

CRIME AS THE GROWING INTERNATIONAL SECURITY THREAT: THE UNITED NATIONS AND EFFECTIVE COUNTERMEASURES AGAINST TRANSNATIONAL ECONOMIC AND COMPUTER CRIME

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I. INTRODUCTION

This paper, which seeks to integrate criminological, legal and public policy perspectives on transnational crime, emphasizes that crime has markedly extended its reach beyond any borders. It also has an exemplary negative influence on the official domestic economies. With the rapid advance of the Internet, perpetrating transnational economic and computer crimes became easier. This paper reviews various forms of transnational illicit trafficking, including illicit profits derived from it, and addresses the problems of search, seizure and confiscation of those. It emphasizes that transnational crime poses an increasing threat to the economies and security of States, as seen from the United Nations standpoint. In conclusion, this paper calls for further strengthening and consolidating of criminal policy and legal action. This would enhance the effectiveness of global countermeasures against transnational crime.

II. DIMENSIONS OF TRANSNATIONAL CRIME

Transnational crime, which is increasingly becoming organized, assumes many dimensions. From the public policy (governance) perspective it is seen as an

expression of “uncivil society”¹. From the criminological (crime prevention and criminal justice) perspective, it is a threat to the security and well being of peoples². In practical terms, one may note that most representative dimension of transnational crime includes at least two State jurisdictions, not necessarily adjacent to one another³. This will be demonstrated by the first of the three cases below.

¹ Kofi Annan, Secretary-General of the United Nations. In November 1997, the CICIP/ODCCP/UNOV was designated to deal with criminal manifestations of “uncivil society” (see: doc. A/51/950, *Renewing the United Nations: a programme for reform*. Report of the Secretary-General, para. 209). United Nations resolutions and other documents may be obtained electronically through the Internet at <<http://www.un.org>>.

² United Nations Declaration on Crime and Public Security, General Assembly resolution 51/60 of 12 December 1996 (art.1).

³ Criminological definition suggested by G.O.W. Mueller, speaks of “criminal activities extending into, and violating the laws of several countries” (*Global Report on Crime and Justice*, (chapter 9), Oxford University Press, New York 1999(forthcoming)). Treaty definition of transnational organized crime has been a subject of discussions in the process of elaboration of a draft United Nations convention against transnational organized crime, due to be finalized by the end of the year 2000. Ongoing drafting work is officially reported to the General Assembly through the Economic and Social Council, in the form of reports on the sessions (sixth-eighth) of the Commission on Crime Prevention and Criminal Justice (docs E/1997/30-E/1999/30).

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On 17 December 1995, huge quantities of firearms and ammunition were air-dropped by parachute into Purulia (West Bengal, India) from an AN-26 Russian-made aircraft. An estimated two to three hundred AK-47 assault rifles, 17 000 rounds of ammunition, 8 rocket launchers, 80 anti-tank grenades, seven 9 mm pistols and various combat accessories were among the dropped weapons. Reportedly, in addition to this cargo, two other consignments were dropped in Pakistan, and another in the sea of Thailand. The plane, purchased in Latvia, carried arms loaded in Bulgaria. It was manned by a 4 person crew of Latvian, Dutch, Danish and British. Before it was stopped by the Indian authorities in Bombay, the plane transited Pakistan, Thailand, and attempted to land in Bangladesh. The shipment it carried was financed by a Hong-Kong based Chinese with connections to a Romanian arms trafficker, as well as British, Chinese and Indian shipping companies. The plane was impounded, and the crew of the aircraft have been arrested and detained by the Indian authorities. However, the two main operatives in the scheme remain at large. One of them is also wanted for gold and drug smuggling, and for counterfeiting US \$100 bills. On behalf of the Indian police, INTERPOL issued its pre-arrest “red notices”⁴.

The following example of a “local” transnational crime shows how it may be

“grounded” in one particular area. In 1996, in a border triangle between Argentina, Brazil and Paraguay, in a Paraguayan city Ciudad del Este, the law enforcement agencies of the Paraguayan and Brazilian Governments jointly carried out an investigation with a view to eliminating a cross-border firearms trafficking between those two countries. The scheme involved a legal purchase (with an export license) of such weapons in the U.S., and their legal import (no import license was necessary) to Paraguay. Shipments arriving to Ciudad del Este were sold to Brazilian customers, and illegally brought (import license is required) into one of the Brazilian bordering cities. There they fell into the hands of organized crime traffickers. Alternatively, shipments ordered in Ciudad del Este ended up directly from the U.S. in Sao Paulo (Brazil), where they were sent to the “favelas” (slums). There, again, they fell into the hands of organized criminals⁵. Reportedly, in the same Paraguayan city, organized crime groups were involved in cross-border trafficking to Argentina and Brazil of various other contraband (e.g., drugs, alcohol, cigarettes, pirated compact disks, software). The city’s trade industry were, partly, involved in the illicit manufacturing of such commodities, and, plainly, in their massive sale. It was estimated that the official gross national product of Paraguay (US \$ 10 billion) matched the profits from provision of such contraband, that ends up in Argentina and Brazil and undermines their official economies. To visualize the amount of illicit trafficking originating in Ciudad del Este, in 1997, according to an Argentine intelligence report, more than 1500 freight containers passed through the borders

⁴ Donald Manross, Developing new links and international policing (in:) Pericles Gasparini Alves, Daiana Belinda Cipollone (eds), *Curbing Illicit Trafficking in Small Arms and Sensitive Technologies. An Action-Oriented Agenda*, United Nations Publication, Sales No. G.V.E.98.0.8, New York and Geneva 1998, p. 105; Raymond Bonner, A world of arms: weapons in the sky. The murky life of an international gun dealer, *New York Times*, 14 July 1998.

⁵ Silvia Cucovaz, Interrelationship between illicit trafficking in small arms, drug trafficking and terrorist groups in South America (in:) Pericles Gasparini Alves, Daiana Belinda Cipollone (eds), *Ibid.* p. 38.

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without scrutiny. According to other estimates, most of the 40 000 people crossing each day the bridge between Paraguay and Brazil were not controlled. In a spot check by the Brazilian police, within two hours, they arrested 200 illegal immigrants.

Finally, a Taiwanese businessman, taking advantage of good investment opportunities, who built up his toy factory in Ciudad del Este, reportedly became a victim of extortion demands. These were carried out by two Chinese gangsters, and one Paraguayan woman (such groups are also composed of Arabic nationalities). In sum, the amount of criminal violence (e.g., extortions and gang wars), vice (gambling), perpetrated by various foreign and Paraguayan nationals in the city, and transnational smuggling originating from it, is so great, that one of its residents sarcastically and with resignation concluded to a visitor: This is the United Nations of crime”⁶.

The Transnational nature of crime is brought home to almost any visitor of the Internet. One may imagine a group of computer users involved in penetrating, for financial gain, a computer system of a trade company. The penetration takes place indirectly through computer networks in other jurisdictions, in the same State or abroad. Investigating law enforcement agencies, tracing the origin, finds out that its last stage was carried out by a computer in country B. The law enforcement authority turns to that country for assistance under an existing mutual legal assistance treaty. Country B offers such assistance, but informs that it was only a

transit country through the computer network of which the penetrators send their communications to the victimized trade company. That communication arrived earlier from country C with which country B has neither a mutual legal assistance treaty nor friendly relations. Ultimately, after further such tracing, it turns out that both the penetrators and the victim reside in the same jurisdiction in country A.

Obviously, perpetrators want to conceal their identity by routing their actions through countries from which it would be difficult, if not impossible, to detect their original location⁷. In fact, similar penetration has already taken place in the United States, as reported by the press⁸. What appeared to be a transnational crime planned abroad, turned out to be local, in the sense that both offenders and victim were of the same country and place of residence. In the virtual world nowadays, the “United Nations of crime” has arrived at the doorsteps of Internet users under the guise of foreign involvement.

