

TOPIC 4

CURRENT SITUATION OF DETECTION AND INVESTIGATION

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I. INTRODUCTION

A. Introduction of Discussion Issues

The task given was to discuss the current situation of detection and investigation among the participating countries of the 108th International Seminar, specifically the discussion guidelines enumerated the following points:

- (1) Structure and characteristic of investigative organization, its sufficiency in terms of personnel for investigation and devices (equipment).
- (2) Ability and expertise of investigators.
- (3) Collection of information for detection of transnational crimes.
- (4) Difficulty in identification of transnational crime groups and in gathering information on them.
- (5) Success of detection and reasons for failure in detection.
- (6) Are the king-pins successfully arrested?
- (7) Difficulties in gathering evidence.
- (8) Difficulties in international co-operation.
- (9) Use of international systems and organizations.

B. Definition/Characteristics of Organized Crime

If you notice the definition and/or characteristics of organized crime, you may realize that such characteristics may cause significant and specific problems in

investigation and detection of organized crimes compared to others. Thus, this report touches upon these points.

The definition of “organized crime” may differ from country to country, or jurisdiction to jurisdiction, so it is better for us to try it and mention the characteristics of organized crime or organized crime groups here. The traditional definition and concept of organized crime is somewhat restrictive in its exclusion of general conspiracies to extort monies, services and associations of outfit, as well as by non-outfit organizations and groups. Organized crime in effect, consists of the participation of persons and groups of persons (organized either formally or informally) in transactions characterized by:

- (1) An intent to commit, or the actual commission of substantive crime;
- (2) A conspiracy to execute these crimes,
- (3) A persistence of this conspiracy through time or the intent that this conspiracy should persist through time;
- (4) The acquisition of substantial power and money, and seeking of high degree of political or economic security, as primary motivation; and
- (5) An operational framework that sometimes seeks the preservation of institutions of politics, government and society in their present form.

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It should be noted that any definition of organized crime or organized crime groups does not refer to a particular offence or crime. Even though some organized crime groups may tend to commit specific types of crime, most of them usually commits many types of crime in order to have economic gain and maintain its organization. As already reported in Topics 1 and 2, even if limited to organized crimes in transnational nature, various types of crime (such as drug trafficking, firearms trafficking, smuggling of illegal migrants, illicit trafficking in women and children, illicit trafficking in stolen motor vehicles, money laundering, etc.) are touched upon.

C. Investigative Agencies

In many countries, the police or/and other law enforcement agencies (like the narcotic control agency, immigration agency, etc.) investigate crimes including organized crime in general. On the other hand, it should be noted that in some countries like Japan, Korea and Turkey, public prosecutors investigate crimes in addition to the police. Although Japanese prosecutors initiate and complete investigation about white-collar crime (e.g., corruption, tax evasion, etc.), they do not initiate investigation about organized crime, which is primarily investigated by the police. Japanese prosecutors conduct supplemental investigation after the referral of such cases by the police. Needless to say, there is no significant meaning in whether prosecutors investigate crimes in terms of addressing problems in investigation and detection. However, since the current situation of investigation and detection is to be discussed, the word "investigator" in this report includes public prosecutors for those countries.

II. PROBLEMS IN INVESTIGATION AND DETECTION

A. Difficulty in the Collection of Information and Witnesses

Investigation begins when investigators recognize an occurrence of a crime in some way or feel that a crime has been committed. In many countries, law such as codes of criminal procedure stipulate a complaint, an accusation, etc., as the beginning of an investigation. This is meant to give special legal effect to these deeds, and not to restrict the beginning of an investigation. Although some cases (especially, damage to individuals or their property) tend to require a complaint/accusation of an interested party, to be investigated or prosecuted; the damage given by corruption cases is not concerned to a particular party but to the public and the state. Therefore, the clues to start investigation are not only a complaint/accusation etc., but also the investigation of other cases, anonymous letters, news articles etc. in order to initiate collecting evidence.

However, in most organized crime like drug trafficking, illegal trafficking in firearms, illegal, smuggling of illegal migrants (in case some are willing to do so), money laundering, etc., there is no complainant reporting to the police or other investigative authorities. A visiting expert of this Seminar mentioned that organized crimes are bloodless and victimless. Hence, there is difficulty in reporting such crime and consequently organized crime groups maintain and further proliferate.

