there are some forms that need to be filled out with certain information, such as the reason for opening the bank account. A person is prohibited from using someone else's bank account.

In Laos, according to their domestic law, every time that an account has any kind of activity of transferring money the bank gathers and checks the information in detail of the transferor and the purpose of the transfer before further delivery to the beneficiary. If that information is not provided correctly and completely, the financial institution shall refuse the payment to the beneficiary and transfer the money back to the transferor and promptly report the case to the Anti Money Laundering Intelligence Office (AMLIO).

According to the group discussion, nowadays it is not difficult for any country to obtain any kind of bank records. This has been overcome with the UNTOC according to the article previously cited. It does not matter if you need a warrant from a judge to request the bank records, or if the prosecutor can request the record directly from the bank; the important thing here is that now the banks are obliged to keep all the records of bank transactions—loans, opened accounts, credit cards, all accounts transactions, etc., and they shall provide the information when requested by the legal authority of each country according to their domestic laws.

This final point on bank records, also applies when mutual legal assistance is the original request: all the States Parties of UNTOC shall provide other States parties with information previously requested by mutual legal assistance, and they apply their own domestic laws to collect the information related to bank records if that is the specific request in order to facilitate the necessary documents that are useful in other money-

laundering investigations that involve other countries.

(c) Taxation reports

Taxation reports are also important sources of information to monitor and to identify money-laundering activities by relevant agencies to execute any further investigations.

In some countries such as El Salvador, when a money-laundering investigation is opened, the tax reports become an important source of information because such information is available at the Taxation Department. In Japan, timely reports on taxation payments by individual companies can be obtained from the Ministry of Finance for the purpose of investigation.

Thailand shared its experience on drug trafficking issues and like in any other country drug traffickers do not pay any kind of tax for their illegal businesses. It is very difficult to trace the flow of money and to be able to separate legal from illegal assets and consequently forfeit any proceeds of crime. It is very difficult in Thailand to obtain tax reports of foreigners because there are too many informal activities and hard to collect tax information when it is an informal business.

Obtaining taxation reports is a basic step in any investigation relating to money laundering and tax fraud in Brazil. It helps to confirm whether the tax declaration made by the Person of Interest (POI) is consistent with the assets and if these assets are covered by the legal declaration made by the POI. If there is any disproportion, this kind of information can help in further investigations. Once the investigator or prosecutor has suspicious information that leads them to think that the POI also has an illegal source of income, there should be a comparison between all the income of the POI and all the assets that this person might have. If there is any disproportionality, then there is strong evidence of money laundering.

Brazil also has a standard means of collecting information. The agency that oversees public expenditures provides information to the prosecutor about overpricing in public contracts. In these kinds of cases, the prosecutor obtains from the Federal Revenue Service the list of the major payments done by the hired companies through these suspicious contracts. After getting this list, the prosecutor checks the social security records of the firms that received such payments. Sometimes it turns out that one or more of those firms do not have employees registered with the social security service. This kind of information is a clue that those firms do not have actual activity, and could have been used as a channel for kickback payments and money laundering.

PNG experiences the same situation as Brazil with fake or temporary companies who disappear after obtaining funds from the Government to do projects and do not pay tax. There are so many informal businesses that do not pay tax, making it very difficult to obtain tax reports to keep control of the regular and irregular activities, even if they are a legal or natural person. Taxation reports can be obtained from the Internal Revenue Commission. In Zambia, the Revenue Authority is the independent authority that collects taxes on behalf of the State in Zambia. It works with relevant agencies. Police can only obtain a search warrant and do searches at the Revenue Authority to collect taxation reports.

In El Salvador when they conduct investigations related to the MS-13 gang for any kind of crime, especially for extortion, the prosecutors and investigators look for information related to all those persons that somehow help the gang to launder their money. For example, if the investigation shows that the gang is buying cars, the investigation is conducted to find out if the person that is selling all these cars actually knows that the money used to buy those cars is illegal, or if in fact selling those cars without knowing the precedent of that money. There have been effective investigations conducted this way; in fact, in one case the investigation showed that the car importer in reality knew that the cars were being bought by gang members, and that the money was the result of different extortion schemes. The main clue for this investigation was the information collected from the tax department in that country.

This source of information is one of the main pieces of evidence in cases of money laundering. The reason is that with this information the prosecutor can demonstrate that the POI in fact cannot backup with legal documents the source of the money that sometimes can be translated into assets such as cars, houses or land.

(d) Immigration reports

All participants agreed that immigration reports provided by the immigration authorities in the respective countries can provide valid information on the movement of POIs who travel from country to country to determine transfer of dirty money to conduct illegal activities in those countries.

In some countries like in Japan, if you are travelling to these country, some questions are asked by Japan's customs agents at the border, such as if you have a specific amount of money, the reasons why you are traveling to this country, period of time staying and the address of the place where the person will be staying. Police and investigating authorities can obtain further information from customs about a POI, especially if the person declares and enters with a large amount of money.

Japan had an experience in which a POI travelled to Hong Kong for short visits. Investigations showed he was purchasing gold in Hong Kong. He brought 10 Million Yen to Hong Kong to purchase gold. The purpose of the investigation was to establish that the gold was purchased using money fraudulently obtained. Investigation showed that the person did not make any reports on the gold he purchased to the respective authorities. The money used in this case was obtained from fraudulent activities, and after buying the gold, the person took it to Japan for the propose of selling it and obtaining more cash. The investigators obtained a number of immigration records that indicated the number of trips that the person made to Hong Kong. The suspect claimed that he brought the hard cash to Hong Kong undetected. He may have had criminal intentions so that was why he did not declare that he was carrying 10 million yen.

In one case, the accused person was travelling to Israel regularly, and was caught when he was entering US with millions of dollars. Immigration reported to customs. Customs took him in custody, conducted a body search, and they discovered and obtained millions of US Dollars attached to his body.

In other countries like Laos, if the person who takes money in or out of Lao PDR or any other valuable material goods, the value of which exceeds the limit fixed by the Bank of Lao PDR, the person needs to declare them to the customs officers, and the officer will do a follow up report to the AMLIO; in case the authorities detect or see any suspicious movement, that there is no declaration or there is an underreporting of valuable property, they will be seized and sequestrated immediately, and then will be reported to the AMLIO so they can do an investigation to determinate the source of the money or valuables.

The border controls are a very useful source of information if the money-laundering investigation involves transnational organized crime, with this kind of information the investigation can prove the movements of the person, or even only give a hint as to the amount of traveling the person does in a specific period of time, and if this amount of traveling can be possible according to the income that the person has, or if it is impossible for this person to travel that much because he does not have enough money to do this kind of traveling.

(e) Trade records

The Group agreed that information such as invoices, receipts, customs documents, online transactions like eBay, business registrations, and licences are also important to determine the trade (sales and buying) of properties or investments using dirty money.

Lao PDR has never prosecuted any money-laundering related cases as of yet. In the case of Mali, the public workers have more money than the business people, and most of the time the money comes from public funds; however, the authorities cannot do anything or just very little to investigate where the money is coming from. The reason is that it is very difficult to obtain records from companies, as they cannot expose records of purchases. In Mali, if a Government Minister is a shareholder in a certain firm, the company under the law must disclose that the Minister is the shareholder. This fact will be made known to the public to allow the transparent process of awarding tenders. If someone becomes president, he must by an oath declare that he is leaving the company during the period of the presidency, and cannot be a shareholder or provide any input in the operation of the company, which can be managed by someone else. The president is open for investigation and prosecution after he loses the election to see if his/her company had benefited by any means while he/she was in power.