III. DIMENSIONS OF THE INTERNET

One hundred and ninety four countries with about 70 000 networks are now connected by one Internet meta-protocol. In January 1997 there were 16.1 million computer hosts worldwide serving 57 million users, not including 14 million who have access only to electronic mail. All those included governments, transnational and domestic financial and commercial institutions, millions of private individuals and, last but not least, academics, with whom the dynamic growth of the Internet

⁶ Sebastian Rotella, *Jungle hub for gangsters, terrorists*, *The Yomiuri Shimbun* (Tokyo, Japan), in the article of 7 September 1998 jointly published with *The Los Angeles Times*, p. 12. Other alleged facts and estimates are also drawn from that article.

⁷ This example was drawn by Mr. Gregory P. Shaffer, Computer Crime Unit, U.S. Department of Justice (private conversation, 6 October 1998).

⁸ *Ibid.*

started⁹. Although the majority of computer servers are located in the developed world, this proportion becomes more favourable to developing countries, where the growth of the Internet is particularly strong¹⁰. Needless to say, this dynamic growth, currently estimated at a rate of 20 % a month, basically takes place in the developed world (North America and Western Europe)¹¹. However, the U.S. holds 80 % of all global computing power. As of this writing, there existed about 320 million world wide web sites, mostly in the developed world¹².

Estimates suggest that by the year 2001 there may be 1 billion personal computer users, with one third connected to the Internet (that is about ten fold more than in 1996). This about 175 million of them

will have an access to, and the possibility to enter into, various financial transactions facilitated by this medium¹³. By the year 2001 the value of financial operations carried out through the Internet may exceed US \$ 210 billion.

This may be very little in comparison with the total volume of economic transactions carried out in the world now, by means other than the Internet. But one would need to put such estimate into perspective to realize, for instance, that what is now 100 % of all available data and information in the world, will represent only 5 % of that available in 50 years¹⁴. Consequently, the growth of electronic commerce on the Internet will alter the proportions between the Internet and non-Internet-based commerce steadily and more dramatically, as the time goes by.

Last, but not least, in sharp contrast with the facts, figures and estimates suggesting expanding dimensions of the Internet, one must note that in the world population of about 6 billion people, more than 60% of the world's population have never made a phone call¹⁵. The great divide between developed and developing countries may be even greater in the years to come.

⁹ In 1969 Internet begun its origins as a very small internal network connecting about 100 computers of scientists and engineers forming a team of the Advanced Research Projects Agency (*ARPANET*) of the U.S. Department of Defense (DOD). Its international outreach started in 1971. "Cyberspace", as a term, was first used in a science-fiction novel "Neuromancer" by William Gibson (1964). Currently, "cyberspace" tends to be equated with "the Internet," though cyberspace is generically broader than the Internet, and better communicates a meaning of this new multidimensional, non-physical global community.

¹⁰ Matrix Information Directory Services, Inc. (MIDS), Austin, Texas, USA <<http://www.mids.org/>>.

¹¹ Neil Chambliss, Lee W. McKnight, and Richard J. Solomon, *Re-Engineering the Elephant: Organizational Alternatives for Accelerating Internet Access in Africa* (in:) White Paper for United Nations Development Programme in Cooperation with the World Bank, US National Aeronautics and Space Administration, US Agency for International Development, US Department of State, 16 May 1995, <<http://www.undp.org/sdnp/aif/mitrep.html>>.

¹² <<http://www.neci.nj.nec.com/homepages/lawrence/websize.html>>

¹³ Estimates published by a private transnational company, International Data Corporation <<http://www.idcresearch.com/HNR/ii7sf.htm>>.

¹⁴ S.L. Amranathan, *Crimes related to the Computer Network*. From *New Economic Order to New Information Order*, position paper submitted for the Experts Meeting on "Crimes related to the Computer Network," UNAFEI, 5-9 October 1998, para. 3 (available from UNAFEI).

¹⁵ Pekka Tarjanne, Secretary-General of the International Telecommunication Union, *TeleEuropa's Communications Newsletter*, 30 October 1995.

IV. TRANSNATIONAL ECONOMIC AND COMPUTER CRIME

Abuse of the Internet for illicit or criminal purposes makes economic and computer crime more intermingled than before. Before the computer era, illicit profits derived from various forms of economic crime could be concealed by fraudulent (paper) book-keeping. With the outset of computer (“paperless”) book-keeping records held on stand alone machines could be more readily manipulated. However, the outcome of such manipulation could be exclusively identified and pursued within a local parameter. Local computer networking and global computer networking through the Internet overwhelmed such limits. It enabled honest and dishonest users to carry out paperless financial transactions anyplace in the world. For the latter ones, it also allowed them to hide and legalize illicitly earned profits any place where domestic legislation and regulatory schemes were more favorable (“tax havens”). The burden, anxiety or fear of carrying through State checkpoints cash of, e.g., US \$ 1 million, in false-bottomed suitcases or smugglers’ vests is no longer felt. By one computer key stroke, the same amount of cybercash within a moment ends up in a bank account in one of the many tax havens in the world. There is no physical trespass of a border, only virtual¹⁶.

¹⁶ Obviously, crimes related to the computer network go beyond money laundering, and involve violations the essential motive of which is not economic. For instance, stealing passwords (hacking), sending harrasing e-mail or intrusion to destroy computer records, including “cyberterrorism”, have other motives. This article focuses mainly on economic computer crimes.

¹⁷ E.g., Trafficking in children for medical exploitation <<http://www.uia.org/uiademo/pro/d4271.htm>>.

A. Illicit Trafficking: Facts, Figures and Estimates

Facts and figures about various forms of transnational trafficking, even if occasionally questionable, are plentiful¹⁷. Every day, on a case-by-case basis, the international press reports on spectacular seizures, arrests and convictions. Police and other criminal records which evidence how the criminal justice apparatus handle those cases hardly confirm the composite picture of developments in illicit trafficking, especially if it transcends national boundries. However, there are no transnational crime statistics on these phenomena; there is hardly any country in the world whose statistics would account for them, and there is no treaty definition of transnational crime or transnational organized crime. Moreover, amongst geopolitical, legal and economic factors, the volume of illicit traffic in certain commodities would also be influenced by black market relations between the demand for and supply of that commodity, and the more active or passive activities of law enforcement apparatus involved in seizing it.

Depending upon the assumptions and methodologies of experts, governmental authorities, international and non-governmental organizations, informed estimates on the full scope of the traffic in the commodities in question, and resulting illicit profits, will vary¹⁸. To these many limitations is added still another: none of those estimates consider what proportion of illicit profits remains within the jurisdiction of the country of origin of the assessed activities, and what is abroad, thus making them really transnational.

Questionable as the estimates may be, the most overarching estimate, supposedly covering all forms of illicit trafficking, was hazarded by a group of economists in 1997, and reported by the Financial Times¹⁹.

According to that source, the total annual amount of laundered money would be about US \$ 1000 billion, resulting from illicit traffic in various commodities. In the most frequently repeated, but also speculative estimate, the first part of this sum (US \$ 300-500 billion) involves annual sales of drugs; out of which there are enormous, unaccounted for and, of course, untaxed profits.²⁰ The lowest estimate of US \$ 85 billion acquired in the late 1980s from illicit sales of cocaine, heroin and cannabis in the

US and Europe equalled the individual Gross Domestic Products (GDP) of 150 of the 207 economies of the world. The highest estimate of USD \$500 billion would approach 13 % of the combined GDP of the European Union (EU) countries, 8 % of the GDP of the U.S., or about 4 % of countries of the Organization for Economic Cooperation and Development (OECD)²¹.

Apparantly, the turnover in and illicit profits obtained from selling other commodities follow suit. Stolen art is said to be second to drug trafficking, in turnover and in laundering the profits²². Not corroborated by any evidence, this is undermined by an equally unsubstantiated and competing claim that it is the illicit traffic of flora and fauna which occupies second place²³.