Even in traditional and serious crimes having victims like murder, kidnapping, bodily injury, extortion, illicit, trafficking in stolen motor vehicles, economic crimes, etc., victims and other people concerned are reluctant to report those crimes to the police or other investigative agencies because of fear of revenge from organized crime members in the future. Thus, again

there is a difficulty in reporting such crimes.

Furthermore, although information from people inside or close to legitimate organizations, like in cases of corruption or economic crimes, may come out, such information seldom comes out in organized crime. This is because of the tight relationship among such group members which is often reinforced by strict internal rules and punishment.

B. Inadequacy of Existing Laws

Organized crime is a continuing conspiracy, hence the incidents of the organized crime are dealt with under the general rule of conspiracy in most of countries.

Existing laws are mostly inadequate to meet the challenge as they target the individuals and not the criminal groups or criminal enterprises. Conspiracies are hatched in darkness and proving them in a court of law is a herculean task. Being a member of the gang is punishable in a few countries.

In most of countries, anti-drug laws have been enacted after the so-called Vienna Convention. Such laws criminalize money laundering of illicit proceeds derived from drug-related crime. However, such laws are insufficient for many countries to combat organized crime or organized crime groups, since their activities are not limited to drug-related crimes.

C. Difficulty in the Arrest of Kingpins

As organized crime groups are structured in a hierarchical manner, the higher echelons of leadership are insulated from law enforcement. It may be possible to have the actual perpetrators of crime convicted, but it is difficult to go beyond them in the hierarchy because, more often than not, there is less evidence to get such kingpins arrested. For example, the witnesses are not willing to depose for fear

of their lives and most countries have no law to provide protection to the witness against organized gangs, except for the Philippines.

D. Admissibility of Confessions

In some countries like Fiji, Hong Kong, Japan, Malaysia, Papua New Guinea, the Republic of Korea and Tonga, the confession made to investigators is admissible in trial, subject to the proof of its voluntariness, or other certain requirements. However, a confession made before a police officer is not admissible in other countries like India and Pakistan. There has been other practices for recording confessions in such countries. A police officer may take the accused before an executive or judicial magistrate to record the confession. Once recorded this way, it is admissible in trial. However, for example in India, when a police officer takes the accused for confession, the magistrate provides one to two days time to the accused for reconsideration, the accused may meanwhile alter this version. Hence, the investigative agencies find it difficult to effectively cope with organized crime. As it is difficult to get eyewitness evidence in cases of criminal conspiracy, inadmissibility of confessions before a police officer, can result in the failure to prove cases in the courts.

E. Time Lag between the Commission of Crime and Arrest or Trial

Even if investigators successfully obtain information about organized crime, it takes a long time to collect evidence, secure arrest, prosecution and conviction. This is the same in other crimes, but since organized crime groups would continue illegal activities and order their lower level members to commit other crimes, such time lag may give organized crime groups significant benefit. Even after the arrest of such members and acquisition of

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evidence to arrest them, members in higher levels of hierarchy are still unlikely to be caught and more relevant evidence would disappear.

“Justice delayed is justice denied” is a well known axiom. In some countries like India, Malaysia, Pakistan, the Philippines, the pace of trial is very slow. Hence, people are losing faith in the efficiency of the criminal justice system and have become cynical, apathetic and non-cooperative in control efforts.

F. Limited Special Techniques in Investigation (Undercover Operations and Wiretapping)

Undercover operations are carried out in instances where a person approaches the investigative agencies and files an official complainant against the illegal conduct of offenders. In Hong Kong, Madagascar, Malaysia and the Philippines, this is functioning well. Normally, undercover operations require the approval of the designated authority in those countries, for example, Attorney General in Hong Kong, magistrates/judges in Madagascar. Since other participating countries have not legalized undercover operations, they face difficulties in penetrating organized crime groups by traditional investigation methods.