El Salvador, Zambia and Japan have a specific agency accorded with functions to register and keep records of property, land titles, property development, purchases, ownership and transfer of property. It is

very easy to obtain relevant records from these agencies.

Trade records can be a very important source of information, and the person in charge of the investigation needs to have in mind that with organized crime, especially when it is transnational crime, some of these groups' main goals are to obtain money, properties and any other kinds of assets, and to reach these goals these groups commit any crime that can be a source of income. It is important for every country to keep records of all the assets that the community possesses, not only to have order in society, but also to keep track of the investments that people do, and to be able to provide the necessary information to the authority that is leading an investigation that involves properties or other kinds of assets that can be frozen and later confiscated upon a determination that they are the result of money laundering.

(f) Information provided by other countries (international cooperation)

All participants agreed that information on individuals and groups or organizations that are connected to money laundering activities, can be informally obtained at the beginning through the Financial Intelligence Unit (FIU), Interpol or through the police under relevant agreements as well as through diplomatic channels. However, working through diplomatic channels is a cumbersome exercise. Therefore, for any formal request, Mutual Legal Assistance (MLA) is a very important tool that is readily available for countries to send and receive information or evidential materials relating to money laundering and other transnational crimes. The Egmont group among other international organizations can be a valid source of information.

Countries can provide adequate support to each other if they have a previous agreement based on good will. For example, Brazil and the United States have come to this kind of agreement, and it has been a successful practice between these two countries. The best example was during an investigation that was being done by authorities in Brazil and they needed some information from the U.S; before the U.S. could give an answer to Brazil, they invited the respective authority that was conducting the investigation in Brazil, to come to the U.S. so they could identify the evidentiary materials that they needed and then make the correct or appropriate request. As a consequence, Brazil's authorities went to the U.S., identified exactly what they needed and finally made the appropriate request, having at the end the correct assistance from the U.S.

Mali, as some other countries, sometimes faces problems with mutual legal assistance. Sometimes the assistance requested is related to the extradition of a citizen of Mali, but countries such as Algeria, sometimes refuse saying that they cannot cooperate on the basis that they do not know exactly where the person is.

Papua New Guinea is able to receive or provide information both formally and informally to countries in the Pacific Region, including Australia, through MLA. As a result, recent investigations and criminal trials were successful.

Mutual Legal Assistance plays an important role during the investigation of transnational organized crime related to money laundering. The countries should provide all the information requested, having in mind that the help they provide will also have a good influence on their own countries, because in this way it is not only one country that is fighting organized crime. This also leads the other countries to look for persons that they did not know were related to organized crime or to crimes like money laundering.

(g) Past criminal records

The participants discussed how past criminal records can be a source of information to further investigate money laundering crimes.

In Mali, a list of groups and members of organized crime is provided by the Security State (Special Unit under the Authority of the President) to the President for review, specifically for the purpose to see if future crimes are committed by the offender.

In Japan, past criminal records are kept in the prosecutors' offices. The prosecutors use the previous documents to find useful information. If someone has a case and the name of the suspect, the police can go through the criminal records and find useful information related to money laundering. From the evidence, they can draw links and conduct an appropriate investigation. In Japan, they keep information on criminal offences for 50 years for offenders who are serving life in prison or who were sentenced to the death penalty. For offenders serving 10-30 years' imprisonment, their criminal records are kept for 30 years. It is easy for

the Japanese government to provide information. All the records are kept in the public prosecutors' offices.

In Zambia, the court keeps the records for 2–3 years only in the prosecutor's office. The prosecutor goes to court to obtain previous records that are beyond 3 years. Court records are accurate. You can easily access them and refer to them for future reference.

The participants shared further experiences from their jurisdictions on keeping POIs on blacklists or investigation watch lists to monitor their movement or activities. Most participants agreed that it is not a practice in their countries. In Japan, it is the normal duty of the police to keep records of known individuals in criminal organizations within Japan. In PNG, the Task Force Sweep, which has currently had its operations suspended by the government, had once issued instructions to airline companies to keep records on the movements of government Ministers, PNG elites, foreigners and individuals who became POIs in the investigations conducted by the agency, but in this case issues were raised on infringements of rights of individuals on freedom of movement under the Constitution. Many implicated were later investigated and prosecuted for embezzlement and money laundering.

(h) Information from social media

The participants agreed that social media is a source of information to conduct a preliminary investigation. POIs may operate in secret Facebook groups or openly discuss their criminal activities on Facebook. Nowadays organized crime is evolving as the technology evolves, setting a high bar for countries to come up with creative and legal methods of investigation, so this source of information can be used efficiently and not only as isolated information. Technology should not be a barrier to conducting an appropriate and effective investigation.

Some countries are now making conscious efforts to generate leads from their citizens. Such is the case in PNG. Nowadays the citizens of this country can expose suspicious movements on Facebook groups like "The Voice PNG" or "The News Page PNG" and several others on corrupt practices including money laundering before police do their own investigations. Sometimes such publications provide leads to police to conduct further investigations.

In other countries like in El Salvador, a case can be opened in the prosecutor's office on their own initiative if any sign of a probable crime is shown on any kind of social media site; such is the case that their domestic law allows them to initiate an investigation if a newspaper reports news related to someone or to some group that might be committing crimes such as corruption or money laundering.

(i) Witness testimony

All group members noted that testimony provided by a witness to police or investigators is a legitimate source of information, but it is required by the authorities and by the law, that in cases related to organized crime and more so if it is related to money laundering, there must be other sources of information that can support the witness testimony. This is to eusure that investigators do not only rely on one source of information. Thinking that maybe at trial, simple testimony would not be sufficient to prove that someone or some people have committed money laundering, the prosecutor needs documents to support that situation, even more so if we believe that the witness can refuse to give testimony in front of the judge or if something happens to the witness.

C. The Techniques Involved in Conducting Investigations

After discussion on the kind of information and the sources of information that the authorities need to conduct an efficient investigation, group members further proceeded into discussing the methods applied in collecting such information.

(a) Bank transactions

The participants discussed the techniques involved in collecting information from banks, and also shared challenges of obtaining information on bank transactions in their respective jurisdictions.

In some countries, mobile phones are used to withdraw or transfer funds, just like in Somalia, and the bank accounts can be traced. This mechanism can also be used to make purchases in some shops inside the country. The owner may use a SIM number that is not registered so it is complicated to get more

information. SWIFT runs infrastructure all over the world.[3] SWIFT has to determine which bank is used, so to get bank details it is necessary to go to the bank with search warrants to obtain details of the transactions.

The commercial banks in most jurisdictions are obliged to report any suspicious transactions to the FIU. A warrant is needed for obtaining bank transaction information in jurisdictions where it is not mandatory to provide information. The mandatory reporting is based on the amount of money involved in the transaction. Some of these reports are called Suspicious Transfer Reports, and other reports refer not to the quantity of the transaction but to the activity itself and it is called not a quantified but a qualified report.

Countries are recommended to establish FIUs that serve as national centres for the receipt and analysis of: (a) suspicious transaction reports; and (b) other information relevant to money laundering, associated predicate offences and financing of terrorism, and for the dissemination of the results of that analysis.[4] All FIUs are recommended to apply for membership with the Egmont Group and share information with each other.