¹⁸ "Police seize at most 40 percent of the drugs coming into the U.S. and probably a smaller percentage of those entering western Europe. The supply of nuclear materials is obviously much smaller, but law-enforcement agents are also less experienced at stopping shipments of uranium than they are in seizing marijuana or hashish. To believe that authorities are stopping more than 80 percent of the trade would be foolish" (Phil Williams and Paul N. Woessner, *The Real Threat of Nuclear Smuggling*, <<http://www.sciam.com/0196issue/0196williams.html>>. Nevertheless, all appear to agree that the number of incidents is growing and represents a disturbing trend, especially in qualitative terms. For example, the New York Times in February 1995 cited a "Western European intelligence report" to the effect that the number of cases of actual or attempted nuclear smuggling from former communist countries reported to Western governments had more than doubled in 1994, to 124 from 56 the previous year and 53 in 1992. Furthermore, of the 1994 cases, a total of 77 had involved uranium or plutonium rather than "more harmless materials". For its part, the German federal criminal police (the BKA) recently reported that it had investigated no fewer than 267 cases of "illicit traffic in nuclear or radioactive materials" during 1994, compared to 241 in 1993, 158 in 1992, and just 41 in 1991. See A. Robitaille; R. Purver, *Commentary No. 57, Canadian Security Intelligence Service Publication, Smuggling Special Nuclear Materials*, <<http://www.csis-scrs.gc.ca/eng/comment/com57e.html>>.

¹⁹ Vincent Boland, *Earnings from Organised Crime Reach 1000*, *Financial Times*, 14 February 1997.

²⁰ Freda Adler, G.O.W. Mueller, William S. Laufer, *Criminology*, (sec. ed.) Mc-Graw Hill, Inc. 1994, p. 327. This estimate was originally calculated by the Financial Action Task Force working within OECD. United Nations estimates, based on cash flows from international banking and capital account statistics, suggested that up to US \$ 300 billion globally turned over annually may have been available globally for lundering in the 1980s, amounting now to US \$ 500 billion in the 1990s. This is to represent 8 - 10 times of the original value of drugs before their entering the US market, i.e., \$ 50 billion. See further: United Nations Drug Control Programme, *Economic and Social Consequences of Drug Abuse and Illicit Trafficking*, UNDCP Technical Series Number 6, Vienna 1997, p. 27.

²¹ *Human Decelopment Report 1997*, Oxford University Press, New York 1997, pp. 222-223.

²² Norman Palmer, *Statutory, forensic and ethical initiatives in the recovery of stolen art and antiques* (in:) Norman Palmer (ed.) *The Recovery of Stolen Art. A Collection of Essays*, Kluwer Law International, London 1998, p. 4.

²³ Deutsche Presse Agentur, 17 November 1994 (*Global, op.cit* note 3., (chapter 9)).

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Available estimates show the possible financial scale of illicit traffic. International traffic in human beings, which is claimed to involve millions of people, reportedly produced about US \$ 9.5 billion in illicit profits in 1994,²⁴ stolen, smuggled and looted art between US \$ 4.5 to 6 billion a year²⁵, and in trafficked flora and fauna, between US \$ 2-3 billion a year²⁶. Quite notable are believed to be the illicit profits caused by maritime fraud, illicit trafficking in human organs, and in motor vehicles²⁷. Last but not least, in 1997, while illicit traffic in computer software reportedly caused losses of US \$ 11.4 billion in roughly half of the world (80 surveyed countries) against US \$ 17.2 billion in revenues, there were also unaccountable illicit profits untaxed by States²⁸. The heaviest losses in taxes, and the highest profits for illegal traders, were absorbed because of developing countries which seemed to be a scene of, comparatively, more cases of software pirated from the originals manufactured in developed countries, than within developed countries themselves²⁹.

Separately, one should mention a very sizeable traffic in small arms and light weapons, but the proportion between traffic driven by political and economic motives cannot be ascertained. While aggregate estimates are extremely tenuous,³⁰ information on black market prices of single items shows a great disparity in prices, hence illicit profits³¹. Profits from that traffic are additionally increased from barter transactions involving illicit selling

²⁴ D. Torres, *Esclaves: 200 Milliond' Esclaves Aujourd'hui*, Phebus, Paris 1996; Financial estimate of the International Center for Migration Policy and Development (Global, *op. Cit* note 4 (chapter 9)). In comparison with that suggested in the above book, the United Nations estimate is of 4 million people trafficked worldwide annually. Also "[t]here is an estimated seven billion dollars annual profit in this market" (Gillian Caldwell, Co-Director of the Global Survival Network, interviewed by Associated Press, 22 June 1998).

²⁵ Global, *op. cit* note 3 (chapter 9).

²⁶ Estimate of the World Wildlife Found (Global, *op. Cit* note 3 (chapter 9)).

²⁷ See further, Global, *op. Cit* note 3. (chapter 9).

²⁸ Software Publishers Association, *Software piracy and global competitiveness. Report on global software piracy, 1998* <<http://www.spa.org>>.

²⁹ Global, *op. cit* note 3 (chapter 9).

³⁰ The legal turnover of the armaments industry "has been estimated at around \$ 5 billion a year-plus at least as much again on the black market" (The Economist, Hey, anybody want a gun ?, 16 May 1998, p. 47).

³¹ An AK-47 automatic machine gun in Albania can be bought for a few U.S. dollars. In Uganda, an AK-47 can be purchased for the cost of a chicken and, in northern Kenya, it can be bought for the price of a goat (Note by the Secretary-General, Impact of armed conflict on children, UN doc. A/51/306 of 26 August 1996, para. 27). Research in South Asia reveals that locally produced AK-47s are everywhere, but those manufactured in national arsenals still fetch a higher price (The New Field of Micro-disarmament: Addressing the Proliferation and Buildup of Small Arms and Light Weapons, Brief 7, based on a study prepared for the German Foreign Office by Edward J. Laurence, assisted by Sarah Meek, Bonn International Centre for Conversion (BICC), September 1996, p. 13). In Japan, a handgun is as expensive as a compact car (Statement in : Firearms Enforcement Strategy of Japanese Police, Firearms Control Division National Police Agency, Japan). The profit margins for retail shipments of firearms are high. For example, and reportedly, in the Purulia drop case, the contracting company operated at a 65 % profit margin (Bonner, *op.cit.* note 4.).

³² R.T. Naylor, *The structure and operation of the modern arms black market* (in:) Jefferey Boutwell, Michael T. Klare and Laura W. Reed (eds), *Lethal Commerce: The Global Trade in Small Arms and Light Weapons*, Committee on International Security Studies, American Academy of Arts and Sciences, Cambridge, MA 1995.

of arms for diamonds, precious gems, jade, ivory, teakwood, recreational drugs, and also looted antiques³².

In other forms of illicit trafficking, financial profits may still be very considerable, e.g. in the case of traffic in nuclear material³³. However, experts, even if they emphasize the seriousness of nuclear smuggling, add also that such traffic "has been overblown by the media because it was a good scare"³⁴. Secondly, they are not sure whether the motive of smuggling (political or criminal) has been identified clearly enough. Only according to some is it now, with the onset of Mafia-type organizations, becoming increasingly criminal, whereas earlier it had mainly been political³⁵. Nonetheless, transactions in all the above mentioned commodities would contribute to part of a total of an estimated US \$ 1000 billion in money to be laundered. In what percentage, it is impossible to say.

B. Illicit Trafficking: Search, Seizure and Confiscation of Illicit Profits

Traffic in most of the above involves receiving countries but also countries where obtained illicit profits may be finally returned as laundered, through the network of others and legislation vulnerable to such processes. In 1998, the United Nations listed 48 countries and territories with such legislation attractive

to stock fraudsters, drug traffickers, corporate embezzlers and commodity smugglers. The problem seems to be not only identified with a particular location, but also with evolving comparative advantages that any banking system in the world may offer their clients³⁶.