Similarly, wiretapping is not allowed in most of the participating countries like Hong Kong, Papua New Guinea, Tonga and Thailand, except for Turkey. Thus, most of the participating countries have difficulty in revealing cases and collecting evidence. Controlled delivery techniques are widely used in some countries like India. There has been good success in recoveries of drugs there, however it is not fully used in other countries like in Fiji, Tonga, etc.

G. Lack of Coordination

Crimes committed by organized crime groups are not limited to certain types of crime as mentioned in the introduction. On

the other hand, some countries give investigative power to several agencies, either exclusively for a particular crime or concurrently for some crimes. In such a case, coordination among several agencies are necessary because of the lack of or limited coordination may cause some difficulty in combatting organized crime groups. Most countries have good coordination but there is still a possibility of failure in investigating organized crimes because of un-streamlined coordination among agencies.

Moreover, in India, there is no national level agency to co-ordinate the efforts of the State/City Police Organizations, as well as the Central Enforcement Agencies, in combatting organized crime. Further, there is no agency to collect, collate, analyze, documents and function as a Central Exchange of information relating to international and inter-State gangs operating in India and about the Indian gangs operating abroad. Similarly, there is no system of sustained pursuit of selected gangs at the national and the State level. Apart from lack of an institutional framework, there are problems of coordination between the Central Government and the State Governments and between one State Government and another State Government due to differences in political perceptions. This problem becomes quite acute when different political parties are in power at the center and in the States. Thus, there appears to be no sustained effort to combat organized crime. The information that comes in the hands of Central and State investigating agencies is not exchanged and, if exchanged, not in real time. Thus valuable clues are lost.

H. Political Influence

There has been a rapid spread and growth of criminal gangs, drug mafias, smuggling gangs, drug peddlers and economic lobbyists. Since some organized crime groups are close to some politicians,

political influence has been made during/ after investigation in some countries. Due to the political influence of these syndicates, the investigating and prosecuting agencies are finding it extremely difficult to deal effectively with them. This problem was mentioned by India, the Philippines, Pakistan and Thailand.

I. Problems in International Cooperation

Different nations have different legal structures. A certain act may be crime in one country but not in another. Similarly, some countries have laws against terrorism but the others do not. Extradition of criminals from one country to another is possible only when the principle of dual criminality is satisfied. However, no country agrees to abolish this principle because it is natural for the requested country that fugitives cannot be extradited for conduct which is not criminalized in their country.

Bangladesh, Fiji, India, Nepal, Malaysia and the Philippines require an extradition treaty to honor an extradition request. This is known as the treaty prerequisite principle¹, which is the most significant impediment to extradition from the perspective of a civil law country (e.g., Japan, the Republic of Korea and Thailand are categorized as civil law countries in terms of extradition). A prima facie case requirement is the usual practice in common law countries. Some civil law countries, in extradition procedure, require reasonable grounds for having committed a predicate crime (tantamount to “probable cause”). Even if all legal requirements are satisfied, the execution of extradition takes a long time.

¹ Although such countries do not need a treaty for extradition within other commonwealth countries, they are categorized as treaty prerequisite countries since they still require a treaty with other countries.

J. Inadequacy of Equipment

In most countries like Fiji, India, Madagascar, Nepal, Pakistan, the Philippines (law enforcement equipment), Papua New Guinea (communication equipment), Tonga (especially on detection of drugs), there is problem of inadequacy of equipment to deal with sophisticated, high-tech crime.

K. Lack or Lesser Priority by the Government

In some countries like India, Malaysia, Pakistan and Thailand, there has been continued demand for increase in the work force. Due to the variety of duties and complexities of crimes, it is extremely difficult for the existing man power to cope with crime.

L. Insufficiency of Expertise and Training

Almost all participating countries mentioned the problem of insufficiency of expertise and training in investigative agencies. Investigation of cases, their prosecution and the setting up of the criminal courts is the responsibility of the prefectural Government concerned, like in India. Most of the prefectural States face resource crunches and are not in a position to spare adequate resources for the criminal justice system agencies. The number of police personnel posted in police stations, is inadequate. Besides, hardly any training facilities exist for the investigation of organized crime. Prosecutors neither have any special aptitude nor any specialized training for conducting organized crime cases. Moreover, they are vulnerable to frequent transfers resulting in discontinuity in prosecution efforts. As organized crime cases are tried, there is inordinate delay in their disposal due to heavy backlogs.