In Japan, security cameras outside the Automatic Teller Machines play important roles in tracing who withdrew the money and at what ATM, the location and time. Using the special fraud method, prosecutors can only charge a person for fraud if the accused had known that opening an account using another person's name was fraudulent. However, it is quite difficult to charge a person with fraud if he or she was allowed by another person to use the account.

In El Salvador, banks share information and photos with all other banks in the country to create the same base or records of suspicious persons, making it easier for the investigators to interview and identify the users of some bank accounts. Sometimes other jurisdictions help provide intelligence and information to El Salvador, such as the U.S. State Department does when they trace a suspicious transaction between an account open in El Salvador, if it is related to another account in another country.

(b) Techniques applied in collecting information from social media

The group shared the same idea, that it was necessary to discuss the effective measures and techniques that can be applied to collect all the information during an investigation, and everyone agreed that nowadays some relevant information can be found in social media, but in these cases, it is quite complicated to obtain the information from these sources, and the legal procedure varies from country to country.

When it comes to money laundering investigation, it is important to consider the efficiency in collecting information from social media and to check the legal bases in each country so the information obtained can be used in an eventual trial. In other words, it is very important to conduct a clean investigation by ensuring the legality of obtaining information from social media, and sometimes the information we can collect from individuals' mobile phones or from private companies or applications or software like LINE in the case of Thailand.

It was very interesting when the discussion reached the question of the legality of using the fingerprints of POIs to access their mobile phones, including whether the use of fingerprints in this manner requires a warrant from a judge. The conclusion was that in these cases the investigator cannot force the person to unlock his or her phone, because this measure can be viewed as a form of self-incrimination. Therefore, obtaining fingerprints should require a warrant from a judge so legal means are used to force the person to unlock the phone, thus granting investigators access to all information that is inside and to social media applications.

As it was said before, in this technique of investigation the police officer can use the suspect's fingers to unlock the mobile phone, but to do so the police officer needs to have a warrant from a judge. Otherwise to open the mobile phone using the fingerprint without a warrant would be considered illegal. Everyone during the discussion agreed that nowadays smartphones carry many kinds of information, and somehow can be

[3] Swift is the Society for Worldwide Interbank Financial Telecommunication. SWIFT's original mandate was to establish a global communications link for data processing and a common language for international financial transactions. http://searchcio.techtarget.com/definition/SWIFT

[4] https://egmontgroup.org/en/content/financial-intelligence-units-fius

compared to a PC, so if we make this comparison, the conclusion will be: *to obtain the information inside a PC the investigator or the prosecutor needs a judicial warrant; therefore, it should be the same when it comes to mobile phones.*

Finally, the group discussed the legality of hacking email accounts, Facebook profiles and other forms of social media that belong to a POI. The conclusion was that for hacking these sources of information, the principle of wiretapping can be applied, which means that in order to violate the right to privacy, it is necessary to obtain a judicial warrant in order to be able to continue the investigation with these kinds of techniques.

(c) Undercover operations and pretense

The group came up with a scenario to discuss legal issues surrounding undercover operations: *"Suppose that a suspicious person purchased a house using illegal money.* At the *beginning of the investigation the investigator sends a message to the person of interest, and the investigator says, "We were friends a long time ago". (Although in reality there is no real relationship.) "You live in a good house. How did you buy it?" By saying we know each other from a long time ago, the investigator is looking to get the suspect closer to him. And as it was expected, because the suspect was feeling comfortable, he says to the investigator that he bought the house using the money that came from illegal activity. In this case, the question whether is this kind of investigation is legal or not.*

During the discussions, group members agreed that such technique is normal for an undercover operation to obtain information and therefore is legal. In such case, the investigator must not induce, and avoid use of force on the suspect in order to get information. Probably this kind of technique is necessary only for the initial investigation, and of course it would be necessary to bring together other supporting evidence to confirm the information that was provided at the beginning.

According to the group members, to do undercover investigations, there must be a previous order from the judge or the prosecutor, and this would depend on every country and their domestic laws; however, this kind of technique sometimes is only allowed in specific cases such as those that involved organized crime, and the investigation requires special techniques in order to do an efficient investigation.

In PNG, the new *Cyber Crime Act* criminalizes fake Facebook accounts, so for the police to create a fake account and do undercover operation to be able to get in touch with criminals, the police may require a warrant from the court.

(d) The use of cameras

The participants also discussed the use of cameras as a special technique of investigation, and the legality surrounding hidden cameras.

In some cases, surveillance techniques allow the use of hidden cameras in particular cases, but the legality of the use of this technique will depend on the space where the camera was placed and especially if it was required to have a warrant from ae judge, such as in cases where the camera was set inside a private place.

It was also important to discuss the use of private video tapes, such as in cases where the POI or someone else has already placed a video camera inside an office, a house or any other place that can be considered as a private place; in order to be able to use these kinds of video records, even though they can be considered as private, the police officer or investigator can seize the video record and provide it as evidence during the investigation.

A real case happened in PNG, where a corruption fighting Global NGO became a witness after using undercover techniques to secretly record a video of an entire interview with some lawyers from a famous Port Moresby based law firm. Without knowing the conversation had been secretly recorded, some Government ministers, lawyers and PNG elites were named as persons who have secret accounts in Singapore and Australia, and PNG law firms helped facilitate the transfer of millions of Kina to pay PNG politicians. In this particular case, the video could not be used even though there was a search warrant, and the main reason was that it is illegal to film someone secretly in PNG without their consent according PNG laws.

The conclusion that can be made from this technique of investigation is that in order to place hidden cameras inside private places, there must be a previous warrant; if the camera is located in a public place, there is no need for a warrant and the only necessity is to seize the video. The same goes for private cameras that were previously placed by other persons. In this case, the investigator would only need a search warrant and to seize the video that was recorded for a third person.

(e) How to analyse information

The participants discussed the importance of analysing information as part of the investigation. Questions were raised as to whether analysis of data and information can be done at the same time while collecting information. Important key questions involved in the analysis of information were identified and discussed as follows:

i. *Does the information obtained prove the elements of that breach or offence?*

ii. *Does the information obtained identify another source of information?*

iii. *Does the information identify another POI or link to an organization of interest?*

iv. *Whether the information obtained complies with the rules of evidence, i.e., it must be legally obtained, obtained by rules of evidence, and the legality of the evidence. After arrest, the suspect is informed when charged.*

Members agreed that it is possible to differentiate the collection of evidence and do the analysis at are the same time. Collection of evidence and analysis go hand in hand where the prosecutor is also the investigator, though theoretically they are different. Members agreed that when analysing the whole body of evidence, it is important to analyse it in a broader context, which sometimes requires forensic analysis. The investigator or prosecutor must have a plan to ensure the collection of all information needed, and that the information is collected on time.

The final conclusion on this topic was as follows: if we are investigating a money laundering case, at the beginning of the investigation while the investigator is collecting all the information, at the same time this information needs to be analysed with the objective to check whether all the information collected is sufficient to charge a specific person, or if the investigation needs to be open to other persons that may be related to the first POI, and to determine whether these third persons participated in the money laundering.

D. How to Financially Weaken Criminal Organizations: Identifying, Tracing, Freezing or Seizing Assets and Confiscation of Proceeds of Crime

In our discussions, the participants shared experiences from their respective jurisdictions on how they have weakened criminal organizations. Everyone concluded that criminal organizations can be financially weakened by the identification, tracing, freezing or seizing of assets and confiscation of the proceeds of crime.