Technically, identifying possible money laundering schemes is a tedious task. In the U.S. the volume of annual money wire transfers reaches approximately \$500 trillion per year. Assuming that all laundered funds pass through the United States, sent by wire transfers (either single or several), a median of 0.05 percent was suggested to represent the portion of money which is laundered³⁷. Estimates concerning other countries in the world are, generally, not available (except for Australia)³⁸. For the time being, finding out the global extent of money laundering is impossible.

The legal and technical context enabling search, seizure and confiscation of incriminated funds gets even more complicated in cases of identifying computer records of operations supporting illicit traffic. As official traders rely more on computer networks, so do the criminals, organized or not, who carry out their operations³⁹. Commission of crime by using

³³ In an unsuccessful police entrapment attempt, US \$ 250 million had been offered for four and a half kilograms of plutonium (Barry Kellman, David S. Gaultieri, *Barricading the nuclear window - a legal regime to curtail nuclear smuggling*, University of Illinois Law Review, Vol. 1996, Number 3, p. 672). See also: Pricles Gasparini Alves, Daiana Belinda Cipollone (eds), *op.cit.* note 6, pp. 125-152.

³⁴ Statement ascribed to the IAEA official, as quoted in: Barry Kellman, David S. Gaultieri, *Ibid.*, p. 676.

³⁵ *Ibid.*, p. 673.

³⁶ Financial Havens, Banking Secrecy and Money Laundering, United Nations Office for Drug Control and Crime Prevention, Global Programme Against Money Laundering, Preliminary Report, 20 May 1998, p. 51.

³⁷ For further details see: OTA, *Information Technologies for the Control of Money Laundering*, September 1995 (OTA-ITC-630).

³⁸ John Walker, *Estimates of the Extent of Money Laundering in and through Australia*, AUSTRAC, Sydney 1995.

³⁹ Raphael Winnick, *Searches and seizures of computers and computer data*, Harvard Journal of Law & Technology, Vol. 8, No. 1 (1998), p. 76.

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traditional techniques only (e.g., making the paper based operation of money laundering as seemingly legal as possible) is already a very difficult investigative and judicial task. But with the increasing use of computer networks for criminal purpose, the difference in the methods of operation (paper based or paperless) makes a tremendous impact on the way in which two suspects, using, respectively, traditional or modern techniques, will be handled by the criminal justice system. This will be illustrated by the example below.

Mr. J. D., who is a citizen of country A, had been suspected of illicit drug trafficking to country D, through country B and C. While he was staying there, police of country D surveilled his activities. Police surveilled visits made to Mr. J.D's house, and controlled incoming letters. After obtaining a search and arrest warrant, provided in two days at the request of the police by a judge, and delivery of last mail of which police knew contained incriminating material, they decided to start with the search. Police simultaneously searched the premises rented by Mr. J. D., and where he lived. They entered the rented premise by force, and found large quantities of drugs hidden in a cargo with officially imported coffee. In Mr. J. D.'s house, which stood open, police found papers documenting his illegal transactions with accomplices and banks in which he deposited profits from those transactions. They also found suspected papers, located in a container in a locked safe, which they opened with the assistance of a locksmith. Further, they found in his house merchandise (TV set and a radio), allegedly stolen from a nearby shop. Outside his house, police found a car with a counterfeit vehicle identification number. Police seized the drugs, papers, TV set and radio, sealed off the rented premises and his house, and towed away a suspect

vehicle. Since, at the time of the police action, Mr. J. D. was visiting a neighbour in the vicinity of his house, and noticed an imminent danger of being arrested, he managed to elude police and flee to country A. An extradition request prepared by country D, was not granted by country A because that country's constitution prohibits extradition of its own nationals abroad. Instead, country A initiated preparatory proceedings with a view to determining if Mr. J. D. may be charged with a serious criminal offence in country A.

Depending on the legal tradition of a country (common, civil law) from which one may want to assess the situation of countries A and D, there will be rather clear answers to the questions asked. If actions taken by their respective criminal justice authorities regarding various objects searched and/or seized, and Mr. J. D. himself, were legal or not. With more difficulty, the same actions may be legally assessed in terms of their compliance with the United Nations criminal justice and human rights standards and norms. Hardly in any country in the world, and not in the United Nation law at the time of this writing, could one find comprehensive and uncontested answers to the following series of questions, if they were posed in relation to an alleged crime related to the computer network:

- (i) May police monitor the traffic of data on the Internet ?
- (ii) Is the data regarded as a tangible or intangible object ?
- (iii) Can criminal justice authorities of countries B and C be asked for legal assistance, in finding out if the Internet service provider(s) (ISP) in their countries have any computer records evidencing a suspect's transactions, both with alleged accomplices and/or financial

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- institutions ?
- (iv) Is the ISP under the obligation to keep its own records for a specified period of time for possible inspection by the police in cases of alleged computer criminal activities of receivers of their service ?
 - (v) What if a suspect used an alias on the Internet to hide their true identity and original location from which s/he was communicating by the Internet ?
 - (vi) Is it necessary to catch a suspect in the act (striking the keys on the computer's console) or is it sufficient that incriminating data would be found on the computer in their absence?
 - (vii) Does the ISP have an obligation to cooperate with the police in country A, by notifying the arrival of specific suspected messages ?
 - (viii) What happens if some of those messages were not anticipated ?
 - (ix) May any messages be read by their content, or only from whom they originate ?
 - (x) Should the search warrant and subsequent possible seizure be particularized or extended to any data found on the suspect's computer, including those which a suspect may have deposited abroad, for example with the affiliated financial institutions abroad on their computer servers there ?
 - (xi) What if some of the data stored on the hard disk of a suspect's computer are personally very sensitive and private (e.g., correspondence with family, health records) ?
 - (xii) May a computer system of an ISP provider be searched, all its equipment with data seized, thus bringing its operation to a complete halt ?
 - (xiii) How soon can the police receive a search warrant from a judicial authority, given that computer data may be faster, more readily and inadvertently destroyed than objects like drugs or papers ?
 - (xiv) Is it possible for the police to force (hack) entry to a suspect's computer and use an encryption key to decipher the contents of the communication (data on transactions, and transaction data) ?
 - (xv) May the police search for and seize computer data from an unrelated alleged criminal activity by a suspect ?
 - (xvi) Does the bilateral extradition treaty cover the question of making and granting requests for crimes related to the computer network ?
 - (xvii) Is the suspect entitled to any remedy against the seizure of their lawful belongings, either in the country of seizure or in the country to which the suspect fled ?
- The above set of questions is far from being exhaustive. However, they do not seem to be farfetched, even though FATF admits that no case of Internet-based money laundering has been noted⁴⁰. Finding legal answers to those questions in the near future may be ever more urgent for determining effective countermeasures against crimes related to the computer network.
- Fragmentary replies can now be found in the United Nations trade and criminal law. They have the form of various recommendations. Regarding drug related

⁴⁰ "The fact that no laundering operation has been identified to date may mean that the appropriate services lack the necessary means and capability of detection" (FATF Annual Report 1997-1998, para. 7 <<http://www.oecd.org/>>).

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crimes, there are the recommendations and treaty provisions of the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (the 1988 Convention). In the "Model Law on Electronic Commerce," the United Nations Commission on International Trade Law (UNCITRAL) defined "data message" as "information generated, sent, received or stored by electronic, optical or similar means, including, but not limited to, electronic data interchange..., electronic mail, telegram, telex or telecopy" (art. 2 (a))⁴¹.