III. SUGGESTIONS

Realizing the problems the above mentioned pose to law enforcement agencies in combatting against organized crime, the following suggestions should be taken into consideration.

A. Projects to Collect First Information

Even though investigation begins with various clues, it is necessary for successful investigation or prosecution to obtain credible information as much as possible. However, such credible information is shared by the people who are officially or personally close to corrupted officers, because of the clandestine nature of corruption cases. Thus, how to encourage such people to release information must be taken into consideration. Investigators have to be cautious in dealing with anonymous letters because they are sent by someone to obtain a personal interest by making a false accusation against a particular person. Such information tends to be overstated or over-decorated. On the other hand, there are some anonymous letters, especially from persons who have inside information, which inform us of the important truth. In this regard, it is worth considering introducing the project, so-called "Crime Stoppers" as in Fiji.

In order to resolve the problems of having an uncooperative attitude from organizations concerned with criminal cases in Fiji, the Commissioner of Police has introduced a project called "CRIME STOPPERS" which is directly under his control. For the last two years, it has been functioning where anyone can address the letter without giving his identity and can forward information or lodge a complaint regarding criminal activities of a person. If people give information, and upon police investigation the case information proves to be true, the informer will be paid after successful arrest (depending how serious

the information was). The source of information will never be disclosed, thus informers confidentiality is protected.

B. Effective Anti-Money Laundering Law

Money laundering regulations were initiated by the United States to deprive criminals of property together with the Asset Forfeiture system. The predicate crime of money laundering is now extended to almost of all the serious crime in some countries like Turkey and the United States. Even though some participating countries have money laundering regulations, the predicate crime is limited to drug-related crime. However, organized crime groups commit any type of crime in order to obtain economic gain, thus there is no reason to limit predicate crimes to drug-related crimes. Moreover, since the development of transportation and communication carries over cultures, once one country adopts stringent policies and complete legal systems for depriving criminals of illicit property, it is natural for such criminals and property to move to another country where such systems do not exist. Therefore, to protect one country from such a situation, it is indispensable to establish these legal weapons which extend money laundering predicate crimes as much as possible. Thus, for example, Japan is now considering to extend the predicate crimes of money laundering as well as asset forfeiture. Such predicate crimes may be serious crimes, including those crimes committed by organized crime groups. India has prepared a draft which is in consideration in Parliament.

C. Legalization of Undercover Operations

The law enforcement agencies in some countries run under-cover agents to gather information about criminal gangs, study their modus operandi and evaluate their future plans and strategies. This

information is used both for preventive and investigative purposes. In the United States, the evidence gathered by the undercover agents is admissible in evidence—whether it is in the form of their oral testimony or recorded in audio or video form. However, most participating countries laws do not permit this. This handicaps the law enforcement agents in building up cast-iron cases against organized gangs. It is suggested that amendment of the law should be taken into consideration to provide for admissibility of such evidence.

D. Immunity

Most of the participating countries do not have the so-called use and derivative use immunity. This is a statement given by a witness (e.g. accomplice) implicating the accused in a criminal enterprise involving them. The statement will make clear that the content therein will not be used as evidence to exculpate the witness of his criminal activity. Specifically, it does not imply any promise that the statement-maker will be given immunity from prosecution. However, since the prosecutor must establish that the evidence to be given to the court is not derived from such promises beyond reasonable doubt, prosecution against him is quite difficult.

E. Witness Protection Programme

In cases of organized crime, the witnesses are reluctant to depose in open court for fear of reprisals at the hands of criminal syndicates/terrorists. The cases of threat or criminal intimidation of potential witnesses are too many to be recounted. Some witnesses have also been killed by the criminal gangsters. As the courts go by evidence on record for establishing the guilt of the accused, it is essential to protect the witnesses from the wrath of the criminal gangs. Hence, legal and physical protection should be provided to crucial witnesses in sensitive cases so that they can depose

fearlessly in the court. After the enactment of Witness Security Reform Act 1984, the United States authorities could secure conviction of several notorious mafia leaders. The United States Witness Protection Programme, essentially, involves changing the identity of the witness, relocation, physical protection, if needed, and financial support till such time as s/he become self-supporting, subject to the condition that s/he deposes truthfully in the court.