(a) Tracking

For investigations related to money laundering, it is important that from the beginning the illegal money can be tracked by all available means. Therefore the investigator and the prosecutor need to amplify the scope of the investigation and not only be looking for the money in bank transactions or other types of financial institutes, but also need to consider whether the money can be found physically in a specific place, like a car, house, hotel and so on; in this case, some special techniques can be applied for tracking the physical money. This type of tracking can be done just like in Brazil, where there is a possibility of using GPS to monitor the movement of suspected money that is laundered, or maybe by applying other techniques like undercover delivery, which is done in Japan when it comes to drugs, but it is important that, in order to use these techniques, the investigator or prosecutor should have a warrant issued by a judge.

PNG had an experience related with tracking drugs from country to country. In this case, the police busted a massive 50kg of methyl amphetamine, and it was valued at the cost of US $8 Million, which originated from the Netherlands. When this package was on its way to PNG, a detective in the UK removed the drugs, and replaced it with soap powder and inserted a tracking device to allow the police to monitor its movement to its final destination. This method is called “controlled delivery”.[5] In this case the shipment was

kept under surveillance based on the existing international law enforcement network. Finally, the Australian Federal Police, the New Zealand Police, the PNG Transnational Crime Unit and PNG customs were involved as the illicit cargo moved to New Zealand and Australia before being delivered to a house in Port Moresby. Police obtained a search warrant, entered the property unnoticed, and when the suspects went into the property at dawn to pick up the illicit cargo, the law enforcement officers arrested and detained the suspects. They were prosecuted and are serving terms in prison.

Just as the real case experienced by PNG, the same mechanism should be applied with the movement of cash when there is an open investigation related to money laundering. Of course, it would be very difficult to implement this kind of technique. However, with appropriate legislation and the appropriate devices, along with some other special techniques of investigation, this can lead to a very successful and efficient investigation related to money laundering.

(b) Freezing of assets

The reason why the group chose the topic of money laundering is because transnational organized crime is finding ways to grow every single day, and not only in terms of how many people belong to organized criminal groups, but also in terms of the ways these groups commit crimes and how they are able to obtain money to continue their criminal purposes or just to increase their incomes. Every country needs to find ways to financially weaken these criminal organizations and to find efficient ways to prevent the use of the assets that these groups possess and to prevent them from transferring these assets a third person, making it difficult for the authorities to confiscate the assets after trial.

In order to do so, there are some countries that already have come up with efficient ways to find, freeze and seize assets at the beginning of an investigation, and a good example is Brazil. This country has MOUs signed with the Judiciary & Central Bank in a new system which seeks to unify all databases of all banks. A judge can have access to this database and then freeze any account after a court order that he issues himself. The specific procedure is that the judge, upon request, can search the database, and the system will allow the judge to freeze the account and transfer the money to the Court. Under the relevant laws, the judge can transfer money from the account of the accused into the account of the judiciary. The money kept in the account of the judiciary is then returned to the State or used to compensate the victims of fraud and anti-money laundering activities if the court issues such orders at the conclusion of the trial. To open a bank account, every citizen needs to register with the Federal Revenue Service, which is a requirement according to their domestic law, and this registration is made through an ID.

Just as in Brazil, in other countries like in Zambia and El Salvador a court order is needed in order to freeze a specific bank account. Police in Japan can freeze accounts immediately before investigations are conducted. In other countries like in Japan, police officers can freeze any account or all the accounts immediately by just sending the order to the respective banks, and this can be done before the investigation is conducted.

(c) Non–conviction–based confiscation

The participants also discussed non-conviction-based confiscation as a means of confiscating properties and assets from accused persons, and they shared experiences and challenges in their respective countries.

In some countries like in Mali, the prosecutor can negotiate with the accused person to come to a deal in order to avoid confiscation, and the accused can voluntary return the tainted property. The prosecutor in this case gives assurance that if the accused person repays the whole amount in terms of monetary value, there will be no prosecution. If the negotiation is successful, the accused returns the property through the non-conviction-based method of confiscation.

In the case of El Salvador, non-conviction-based confiscation can be done while the criminal proceeding is progressing, and these procedures do not depend on the other in order to have a successful ending. According

[5] Under Article 2 (f) of UNTOC "Controlled delivery" shall mean the technique of allowing illicit or suspect consignments to pass out of, through or into the territory of one or more States, with the knowledge and under the supervision of their competent authorities, with a view to the investigation of an offence and the identification of persons involved in the commission of the offence.

to their domestic law, the money recovered goes specifically to the police, the Ministry of Justice or the Prosecutor's Office.

This type of procedure is regulated in article 12, paragraph 7 of UNTOC, and some countries are already implementing this provision, which is mandatory for all the States Parties to this Convention.

(d) Differentiating between genuine assets and proceeds of crime

The group had further discussions around a case scenario to differentiate between confiscation of properties obtained from clean money and those obtained from dirty money. The case scenario was: *"Say 10 suspects got US$10,000.00 each through money laundering. Each also has US$90,000.00 worth of assets obtained legally. Say only one perpetrator is charged"*. The question asked was if the assets were commingled with dirty money and clean money, how can the prosecution confiscate what was obtained illegally, and how can the prosecution differentiate illegal money from legal money if both are in the same account.

In these kinds of cases, Mali's courts can either hear the matter in a civil proceeding and the single perpetrator is charged only for the amount received illegally, while in a criminal proceeding the single person charged is accountable to repay everything he and his accomplices purchased using dirty money. In other countries such as Thailand, a case like this can be heard in a civil proceeding and does not require the criminal to show up.

In Brazil and El Salvador, the authorities need to identify and confiscate what is illegally obtained. If damage is done to the society, a separate civil proceeding is conducted if the victims request compensation, and in order to repay the society, a civil proceeding is required.

The group agreed that the ease of identifying and differentiating properties and assets that are legally obtained by POIs and those which are proceeds of crime differ from one country to another. Countries need to understand each other's different economic, legal and social systems that influence the criminal justice system in order to address the money laundering and other crimes, so every country can provide assistance when it comes to transnational organized crime.

(e) Seizing or confiscation in a speedy manner

The participants discussed further as to how authorities in their respective countries can confiscate properties and assets purchased with money that is laundered. Each participant shared the experiences from his or her country. The participants learned that in several jurisdictions, when the authorities are unable to find the assets purchased from dirty money, they can also confiscate the equivalent value. If the accused received a house through a legal process, then that house can be converted to state property if the criminally obtained assets in are not found.

In order to do so, first the authorities need to identify all the properties in a speedy manner. Secondly, they need to identify the properties that were not legally obtained from the illegal money. The authorities have to identify all the money and assets through investigation and do analyses of those assets. After the analysis, the authorities can make a final decision on the properties which are owned by the person investigated or a third party, on those that are legally purchased or received, and those which were illegally obtained. Such allows the authorities to seize properties or assets that can be a substitute if the assets obtained through illegal means are hidden.

In El Salvador, the prosecutors have an arrangement with some public offices and other agencies where information about purchases of assets by individuals can be obtained on all matters within four hours by email. All relevant public agencies supply information by email to the Public Prosecutor, and a special unit in the Public Prosecutor's Office analyses and determines the background information of all properties, houses, cars and firearms including information on addresses, locations and phone numbers of individuals. Evidence is obtained within a two-month period. These kinds of agreements make it easier for the prosecutor to ask for the court to order confiscation of the equivalent value if those assets purchased using illegal money are concealed. If the prosecution knows that an account has a specific amount of money, the prosecutor can issue a provisional order to the bank to freeze the account; then the prosecutor needs to go to the court and request a formal order or warrant.