The provisions of the 1988 Convention oblige each party to adopt such measures as may be necessary to enable the identification, freezing or seizure of any item which constituted either instrumentalities of incriminated acts or their proceeds for the purpose of eventual confiscation (art. 2). "Proceeds" means any property derived from or obtained, directly or indirectly, through the commission of an offence covered by the Convention. "Property" means "assets of every kind, whether corporeal or incorporeal, moveable or immovable, tangible or intangible, and legal documents or instruments evidencing title to, or interest in, such assets" [art. 1 (p), (q), respectively, italics added]. The draft United Nations convention against transnational organized crime (UNTOC) extends such provision to all other offences to be covered by it. However, in art. 2b it lumps in the definition of "proceeds of crime," "property" which in tangible or intangible form is "of any description," as in the 1988 Convention.

Both instruments also empower State Party's courts or other competent authorities to order that incriminated

bank, financial or commercial records be made available or be seized (art. 5 (3); arts 4. 3 (c) and 7 (2), respectively). The UNTOC would impose the obligation to retain such records by a financial institution (which could also be a fund transmitter, casino or securities dealer) for at least 5 years (art. 4bis (c)). Currently, however, regulations of the 1988 Convention have no treaty parallel for commodities other than drugs, and themselves are no longer regarded as sufficient. For the time being, model and "soft law" seeks to fill out this gap.

In 1995 the United Nations International Drug Control Programme elaborated a "Model law on money laundering: confiscation and international cooperation in relation to drugs" (Model Anti-Money Laundering Law)⁴². This law not only deals with the seizure and placing under seal any plants, substances, instrumentalities or other things connected with a drug offence, but also allows for the

⁴² This model law responds to the legal needs of civil law countries. Common law countries may be interested to use a set of six UNDCP model laws (bills) on drug abuse, money laundering and proceeds of crime, mutual legal assistance, extradition, foreign evidence, and witness protection. All texts are available from the United Nations International Drug Control Programme (<undcp_hq@undcp.un.or.at>). Before the 1988 Drug Convention, the General Assembly of Interpol adopted a model legislation which provides for the temporary freezing of property prior to the filing of criminal charges. Additionally, the legislation authorizes the issue of restraining orders, injunctions and other actions upon property which is deemed to be derived from criminal activity (Bruce Zagaris, The emergence of an international anti-money laundering regime: implications for counselling businesses (in:) Richard D. Atkins (ed.), The Alleged Transnational Criminal. The Second Biennial International Criminal Law Seminar, Martinus Nijhoff and International Bar Association, The Hague 1995, pp. 136-137).

⁴¹ UNCITRAL Model Law on Electronic Commerce with Guide to Enactment 1996, United Nations, New York 1997.

taking of provisional measures, including the freezing of capital and blocking of financial transactions, relating to moveable or immovable property suspected of being used or intended for use in the commission of a drug offence (arts 26 and 27). Moreover, the law clearly extends its scope to surveillance of operations which, without apparently being connected with drug money laundering, either involve sums equivalent to US \$ 200 000 or are surrounded by circumstances of unusual complexity (art. 9).

FATF fills that gap with its recommendations approved later by the Lyons Summit of 1996. Next year, the same recommendations were submitted to the United Nations General Assembly which annexed them to its resolution 51/85. Recommendations welcome the resolve of FATF to extend criminalization of money laundering to other serious offences, but also states that countries “should consider adopting legislative measures for...seizure of illicit proceeds from drug trafficking and other serious offences..., as required”. Concerning provisional arrangements, they should include the freezing or seizing of assets, always with due respect for the interests of bona fide third parties (recommendation 29 and 30).

Regarding the confiscation of illicit profits, the most elaborate and far reaching United Nations scheme can be found in the 1988 Convention, and the draft UNTOC. In both, there is an obligation for confiscation of proceeds, property, equipment and other instrumentalities used or intended for use in violation of specific substantive provisions of both conventions (art. 5 (a), (b), and 7, respectively). As the assets from transnational organized crime may be dispersed over several countries, that obligation extends to all such countries, and not only to a country which has

exercised jurisdiction over the offender (UN TOC, arts 4 and 7 (3)).

Model Anti-Money Laundering Law elaborates in detail on the confiscation of proceeds and properties. Starting from the premise that such confiscation is not only a sanction. It is also “a kind of restitution, to the community, of property unlawfully obtained to its detriment”⁴³. Among many provisions, the Law refers to confiscation of proceeds and property directly or indirectly from the offence, including income and other benefits obtained therefrom; places on the offender the burden of proving the lawful origin of property belonging to them; leaves it to the public prosecutor’s office to prove the illicit origin of property obtained by third parties from convicted offenders. In cases where proceeds of illicit origin have been intermingled with property acquired from legitimate sources, confiscation of such property shall be ordered only up to the value, as assessed by the court, of the intermingled proceeds (art. 30).

FATF recommendations state that countries should consider adopting legislative measures for the confiscation and assets forfeiture, always with due respect for the interest of bona fide third parties. Countries should also consider the introduction of arrangements for the equitable sharing of such forfeited assets (recommendation 30).

V. CRIME AS THE GROWING INTERNATIONAL SECURITY THREAT

A. New Security Threat

Inspired by the statement on governance (attributed to the German philosopher Emmanuel Kant, 1724-1804), that the “establishment of a civil society which

⁴³ Model Anti-Money Laundering Law, *op. cit.* note 42, p. 20.

generally administers the law” has been described as “mankind’s most difficult problem,” the commentators felt that:

“[i]n a community of states afflicted with clashing conceptions of the appropriate ends of law and civil society, whose largest arena is a military arena of multiplying devices that promise both infernal destruction and access to the heavens, the establishment of a society generally administering law adequately expressing the deepest aspirations of the world’s peoples for freedom, security, and abundance - the establishment, in other words, of a world public order of human dignity - is truly a problem of the most heroic proportions”⁴⁴.

B. Redefining Global Security Conceptually

Two ages after Kant’s statement, and shortly before the outset of the 21st century, transnational crime as an expression of an “uncivil society”, and security, as one of the elements of civil society, have both been increasingly seen as the two sides of one coin.

New dimensions of security are emerging. They start replacing the traditional notion of global security understood as balancing out military security by a more, albeit only gradually surfacing, universal notion of security. A prominent expert concedes that the initial stage of this development ensues from the two inabilities: to establish a global security scheme by only one super power, and by all. There is no country in the world, including the United States, which would have significant security interests. In today’s very interdependent and heterogenic world, what determines order

⁴⁴ Myres S. McDougal, Florentino P. Feliciano, *Transnational Coercion and World Public Order*, New Haven Press, New Haven, Martinus Nijhoff Publishers, Dordrecht/Boston/London 1994, p. 261.

exists in a particular civilization and beyond it⁴⁵.

How to define and deal with what is “beyond” is a matter of further consideration. It has been argued, for example, that much more attention must be given by the United Nations Security Council to:

“the most pressing economic, social, and environmental problems. The connection between the absence of democracy, gross human rights abuses, and the propensity for aggression and other forms of international irresponsibility was clearly established even before Iraq’s attack on Kuwait. The spread of democracy, and respect of human rights, are indispensable elements of a more stable, less violent human society, and are, as such, a legitimate - indeed an indispensable international concern”⁴⁶.

The Human Development Report observes that:

“[w]hen the security of people is endangered anywhere in the world, all nations are likely to get involved. Famine, disease, pollution, drug trafficking, terrorism, ethnic disputes and social disintegration are no longer isolated events, confined within national borders. Their consequences travel the globe”⁴⁷.

⁴⁵ Samuel P. Huntington, *The Clash of Civilizations and the Remaking of the World Order* (1996), *Zderzenie cywilizacji i nowy kształt ładu światowego* (Polish translation of 1997, Muza SA, Warszawa 1997, p. 227).

⁴⁶ Brian Urquhart, *The UN and international security after the Cold War* (in: Adam Ck and Benedict Kingsbury (eds), *United Nations, Divided World. The UN’s role in International Relations*, Clarendon Press, Oxford 1993, p. 97.

⁴⁷ *Human Development Report 1994*, UNDP, Oxford University Press, New York 1994, p. 22.