Some participating countries like the Philippines have witness protection programmes similar to the United States. However, most participating countries do not have such programmes. These should be taken into consideration to provide protection to witnesses especially in cases of national importance involving criminal syndicates.

F. Admissibility of Confessions

Although confessions made before police officers are admissible in most countries, in some countries like India, such a confession is not admissible. Of course, this is not to say that the court should base conviction only on the un-corroborated confession of an accused. What is being suggested is that the court should take into consideration the confession made by the accused before a police officer along with other corroborative evidence for formulating its opinion.

G. Enhancement of International Cooperation

If an extradition treaty has not been concluded between countries concerned, especially treaty prerequisite countries, even criminal fugitives who allegedly have committed serious crime cannot be extradited. However, it should be noted that Australia, recognized as a treaty prerequisite country, amended its extradition law so as to honor an extradition request from a treaty non-

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prerequisite country.

It is our experience that extradition is a time consuming and lengthy process, where, apart from satisfying the legal requirements of the requested country, the judicial requirement of a foreign court have also to be satisfied. Thus, efforts to simplify or streamline extradition procedure should be made as much as possible. For example, some treaties provide that "the requested country may grant extradition after receipt of a request for provisional arrest, provided that the person sought explicitly consents before a competent authority". This kind of simplified extradition procedure should be taken into consideration for effective international cooperation.

Furthermore, it should be noted that among some Asian countries (e.g., Malaysia and Singapore) having similar legal systems, special procedure for extremely simplifying the extradition procedure has been stipulated in their laws; which enables an arrest warrant issued by a court, a judge or a magistrate of one country effective in the other country if a magistrate of the latter endorses it under some requirements. Thus, various ways to enhance extradition should be taken if not precluded by the law of the countries concerned.

Moreover, if extradition is impossible, deportation may be sought as the last solution. Of most importance is to bring criminal fugitives to justice.

As for gathering more information on transnational criminal and their activities, Interpol should come to the effective assistance of affected countries. Interpol is an overloaded and overworked organization at present, with focus on drug trafficking and illicit transnational migrations. With the proliferation of transnational crime in its various manifestations, it is time to set up regional units of Interpol in Asia, Africa and Latin America.

H. Adequate Training Programme

One of the weakest links in the struggle against organized crime is the education and training at the local level. Public administrators, who are aware that organized crime exists in their community, are not spending sufficient time in educating and training citizens, law enforcement officers and other members in the criminal justice system. Consequently, local persons with interest in curbing organized crime are left to their own resources in securing information about those engaged in organized crime. There are three modus for transmitting information to those concerned with organized crime control. They are (1) education in academic institutions, (2) specialized training for law enforcement officers, and (3) greater public co-operation. To implement one mode of learning without the other will not produce a desirable level of information about the criminal confederations.

It would be desirable to impart intense and highly select training to the police, prosecutors, judges and probation officers, about the impact of organized crime on the society, the intelligence system, the statutes relating to organized crime, the utilization of technology in investigation and the various types of organized crime and various strategies for combating it.

IV. CONCLUSION

"Organized crime succeeds as long as a nation permits it to succeed." The first and foremost step in our control efforts should be to keep incidents of ordinary crimes within reasonable bounds, by keeping the criminal elements under relentless law-enforcement processes. If we reasonably succeed in this effort, we would have obtained or at least diminished the possibility of unattended criminal elements forging alliances with big crime figures, constituting criminals networks and

thereby spawning the phenomenon of organized crime. It is imperative to combat the crime, to strengthen the criminal law and tone up the criminal justice system. Law enforcement, however efficient, cannot succeed by itself without commitment by the Government.

Despite best efforts, the domestic crime is likely to spill over into international society and often does. Hence the need for international co-operation in suppressing it in the form of expeditious extradition of fugitive criminals, deportation of undesirable aliens, mutual legal assistance in investigations and prosecution, and speedy cooperation through Interpol.