In Somalia and Mali, most people do not have bank accounts. They keep money in their homes and large purchases are done in cash. It is the matter of the State to encourage the citizens to keep money in bank accounts. Criminals have a large network of extended family members and friends, and they give money to the POI for any kind of business. The money works for the POI as an investment, and they conduct all kinds of illegal business. Later-on the illegal business comes under investigation.

In Laos, families depend on each other and the money does not go through the banking system. The investigators have to compare the properties and assets the person had in the last few years, and all that he has recently accumulated. In the process of investigation, the law allows for confiscation of all properties and money in his possession related to the case, in order to ensure that the assets seized or sequestered shall not be sold, pawned, transferred, concealed, embezzled, dissipated and so on. This ensures that the assets related to the case shall be applied towards confiscation, fines, court fees or for appropriations as state property.

In Zambia and in PNG, you cannot confiscate the property of the accused. The court must issue further confiscation orders if the court finds the suspect guilty of money laundering and the purchase of properties with such money. In Zambia, the prosecutor advertises the assets after confiscation if the POI somehow escapes and cannot be found. Any person that has an interest in the property may come and claim the property after it is advertised. In a certain case, a POI stole money and bought different items including five vehicles, which were seized. The prosecutor advertised the items after proceedings were initiated. During the advertising period, one came and declared that he acquired that property before the seizure. The issue was, that the third party must be an innocent person, so the question arises whether the cars owned by the third parties can be confiscated and sold by the authorities?

In Japan while the trial is underway or before the trial, the prosecutors have to conserve the tainted properties and an authorization is needed from the judge. After the trial, the properties can then be confiscated.

PNG lately has taken tremendous steps to improve its financial system by passing new laws to counter money laundering and terrorism financing activities. The new laws introduce comprehensive measures to detect and deter money laundering and terrorist financing. Banks, financial markets, real estate companies and law firms are obliged to conduct due diligence on all customers and clients, report cash and electronic threshold transactions, assets of a designated person and entity and suspicious matters to the Financial Analysis and Supervision Unit (FASU), which is PNG's financial intelligence unit. Under FASU's direction, financial institutions can freeze bank accounts if suspicious transactions are immediately reported to FASU.[6]

The group agreed that the arrangement to confiscate assets is the ideal mechanism to weaken organized crime, but such arrangements must always have a legal basis so there is no confiscation outside the law and the procedures differ from one jurisdiction to another. The group agreed that if all government agencies of the respective countries have a good database, and there are agreements to share information between the courts and agencies, like Brazil, freezing of bad bank accounts and confiscation of tainted properties would be swift.

(f) Compensation or restitution to victims

The group went on to discuss how to compensate victims. In Japan, money confiscated in the criminal proceedings is distributed. Distribution can be done administratively. Money acquired through crimes will be only distributed to victims. The person responsible for such proceedings is the prosecutor's assistant officer. The prosecution can ask the court for the equivalent value in money or other properties of the tainted property if the same is concealed. The money goes to the National Treasury, and the victims of transnational organized crime are then compensated.

Brazil has the capacity to freeze and confiscate any properties purchased by dirty money, and the victims are then compensated. After the court freezes the account of the sentenced person, the money is transferred and kept in the account of the judiciary. The money is returned to the State or used to compensate the victims of fraud and anti-money laundering activities if the court issues such orders at the conclusion of the

[6] Explanatory Note of the Anti-Money Laundering and Counter Terrorist Financing Bill 2015, pg. 5–6.

trial.

III. CONCLUSION

In conclusion, the group reached an agreement that the sources of obtaining information in the investigations for money laundering activities are static, which is the same across all countries, but there are differences from one jurisdiction to another in the methods and techniques applied in collecting information. Efficient investigative measures and prosecution based on current laws and practices differ from one country to another.

The ease of identifying and differentiating properties and assets that are legally obtained by POIs and those which are proceeds of crime differ from one country to another. Countries need to understand each other's different economic, legal, and social systems that influence the criminal justice system in order to address money laundering and other crimes, so they can help each other to fight transnational organized crime, which affects all countries.

To confiscate proceeds of crime in a swift manner, a country needs a legal basis so there is no confiscation outside the law, and a strong mechanism must also be set in place. The application of Article 12 of the UNTOC is necessary in order to reach this goal.

All government agencies of the respective countries need to have a good criminal database as well as a database of registration of properties and related information, and there should be agreements between agencies to share information in a timely manner to trace the movement of proceeds of crimes, records of purchases, and money transactions. Such information must be easily accessible and readily available to law enforcement agencies.

Money laundering is a transnational organized crime that occurs across borders, and international cooperation between countries is needed not only in the areas of providing assistance when requested but there must be sharing of knowledge and technical support between countries to enhance the systems on the ground in each country for quick facilitation of requests.

SUPPLEMENTAL MATERIAL

Report of the Follow-Up Seminar for the Third Country Training Programme (TCTP) Focusing on the Development of Community-Based Treatment of Offenders in the CLMV Countries

UNAFEI

REPORT OF THE FOLLOW-UP SEMINAR FOR THE THIRD COUNTRY TRAINING PROGRAMME (TCTP) FOCUSING ON THE DEVELOPMENT OF COMMUNITY-BASED TREATMENT OF OFFENDERS IN THE CLMV COUNTRIES

From 25 to 27 July 2017, the United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders (UNAFEI) hosted the Follow-up Seminar for the Third Country Training Programme (TCTP) Focusing on the Development of Community-Based Treatment of Offenders in the CLMV Countries (hereinafter, the "Follow-up Seminar"). This report summarizes the proceedings, country presentations and general discussions held throughout the Follow-up Seminar.

Proceedings

1. Mr. Senta, Keisuke, Director of UNAFEI, welcomed the participants and thanked the Japan International Cooperation Agency for its sponsorship of the TCTP. Noting that one of the purposes of the Follow-up Seminar is to share and discuss long-term challenges to the implementation of community-based treatment in the participating countries, Director Senta encouraged the participants, as experts and practitioners in the field, to take the initiative to introduce and develop community-based treatment in their countries.

2. Ms. Anchalee Pattanasarn, Deputy Director-General of the Department of Probation (DOP) of the Ministry of Justice of Thailand, noted the close cooperation between the DOP and UNAFEI in hosting seminars to promote community-based treatment in Southeast Asia, and expressed her belief that this Follow-up Seminar would serve as an opportunity for the participating countries to discuss the progress made since the TCTP and share the needs and interests of each country to plan for future seminars.

3. The Visiting Expert, Dr. Manuel G. Co, Ex Officio Member of the Board of Pardons and Parole and Administrator of the Parole and Probation Administration of the Republic of the Philippines, delivered a presentation on "Formulating parole and probation administration policies using statistics".

4. Country presentations detailing progress made since the first phase of the TCTP were made by the delegations from Cambodia, Laos, Myanmar, and Viet Nam.

5. Keynote speeches were delivered by: (1) Professor Ota, Tatsuya, Faculty of Law, Keio University, Japan, on "Prevention of re-offending and the importance of community-based treatment of offenders" and (2) Mr. Imafuku, Shoji, Director of the General Affairs Division, Rehabilitation Bureau, Ministry of Justice, Japan, on the "Institutionalization and implementation of effective community-based treatment of offenders: strategies and measures".