The chairman of the U.S. Senate task force on economic sanctions observes that his country's sanctions should balance the U.S. economic interests with the desire to promote "improvements in basic civil liberties, human rights and nonproliferation, or defeating terrorism, narcotics trafficking and crime"⁴⁸. The U.S. Ambassador to the U.N. extends this observation, saying that:

"[n]arcotics trafficking, international crime, migrant smuggling, terrorism and environmental degradation...these are our enemies. The illegal drug trade and related activities such as money laundering and terrorism undermine fragile democratic institutions, distort economies and hinder long-term growth"⁴⁹.

Those developments and phenomena are "beyond" the sphere of influence of any one country. They are out of reach, in tax, extradition or money laundering havens from where they threaten the security of nations by pouring onto them illicit drugs, aliens and arms, writes another high-level U.S. official⁵⁰. Others emphasize that while earlier, manufacturing and providing small arms and light weapons was once accepted as a necessary evil or even welcomed as a guarantor of security, nowadays cause concern that their excessive amounts can have devastating consequences for global

security⁵¹.

C. Redefining Global Security Legally

Save terrorist bombing, the above mentioned manifestations of transnational crime have not yet been legally embraced by the resolutions of the United Nations Security Council within the concept of global security. However, the General Assembly, in the aforementioned "United Nations Declaration on Public Security," undertook steps to redefine global security. Several illicit trafficking activities (illicit trafficking in drugs, firearms, human beings, laundering of proceeds from serious crimes) have already been declared by the General Assembly as endangering "the security and well being of citizens and all persons" (art. 1). Looking into other official records (statements) of or for the Security Council from the above group State-sponsored or connived acts involving illicit drug trafficking, illicit arms trafficking, but also corruption (art. 10) may fall under the redefined concept of global security⁵².

As noted, and as of this writing, there was only one case of Council's involvement in one possible type of transnational crime

⁴⁸ Senator Mitch McConnell, quoted in: Thomas W. Lippman, Clinton seeks authority to waive any sanctions, *International Herald Tribune*, September 10, 1998, p. 3.

⁴⁹ Bill Richardson, U.S. Ambassador to the UN, *Narcotics Enforcement and Prevention Digest* Vol. 2 No 6 (1996), p. 3.

⁵⁰ Jonathan M. Winer, *International crime in the new geopolitics: a core threat to democracy* (in:) William F. McDonald, *Crime and Law Enforcement in the Global Village*, ACJS/Anderson Monograph Series, Anderson Publishing Co. 1997, pp. 61-62.

⁵¹ Michael Renner, *Curbing the Proliferation of Small Arms* (in:) Lester R. Brown et.al., *State of the World 1998. A Worldwatch Institute Report on Progress Toward a Sustainable Society*, W.W. Norton & Company, New York-London 1998, p. 148.

⁵² For an interesting review of the question of the transnationalization of corruption, see: Michael Jonson, "Cross-border corruption". *Points of vulnerability and challenges for reform*, and Susan Rose-Ackerman, *Corruption and the global economy*, both published in: *United Nations Development Programme, OECD Development Centre, Corruption. Integrity. Improvement. Initiatives in Developing Countries*, Sales number E.98.III.B.18, United Nations Development Programme, New York 1998, pp.13-24, and 25-44, respectively.

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- terrorist bombing⁵³. By adding "terrorism" to the list of acts which either are "a threat to international peace and security" (apartheid,⁵⁴ internal conflict) or "a breach" thereof (aggression⁵⁵), the Security Council broadened the interpretation of the above quoted notions, and opened the way for possible considering other international crimes or violations as threatening or breaking peace and security. Currently, the catalogue from which the Security Council may draw these crimes extends to 26 types⁵⁶.

On the occasion of passing other resolutions, various declarations and other statements were made either by the Council itself, its President or the Secretary-General, which included references to illicit drug and arms trafficking, violence, banditry, etc. Those references or developments provided a part of the entire factual and legislative context in which the Council imposed sanctions on target States.

For example, in 1997, after adoption of the resolution concerning Afghanistan, the President of the Council noted that human

suffering and material destruction there threatens to lead to the disintegration of the country and "represents a growing threat to regional and international peace and security". He stressed the Council's concern about mass killings of prisoners of war and civilians in Afghanistan, and the looting of United Nations premises and food supplies. He reiterated that, in the opinion of the Council, the continuation of the conflict in Afghanistan provided a fertile ground for terrorism and illegal drug production and trafficking which destabilize the region and beyond⁵⁷. The Secretary-General observed that concerned parties must be held responsible for exacerbating the conflict, which already was spreading beyond the borders of Afghanistan, posing a serious threat in the shape of terrorism, banditry, narcotics trafficking, refugee flows, and increasing

⁵³ Against Libya to surrender two Libyan nationals suspected of terrorism and to renounce all forms of terrorist action (S/RES/748 (1992) of 31 March 1992, and S/RES/883 (1993) of 11 November 1993).

⁵⁴ Against South Rhodesia to bring to an end the rebellion in Southern Rhodesia (S/RES/232 (1966) of 16 December 1966; S/RES/253 (1968) of 29 May 1968), and South Africa to end violence against the African people and neighbouring States (S/RES/418 (1977) of 4 November 1977). However, the treaty notion of apartheid first was used in 1965 in the Convention on all Forms of Racial Discrimination, and does not appear in the two first resolutions.

⁵⁵ Against Iraq to restore the sovereignty and territorial integrity of Kuwait (S/RES/661 (1990) of 6 August 1990, S/RES/670 (1990) of 25 September 1990, S/RES/687 (1991) of 3 April 1991.

⁵⁶ While there is no definitive list of such crimes, expert classification includes the following international crimes : genocide, aggression, slavery, torture, apartheid, war crimes, crimes against humanity, crimes against the United Nations and associated personnel, unlawful possession, use or emplacement of weapons, theft of nuclear materials, mercenarism, unlawful medical experimentation, piracy, unlawful acts against the safety of maritime navigation and the safety of platforms on the high seas, aircraft hijacking, threat and use of force against internationally protected persons, taking of civilian hostages, unlawful use of the mail, falsification and counterfeiting, destruction and/or theft of national and archeological treasures, unlawful acts against certain internationally protected elements of the environment, unlawful interference with international submarine cables, international traffic in obscene publications, bribery of foreign public officials, drug offences, and terrorist bombing (see further: M. Cherif Bassiouni, *International Criminal Law Conventions and their Penal Provisions*, Transnational Publishers, Inc., Irvington-on-Hudson, New York 1997).

⁵⁷ Presidential Statement S/PRST/1997/55.

ethnic and sectarian tension⁵⁸.

References to various forms of crime either in the Council's resolutions or justifications thereof, are certainly not coincidental. There seems to be an emerging agreement that the concept of global security should gradually embrace select forms of international and transnational crime.

VI. UNITED NATIONS AGAINST CRIME IN THE 21ST CENTURY: NEW DIMENSIONS OF INTERNATIONAL COOPERATION

A. Global Economy and Crime

The above examples of crime, as dealt with by the Security Council, point strongly to ramifications it has to the security of nations. Traditional transnational (and international) crime, like trafficking in narcotic drugs has been for a long time a worldwide concern. And so terrorism, which, because of its original political or politicized nature, has only recently started entering the classification of "international crime", has entered the Council's agenda⁵⁹. As helpful as defining certain activity as international crime or transnational crime is, there are overriding issues which may drive discussions on redefining global security ahead of other considerations.

Two crime issues, partly interlinked, may contribute to further focus on globalization of the notion of security. First, the spread of economic crime across the world. The global economic recession looming in 1998 prompted some experts to argue that international criminal cartels

could easily arrange the concerted withdrawal of US \$ 10-20 billion in "black" money from a single market economy. "With the threat of such a financially devastating blow, they would be able to extort entire countries"⁶⁰. Second, is the growing computerization of economic transactions. To underscore their actual and potential scope, one may reemphasize that what is now 100 % of all available data and information in the world, will represent only 5 % of that available in 50 years, and add that the functional equivalent of the progress in information technologies made over past 500 years (from the first printed book until today's computer) now will probably be repeated ten times faster in the next 50 years⁶¹. Helpful as computer networking is, it is also a powerful and increasingly dominant medium to create, more easily than before, a fictitious (virtual) basis for brass-plate banks, anonymous trade corporations and other commercial firms⁶².

