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## VISITING EXPERTS' LECTURES

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

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#### 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 value; 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 certainly **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 value (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.