Visiting Expert's Lecture

6. Dr. Co presented on the use of statistics as an evidentiary basis for formulating probation and parole policies. In the Philippines, comprehensive statistical data collected by the Parole and Probation Administration, the Board of Pardons and Parole, and the Bureau of Corrections are crucial for setting the budget and performance targets. They are also used for monitoring and evaluating the success of community-based treatment interventions, as well as the performance of probation and parole officers. For example, the system of probation and parole in the Philippines contains three separate functions: investigation, supervision and rehabilitation. Statistics are collected for each of these functions, and budgets for these services are based in part on the statistics. To ensure that the investigation, supervision and rehabilitation phases are properly conducted, the Board gathers statistical data to monitor the performance of each probation and parole officer. Data collected to measure performance include statistics on the total probation investigation caseload, completed probation investigation cases, court dispositions, etc. Data are also collected on the characteristics of each probationer and parolee, such as age, civil status, educational attainment, criminal offences committed, occupation, etc. The Philippines has

adopted a three-pronged approach to crime prevention and treatment of offenders through the practices of restorative justice, Therapeutic Community, and volunteer support for offenders; statistics are gathered on each of these practices. These data are used by policymakers as the basis for evaluating the programmes, policies, guidelines, etc. to ensure the effectiveness of the community-based intervention. Once the statistics are gathered, they must be analysed in four stages in order to impact policy: Stage 1, identify and understand the issue; Stage 2, set the agenda; Stage 3, formulate policy; Stage 4, monitor and evaluate policy. Dr. Co concluded his presentation by addressing a number of challenges facing the implementation of community-based treatment in the Philippines, including the public outcry for retributive justice among others.

Country Presentations

7. Cambodia. The inmate population in Cambodia is growing steadily after an increased commitment to combating drug crimes, for which almost all inmates are incarcerated. Cambodia currently has around 26,338 inmates (as of 25 July 2017), 24,062 of which are male (as of 25 July 2017). Due to the increase in the number of inmates, overcrowding is becoming a greater problem (164% of capacity); meanwhile, only 1% of offenders have been released on judicial supervision at the pre-trial stage. For the sentencing stage, in cases of suspended sentence with probation, the prosecutor is responsible for assigning a person from the community in which the offender lives (such as a police officer, a member of the community council, or education and rehabilitation officer) to supervise the offender in the community. However, Cambodia has not implemented this practice yet. Data is still collected manually in Cambodia, so collecting statistics is a challenge. Human resources are important, particularly in the implementing authority because community-based treatment is still a new concept in Cambodia. Other challenges include insufficient budgetary resources and the lack of social understanding for community-based treatment. Cambodia is in the process of analysing the possibility to pursue a pilot project on alternative sentencing in a province. It was reported that relevant officials welcome the project, but officials expressed serious concerns about public resistance to the implementation of alternative sentencing.

8. Laos. The delegation from Laos reported that it had gained valuable technical knowledge on probation and community-based treatment from the TCTP. They reported to their minister and are waiting for approval and promulgation of the Penal Code. As of 2016, approximately 9,000 inmates were incarcerated in Laos, with around 6,000 pre-trial detainees. In terms of statistics, the number of inmates has increased by roughly 50% over the past five years. In 2016, it was reported that 76.1% of all inmates were incarcerated for narcotics offences, and female inmates composed 13.7% of the total inmate population. Laos offers a consent-based village mediation programme for adult and juvenile offenders and victims connected with cases of theft, traffic violations, battery, and other cases that do not involve serious harm and do not seriously affect society. The delegation reported that 4,505 cases were referred to village mediation in 2016, and there were 35 cases of conditional release before the end of the inmate's term of imprisonment. Meanwhile, 379 inmates were pardoned on Laos' National Day. Although the Criminal Procedure Law does not provide for clear action by the relevant ministry, offenders are currently being entrusted to the care of state, local and other authorities in order to promote offender rehabilitation. To promote this process, Laos is disseminating information about the law and policies among the public.

9. Myanmar. The delegation from Myanmar reported that it has not enacted any specific legal framework for the implementation of community-based treatment. However, the Union Judiciary Law currently has provisions which promote understanding and compliance with the law through education and the principle of reforming offenders' moral character when meting out punishment. The Code of Criminal Procedure includes non-custodial measures such as bail, release on probation, release with admonishment, and so on. Myanmar reported a growing prison population with 67,632 sentenced inmates in 2016 and 12,022 inmates awaiting judgement. Through the first phase of the TCTP, Myanmar effectively gained knowledge and awareness of the importance of alternative sentencing, and Myanmar began drafting amendments to the Narcotic Drugs and Psychotropic Substances Law (1993) by adding provisions for community-based treatment and rehabilitation instead of custodial punishment. Section 401 of the Code of Criminal Procedure addresses community-based treatment, giving the President of the Union the authority to suspend or remit sentence with or without conditions, and to cancel the suspension or remission of sentence if the offender fails to fulfil the required conditions. Under this law, Myanmar has released 79,197 inmates since 2011. Community-based treatment is also administered through the Department of Social Welfare under the Ministry of Social Welfare, Relief and Resettlement. DSW

addresses social problems in the community by providing social welfare services with the help of trained social workers using the resources of the community. With respect to children in conflict with the law, the DSW assigns probation officers to assist with social support and community supervision. However, there are not enough probation officers to provide nationwide coverage.

10. Viet Nam. In 2016, about 115,000 convicted prisoners were serving custodial sentences in Viet Nam, while about 50,000 convicted persons were serving sentences in the community, including suspension of sentence, non-custodial sentences, etc. Offenders in the community are supervised by the People's commune committees, and supervisees are required to report once every three months; probationers are required to report once a month. In 2015, Article 66 of the Criminal Code was amended to provide for "early release on conditions" for first-time offenders, a measure similar to parole. The delegation from Viet Nam reported that the first phase of the TCTP was successful at sharing the experiences of Japan and Thailand in the field of community-based treatment, including the implementation of the Tokyo Rules. Challenges to overcome in Viet Nam include limited public awareness, challenging economic conditions, lack of facilities and resources to support supervision, and inadequate human resources. Among other solutions, Viet Nam is seeking further expertise from organizations and jurisdictions in order to deepen Viet Nam's understanding of community-based treatment for the implementation of "early release on conditions".

Plenary Discussion

11. Mr. Morinaga, Taro, Deputy Director of UNAFEI, led a plenary discussion on approaches to persuading policymakers and the general public that community-based treatment is a desirable and effective sentencing option for certain offenders, particularly in light of the common perception that retribution is the fundamental purpose of criminal punishment. He encouraged the participants to revisit the prominent theories of criminal punishment in their respective countries in order to identify persuasive theories and arguments that support community-based treatment.

Remarks by JICA

12. Mr. Edagawa, Mitsushi, Senior Adviser and Attorney-at-Law, Industrial Development and Public Policy Division, Japan International Cooperation Agency, closed the session by extending his gratitude to the participants for their participation in the Follow-up Seminar. In his role as a criminal defence attorney, he stressed the importance of empowering offenders who have been isolated from society for years, lost jobs, and lost connections with their families. This can be achieved through the implementation of the Tokyo Rules, and by sharing practices and experiences among practitioners from different countries.