B. Progress in Legal Assistance

(i) *Mutual Legal Assistance*

In the face of computerized information quickly becoming a new "global commons", the international criminal justice community is not prepared to prevent and control crime on and abuse of computer networks, let alone transnational crime committed with traditional methods. Presently, only about one third of most industrialized European countries have criminalized

⁵⁸ Press Release SC/6453.

⁵⁹ In its resolution 51/210 of 16 January 1997 on "Measures to Eliminate International Terrorism," the General Assembly noted the risk of terrorists using nuclear, biological and chemical agents, and involving electronic or wire communications systems and networks to carry out criminal acts.

⁶⁰ Expert statement (in personal capacity) by Vito Tanzi, International Monetary Fund at the press conference on 10 June 1998 (United Nations, DPI/1452, Development Update # 24, July-August 1998).

⁶¹ S.L. Armanathan, *op.cit.* note 14.

⁶² Pino Arlacchi, Under Secretary-General, United Nations Office at Vienna, at the press conference (DPI/1452, *op.cit.* note 60).

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unauthorized access to data or information, which, by and large, makes such penetrations still legitimate⁶³. Consequently, mutual legal assistance is, in principle, possible only when, in both the requesting and requested country the act in question is criminalized.

(ii) *Bilateral Extradition*

Other facets of legal assistance, such as bilateral extradition treaties, have not caught up with the necessities resulting from globalization and informatization. In the 19th and the 20th century, available data shows that 112 bilateral extradition treaties were registered and published in the League of Nations Treaty Series. The first 550 volumes of the United Nations Treaty Series (1945-1964), contain texts of 50 extradition treaties. In making a very rough estimate of valid treaties at the beginning of 1970s, one commentator hazarded a figure below 500 for still functioning old (the 19th-20th century) extradition treaties, and about 1000 for others, unregistered and registered with the United Nations Secretariat⁶⁴.

Against this total estimate of 1500 bilateral extradition treaties, the same expert assumed that if every Member State of the United Nations were to be linked with every other (and at the time of that writing there were 120 Member States) through

bilateral extradition treaties, theoretically, there could have been no less than 14 000 of such treaties. However, since extradition problems were also dealt with through multilateral conventions, regional arrangements secured by reciprocal legislation, and by reciprocal practice of extradition, that magnitude would have been less. Such qualified estimates look pale against the developments in the 1990s. According to the United Nations database, 131 current Member States on which data was collected had, roughly, 900 various legal assistance instruments. This amount consisted of no less than 525 bilateral extradition treaties, including 65 supplementary extradition agreements, 174 mutual legal assistance treaties, and 142 instruments against the struggle in international narcotic drugs, plus a number on the transfer of foreign prisoners⁶⁵. Again, if all Member States (185 at writing) were to be linked by bilateral extradition

⁶³ Doc. CDPC (97) 5; PC-CY (97) 5, Council of Europe, European Committee on Crime Problems, Implementation of Recommendations No. R (89) 9 on computer-related crime, Report prepared by Professor Henrik W.K. Kaspersen, Amsterdam, February 1997.

⁶⁴ Shaffer, *op.cit.* note 7, p. 37.

⁶⁵ Judicial assistance treaties may also contain extradition provisions. For a fuller review of the variety of extradition arrangements, see: United Nations Crime and Justice Information Network (UNCJIN), <<http://www.ifs.univie.ac.at/~uncjin/extradit/extindx.html>>. Out of the total known number of 525 existing bilateral extradition treaties, including supplementary agreements, at least 148 (28 %) were signed by the U.S. alone (or 38 % of all such instruments in the developed world). In construction of this database the following sources were consulted: the United Nations Treaty Series, the Treaties in Force: A List of Treaties and Other International Agreements of the United States on January 1, 1994 (TIAS, 1994), The Cumulative List of and Index of Treaties and International Agreements: Registered or Filed and Recorded with the Secretariat of the United Nations - December 1969 December 1974, (1977).

treaties, there would have been no less than 34000 of them. This seems to be, if not indeed is, pure nonsense.

C. New Approaches

(i) *Multilateral Legal Assistance and Extradition Provisions*

Another approach is needed, which is now being advanced in drafting the aforementioned United Nations convention against transnational organized crime. This draft convention is to cover quite a broad spectrum of legal assistance and extradition matters involving more effective investigation, prosecution and adjudication of acts recognized by it as crimes, including illicit trafficking in and manufacturing of firearms. The draft may provide legal answers to some of the questions ensuing from the case study of Mr. J.D., but also goes beyond. However, by and large, legal assistance and extradition matters have been approached in a generic manner, enabling coverage of the widest possible list of transnational organized crime cases, as determined by the convention itself.

The original draft started with a provision for considering entering into bilateral and multilateral agreements, including direct cooperation between State police agencies and common operations in the territory of each Contracting State (art. 11)⁶⁶. However Member States' observations and commentaries which the draft convention evoked, suggest that in

dealing with the provision on inter State cooperation, there should be joint teams and other arrangements established for "electronic surveillance, undercover operations and controlled deliveries with a view to gathering evidence," including "when appropriate, necessary items or quantities of substances for analytical or investigative purposes" (art. 19 (c), (d))⁶⁷. The Netherlands added to this a proposal that convention "States Parties...shall consider...analyzing trends in organized crime...as well as the circumstances in which organized crime can operate, the professional groups involved and the communication technologies" (art. 20 (2))⁶⁸. Supportive of this approach were Latin American criminal justice

⁶⁶ Doc. E/1997/30, Draft United Nations Framework Convention Against Organized Crime, Commission on Crime Prevention and Criminal Justice. Report on the Sixth Session (28 April-9 May 1997), Annex III, p. 14.

⁶⁷ In favour were also Argentina, Australia, Belarus, Bosnia and Herzegovina, Brazil, Canada, Chile, Colombia, Czech Republic, Finland, Greece, Guatemala, India, Italy, Japan, Mexico, Morocco, The Philippines, Qatar, Republic of Korea, Saudi Arabia, Slovakia and Turkey. This was reiterated later by the U.S. in doc. E/CN. 15/1998/5, Commission on Crime Prevention and Criminal Justice, Report of the Meeting of the Intersessional Open-ended Intergovernmental Group of Experts on the Elaboration of a Preliminary Draft of a Possible Comprehensive International Convention against Organized Transnational Crime (2-6 February 1998, Warsaw, Poland), sec. III. 19 (d) and (e). Such an approach will influence investigative techniques of cooperating countries to the point of possible later harmonizing evidentiary requirements for admission of evidence by respective courts. For a review of judicial cases in which U.S courts assessed legality of joint team operations with a number of countries, see: Richard Downing, The domestic and international legal implications of the abduction of criminals from foreign soil, *Stanford Journal of International Law* Vol. 26, No. 573 (1990), p. 107.

⁶⁸ Doc. E/CN. 15/1998/5, *Ibid*, sec. III, 20.2.

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ministers, and senior experts of the group of eight leading industrialized countries (P-8, now G-8)⁶⁹. States, in turn, suggested restrictions on such forms of inter-state cooperation dictated by sovereignty and be self-determination (Mexico), and human rights requirements⁷⁰. The latter should also generally apply to international criminal law enforcement, including exchange of criminal records, suggested in the draft, and be understood as information not only on previous conviction(s), but criminal investigation and prosecution as well (Australia). Interestingly, in cases where double criminality requirements cannot be observed (e.g., lack of criminalization of hacking in the requested State, and thus no obligation to provide non-criminal information and/or evidence), some States were proposing that mutual legal assistance should nevertheless be rendered, in the interest of more effective and efficient international law enforcement (Russia)⁷¹. The proposed texts speaks of an obligation to render such assistance without the requirement of dual criminality, unless the assistance required unvolves the application of coercive measures (art. 14.6). However, a

counterproposal under the revised United Nations Model Treaty on Mutual Assistance in Criminal Matters, states that “[c]ountries may also consider restricting the requirement of double criminality to certain types of assistance such as search and seizure” (art.4)⁷².