Keynote Speeches

13. Professor Ota emphasized the importance of community-based treatment for the prevention of reoffending. In Japan, due to the vicious cycle of reoffending, roughly 30% of all offenders commit 60% of all crimes. Although it is important to punish offenders in proportion to their criminal responsibility, statistics on recidivism demonstrate that incarceration is not a sufficient answer to reducing reoffending. Professor Ota introduced the case of one habitual drug offender whose family refused to support him. The offender was released directly into society without community-based support for employment or housing, and he murdered two innocent strangers seventeen days after his release. With proper community support, these murders may never have happened. Parole and conditional release are two measures that can monitor the offender and provide necessary support, yet the public often criticizes their use, particularly when an offence is committed while on parole. It is important to note that this criticism is generally misplaced because nearly 50% of released offenders without parole supervision recommit crime within 5 years of release. Thus, parole should be viewed as a form of risk management; if a parolee reoffends while under supervision, he most certainly would reoffend within 5 years of release without supervision, and it is likely that the crime committed would be more serious than that which is committed while under supervision. Professor Ota explained several sentencing models, including the Split Sentence Model and Partial Suspended Execution of Sentence, which, while technically different models, serve the purpose of sentencing an offender to a prison term followed by a lengthy term of supervised or unsupervised release in the community. In Japan, legislation establishing the sentence of partial suspended execution of sentence took effect in 2016, and the sentence is used to provide longer periods of community supervision particularly for drug offenders. Finally, Professor Ota proposed implementation of a team-oriented treatment approach involving probation officers and volunteer probation officers, as well

as other professionals such as doctors, lawyers, psychotherapists and career consultants.

14. Mr. Imafuku presented on successful strategies in Japan for the implementation of community-based treatment, noting that new policy initiatives require strategic planning to set the desired policy as a national priority. Other considerations include preparing the legal system for implementation of the policy and ensuring the proper allocation of human and material resources. These goals will not be achieved without taking a variety of factors into consideration, including: (1) providing prompt solutions to meet immediate political needs; (2) understanding societal changes and conforming policies thereto; (3) implementing policies in line with current research and statistics; (4) adoption of effective practices from the field; (5) taking a multi-disciplinary approach to rehabilitation; (6) incorporating desired policy positions in national guidelines; and (7) enhancing public awareness of the desired policy. With respect to the implementation of community-based corrections, these factors share a number of common themes. First, national commitment to the policy is important to its ultimate success, and new national policies must be responsive to the needs and concerns of legislators and the public by ensuring that community-based treatment measures emphasize making society safer. Second, evidence-based research and statistics are important in terms of determining the purpose of the policy, estimating human resources and budgetary needs, determining the effectiveness of specific measures, etc. Third, the prevention of reoffending requires a multi-agency, multi-disciplinary approach that offers reintegration solutions involving community supervision, social welfare support, employment support, etc. Finally, the promotion of public awareness, particularly among the youth, is important to obtaining the participation and support of the public in realizing the goals of community-based treatment.

Plenary Discussion

15. Ms. Akashi, Fumiko, Professor of UNAFEI, moderated a plenary discussion on the promotion of public understanding, establishing cooperative relationships with other agencies and the effectiveness of statistical data for the implementation and use of community-based treatment measures. She explained that: (i) the use of community sanctions is more strongly correlated with the policy commitment of the implementing jurisdiction rather than other factors such as the crime rate, the seriousness of crime, public support for such measures, etc. (Joutsen, 2015); (ii) expenditures in England and Wales for institutional corrections are ten times as great as those for community corrections; (iii) Rule 18 of the Tokyo Rules emphasizes the importance of public understanding and support for community-based treatment; and (iv) statistics are used in Japan to demonstrate the effectiveness of criminal justice policies by providing data on individualized and effective community-based treatment, promoting measures and polices of the government, and dealing with human resources and budget requests.

16. Mr. Minoura, Satoshi, Professor of UNAFEI, moderated a discussion on planning for the second phase of the TCTP and the third phase of the ASEAN Roadmap, beginning with a review of the needs and interests expressed during the individual country consultations: (i) Cambodia expressed interest in suspended sentence with supervision and social investigation and stated that it needs lectures on social investigation procedure, enhancing public participation in offender rehabilitation, and developing treatment plans and evaluating supervision; (ii) Laos expressed interest in parole systems and administrative structures and stated that it needs lectures on supervision skills and organizational structures, as well as opportunities to observe offender supervision; (iii) Myanmar expressed interest in identifying appropriate systems for parole supervision and stated that it needs to learn from other developing countries based on the concern that the Japanese and Thai systems are too advanced; (iv) Viet Nam expressed interest in monitoring of parolees, staff training, and enhancing public understanding and stated that it needs opportunities to learn from other counties through field work observation.

17. Ms. Taruata Klaewkla explained that the second phase of the TCTP will tentatively be held from 8 to 19 January 2018 in Thailand, and the CLMV countries will be asked (i) to review the progress since the first phase of the TCTP in establishing effective agencies for community corrections, (ii) to clarify the duties, responsibilities, authority and roles of probation officers based on the concept of community corrections, (iii) to observe Thai probation practice, and so on.

18. Mr. Watanabe, Hiroyuki, Professor of UNAFEI, presented on the purpose, background and establishment of Offenders Rehabilitation Support Centres in Japan. He explained that the centres were introduced in 2008 in response to public criticism about the systematic failure of community-based treatment. The

purpose of these centres is to provide support and assistance, including meeting space in a public facility, to Volunteer Probation Officers for their supervision of offenders in the community. The centres have become hubs of VPOs activities, and they amplify each VPO's ability and effectiveness.

Study Visit

19. At the conclusion of the Follow-up Seminar, the participants visited the Ota City Offender Rehabilitation Support Centre.

27 July 2017
Fuchu, Tokyo, Japan

ANNEX

1. List of Participants

2. The Follow-up Seminar Schedule

List of Participants, The Follow-up Seminar of the Third Country Training Programme (TCTP)
for Development of Effective Community-Based Treatment of Offenders in the CLMV Countries
国連アジア極東犯罪防止研修所
CLMV諸国を対象とした犯罪者の社会内処遇推進研修（JICA第三国研修）フォローアップセミナー参加者名簿
（合計 17名）
(In total 17)

	Country 国名	Name 氏名	Sex(M/F) 性別	Title and Organization 所属及び職名
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	カンボジア	**セン・リティ**	男	プノンペン始審裁判所　判事
2	Cambodia	Savna NOUTH	M	Deputy Director General Directorate General of Prisons Ministry of Interior
	カンボジア	**サブナ・ヌース**	男	内務省　矯正局　副局長
3	Cambodia	TY Vichet	M	Deputy Director Department of Legal Affairs and Statistic in Criminal Matters Ministry of Justice
	カンボジア	**ティ・ビチェット**	男	司法省　刑事法制・統計部門　次長
4	Laos	Nosavanh SIHALATH	M	Deputy Director Prisons Inspection Department Office of the Supreme People's Prosecutor
	ラオス	**ノサバン・シハラ**	男	最高人民検察院　矯正監査局　副局長
5	Laos	Sy Amphone INKEO	M	Head of Administration Office Department of Prisons and Rehabilitation Police Ministry of Public Security
	ラオス	**サイ・アムポーン・インケオ**	男	治安維持省　矯正・社会復帰局　事務部門　部長
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	ミャンマー	**コ・コ・ナイン**	男	連邦最高裁判所　事務局長
8	Myanmar	Moe Zaw	M	Director Mandalay Division Office, Prisons Department Ministry of Home Affairs
	ミャンマー	**モー・ゾー**	男	内務省　行刑局　マンダレー矯正管区　管区長
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	ミャンマー	**ス・トゥ・ウィン**	女	社会福祉・救済復興省　社会福祉局　児童法と児童の権利に関する国際条約部門　次長
10	Viet Nam	HOANG Xuan Du	M	Deputy Director, Department for Rehabilitation and Re-integration General Department of Police for Criminal Sentence Execution and Judicial Support Ministry of Public Security
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11	Viet Nam	LE Van Dao	M	External Officer, International Coopereation Division General Department of Police for Criminal Sentence Execution and Judicial Support Ministry of Public Security
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12	Viet Nam	LE Van Minh	M	Deputy Head General Affairs Section, Department of Criminal and Administrative Law Ministry of Justice
	ベトナム	**ル・ヴァン・ミン**	男	司法省　刑事及び管理法局　総務部門　次長

* The capital letters indicate surname.
大文字表記は姓を表す。

	Country 国名	Name 氏名	Sex 性別	Title and Organization 所属及び職名
13	Thailand **タイ**	Anchalee PATTANASARN **アンチャリー・パタナサーン**	F 女	Deputy Director General Department of Probation Ministry of Justice 法務省　保護局　副局長
14	Thailand **タイ**	Saifon JANTAPROM **サイフォン・ジャンタプロム**	F 女	Probation Officer, Professional Level Chiang Rai Probation Office チェンライ保護観察所　保護観察官
15	Thailand **タイ**	Taruata KLAEWKLA **タルアタ・クラエウクラ**	F 女	Probation Officer, Practitioner Level Foreign Affairs and Research Group, Probation Development Bureau Department of Probation Ministry of Justice 法務省　保護局　保護観察開発課　国際調査グループ　保護観察官
16	Thailand **タイ**	Anyamanee TANRATTANA **アニャマニー・タンラッタナ**	F 女	Probation Officer, Practitioner Level Foreign Affairs and Research Group, Probation Development Bureau Department of Probation Ministry of Justice 法務省　保護局　保護観察開発課　国際調査グループ　保護観察官
17	Philippines (Observer) **フィリピン** **(オブザーバー)**	Janette Santos PADUA **ジャネット・サントス・パドゥア**	F 女	Assistant Regional Director,Special Assistant to the Administrator Parole and Probation Administration Department of Justice 司法省　保護局　管区長補佐兼局長特別補佐官

* The capital letters indicate surname.
大文字表記は姓を表す。

Visiting Expert　客員専門家

	Country 国名	Name 氏名	Sex 性別	Title and Organization 所属及び職名
1	Philippines **フィリピン**	Manuel Golloso CO **マニュエル・ゴロッソ・コー**	M 男	Administrator Parole and Probation Administration Department of Justice 司法省　保護局　局長

* The capital letters indicate surname.
大文字表記は姓を表す。

The Follow-up Seminar of TCTP (Tentative)

			Seminar (AT UNAFEI)							
	Mon **24**		**Tue** **25**		**Wed** **26**		**Thu** **27**		**Fri** **28**	
AM	Arrival of participants Registration Orientation		Opening Remarks by UNAFEI Director Remarks by Department of Probation, Ministry of Justice, Thailand (Break) Presentation by Visiting Expert Dr. Manuel Golloso Co (Administrator, Parole and Probation Administration, Department of Justice, Republic of the Philippines) ***Formulating parole and probation administration policies using statistics***	9:30-9:40 9:40-9:50 10:00-11:30	Keynote Speech Prof. OTA Tatsuya (Faculty of Law, Keio University, Japan) ***Prevention of Re-offending and the Importance of Community-Based Treatment of Offenders*** (Break) Keynote Speech Mr. IMAFUKU Shoji (Director of the General Affairs Division, Rehabilitation Bureau, Ministry of Justice, Japan) ***Institutionalization and implementation of effective community-based treatment of offenders: Strategies and measures***	9:30-10:30 10:50-12:00	Plenary Discussion (Needs and interests for the second phase of TCTP) (Break) Feedback Session Lecture and Discussion (UNAFEI)	9:30-10:30 10:50-11:30 11:30-12:00	Departure of participants	
	Lunch (UNAFEI)	12:00-	Lunch (UNAFEI)	12:00-	Lunch (UNAFEI)	12:00-	Lunch (UNAFEI)	12:00-		
PM			Country Presentations Cambodia Laos (Break) Myanmar Vietnam (Break) Plenary discussion Remarks by JICA	 13:15-14:00 14:00-14:45 15:00-15:45 15:45-16:30 16:50-17:50 17:50-18:00	Lecture and Discussion (UNAFEI) (Break) Individual Consultations Cambodia Laos Myanmar Vietnam	13:30-14:30 14:45-15:30 15:30-16:15 16:30-17:15 17:15-18:00	Field Trip Offender Rehabilitation Support Centre	14:30-16:30		
					Welcome Reception	18:30-				
	(Stay at UNAFEI)		(Stay at UNAFEI)		(Stay at UNAFEI)		(Stay at UNAFEI)			

APPENDIX

COMMEMORATIVE PHOTOGRAPH

- ***166th International Training Course***

UNAFEI

The 166th International Training Course

The 166th international Training Course (UNAFEI, 10 May - 15 June 2017)

Above:
Ms. Santanee Ditsayabut (Thailand)

Left to Right:

4th Row
Ms. Oda (Staff), Ms. Iwakata (Staff), Ms. Odagiri (Chef), Ms. Nagahama (Staff), Ms. Yamada (Staff), Ms. Tsujii (Staff), Mr. Kiguchi (Staff), Mr. Ueki (Staff), Mr. Furuhashi (Staff), Mr. Haneda (Staff), Mr. Ohta (Staff), Mr. Hirose (Staff), Mr. Ohno (Staff), Ms. Kita (JICA)

3rd Row
Mr. Chawalitthamrong (Thailand), Mr. Aden (Somalia), Mr. Gyeltshen (Bhutan), Mr. Thongprasom (Thailand), Mr. Lemos De Andrade (Brazil), Mr. Anzai (Japan), Ms. Nishikawa (Japan), Ms. Vannasy (Lao PDR), Ms. Suzuki (Japan), Mr. Kondo (Japan), Mr. Houeye (Cote d'Ivoire), Ms. Takata (Japan), Mr. Dicko (Mali)

2nd Row
Mr. Wakabayashi (Japan), Mr. Melikyan (Armenia), Mr. Kimura (Japan), Ms. Abdul Ghafoor (Maldives), Mr. Wijesinghe (Sri Lanka), Mr. Nanshakale (D.R. Congo), Ms. Puntarangkul (Thailand), Ms. Amaya Soto (El Salvador), Mr. Ohashi (Japan), Mr. Ayub (Bangladesh), Mr. Bhattarai (Nepal), Ms. Nguyen (Viet Nam), Mr. Mulenga (Zambia), Mr. Laule (Papua New Guinea), Mr. Zin (Myanmar), Mr. Mahfuzul Islam (Bangladesh), Mr. Javliev (Uzbekistan)

1st Row
Mr. Hagiwara (Staff), Prof. Matsumoto, Prof. Yamada, Prof. Yukawa, Prof. Hirano, Deputy Director Morinaga, Dr. Testa (Italy), Director Senta, Mr. Wheatley (United States), Prof. Watanabe, A., Prof. Yoshimura, Prof. Minoura, Prof. Watanabe, H., Mr. Jimbo (Staff), Mr. Schmid (LA)

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