(ii) *Preservation of the Integrity of Evidence*

Preservation of the integrity of evidence is essential for compliance with the principle of accuracy of data, as inaccurate or incomplete records shared, may lead to suppression of evidence by the court of a requesting State, if not to violating fair and humane trial.⁷³

In case of evidence gathered through electronic surveillance and shared internationally, preservation of its integrity is an extremely difficult process, starting with the need to assure that, a file documenting fraudulent electronic

⁶⁹ Doc. E/CN. 15/1996/2/Add.1, Regional Ministerial Workshop on Follow-up to the Naples Declaration and Global Plan of Action against Organized Transnational Crime (Buenos Aires, Argentina, 27-30 November 1997), Report of the Secretary-General, recommendation No 14; doc. E/CN. 1997/30, Senior Experts Group Recommendations, recommendation No 26.

⁷⁰ Proposed by the Intergovernmental Expert Group Meeting on Extradition (doc. E/CN. 15/1997/6, recommendation No 29).

⁷¹ Doc. E/CN. 15/1998/5, sec. III, 14.14.

⁷² Doc. E/CN. 15/1998/5, Add. 1, Report of the Intergovernmental Expert Group Meeting on Developing and Promoting the Efficiency of Mechanisms in International Mutual Assistance Practice (Arlington, Virginia, USA, 23-26 February 1998), Annex I. The proposals from that report, as reviewed and recommended by the Commission on Crime Prevention and Criminal Justice, have been forwarded by the Economic and Social Council for action of the General Assembly.

⁷³ Those guidelines, adopted over the period 1980-1995, could be found in the the Privacy International Archive: <http://privacy.org/pi/gopher/ftp_cpsr.org/cpsr/privacy/privacy_international/>. See also: Christine van den Wyngaert (ed.), Guy Stessens (ass. ed.), International Criminal Law. A Collection of International and European Instruments, Kluwer Law International, The Hague/London/Boston 1996, p. 599.

banking transactions for example, does not contain erroneous or materially false information accidentally generated by the criminal justice agencies handling the data files. Of course, States are required to act in “good faith,” but negligent handling of electronic files may tremendously complicate admitting such questionable evidence into trial. As there are only very nascent internationally standardized encryption and decryption procedures for dealing with electronic evidence, this risk cannot be underestimated⁷⁴.

(iii) *Preservation of the Privacy of Evidence*

The problem of preservation of privacy of a suspects’ records continues to be felt by the law enforcement community as hampering the effectiveness of their criminal investigations. It also alerts courts and entire human rights community from the, at times, opposing rule of law perspective. The U.S proposal, made in the context of discussion over the draft United Nations framework convention, called for establishing and maintaining “channels of communication between the competent authorities, agencies and services to facilitate secure and rapid exchange of information concerning all aspects of the offences set forth in this Convention, including, if the States Parties concerned deem it appropriate, links with other criminal activities.”

Specificity in collecting and maintaining criminal records can be interpreted more broadly in two ways. First, so as to cover other potential criminal activities to which ongoing investigation may be not central. Secondly, also as a disclosure abroad, as far as the obtaining information on such activities by other countries is concerned. It seems, that if the principle of equal protection of data (in its transborder flows) is observed by the requesting and requested State, re-interpretation of the principle of specificity to cover foreign criminal investigations would be consonant with the international recommendations in this regard. However, the constituency receiving information will be wider.

This is important the in the case of collecting and sharing electronic records, which would clearly come within the purview of such a proposed regulation. Experts emphasize that there will be a growing conflict between the requirements of privacy, and requirements to collect data in lawful and fair ways. Solutions found to deal concurrently with those requirements, recommended by the UN Guidelines and other international instruments will influence the ways and means of combating the increasing danger of organized crime and terrorist acts⁷⁵.

⁷⁴ Recommendation of OECD concerning guidelines for cryptography policy, 27 March 1997 <<http://www.oecd.org.dsti/sti/it/index.html>>.

⁷⁵ Doc. E/CN. 4/1997/67, Commission on Human Rights, Question of the follow-up to the guidelines for the regulation of computerized personal data: report of the Secretary-General prepared pursuant to Commission decision 1995/114, para. 18.

D. Ingenuity of Lawmakers and Criminals

Criminals used to be always ahead of the lawmakers, as much as thieves ahead of policemen. Sometimes lawmakers and policemen catch up with the criminal underworld by making the laws more flexible, with due regard to the rights of offenders. For example, the Presidential decree in Brazil enabled money raising to fight illicit drug trafficking, mostly destined for Europe and the United States, by auctioning seized assets before the confirmed conviction of alleged traffickers. The seized 100 hundred planes, 200 trucks and several hundred cars, which would have otherwise depreciated in value awaiting valid conviction, can now be auctioned. In case of a suspect found innocent, the value of any assets seized and sold will be reimbursed⁷⁶.

Another innovation is proposed by the draft UNTOC which encourages State Parties to give consideration to the sharing the value of confiscated proceeds and property among themselves, as well as contributing them to intergovernmental bodies specializing in the fight against organized crime (art. 7 (5)). Finally, and as already suggested in the "Model Anti-Money Laundering Law," the draft provides that a State Party may consider putting on to the alleged offender the onus of proof concerning the lawful origin of alleged proceeds of crime or other property liable to confiscation (art. 7 (7)). This innovation would have to undergo scrutiny in the light of domestic constitutional and other legal principles, and by human rights experts in general.

However, more often, it is the criminal underworld that is more ingenious than the criminal justice community. For instance,

⁷⁶ Narcotics Enforcement and Prevention Digest, Vol. 4 No. 17 (1998), p. 9.

in cases of telemarketing and Internet schemes which involve selling foreign currencies, investments in high-risk penny stocks, gourmet coffee shops, and even ostrich farms⁷⁷. Presently, international policing of the Internet is far behind such ingenuity (as admitted by FATF).

Another example involved an Ukrainian criminal group based in California, U.S.A., which cracked mathematical codes of assigning new vehicle identification numbers (so called "VINs") of car manufacturers. The group was able to create their own "VINs" that could make the stolen car appear as if had just rolled off an assembly line. The cars, the total value of which was estimated at US \$ 10 million, ended up in Central America, Russia and Ukraine⁷⁸. German car manufacturers finalized projects for tracing cars' routes through satellites⁷⁹. One may imagine that organized criminals would illegally access satellite telecommunications systems, in order to obtain control over cars' locations and their possession. In an attempt to cut financial losses because of pirated computer programmes, software manufacturers have considered replacing compact disks with a shareware service offered to end users via the Internet. One may concede that theft of intellectual property will become more difficult, but will it be eliminated ?

Many of the new forms of crime employ or will employ computer or satellite technology, which in its various forms is increasingly intermingled and contributes

⁷⁷ Authorities cracking down on gambling investment fraud, *Organized Crime Digest*, Vol. 19 No. 6 (1998), p. 7.

⁷⁸ Warren Richey, *World's cops rev up strategies to nab cross-border car thieves*, *Christian Science Monitor*, 4 December 1996.

⁷⁹ *The Reuter European Business Report*, 2 December 1996.

to the generic term of “information technology”. There is little doubt that the international community will also resort to new forms of crime control⁸⁰. However, it is not technology itself which will dramatically improve international cooperation. In fact, if present trends in technological applications continue, the “great divide” between developed and developing countries will also stay on. Transnational abuse of the Internet may affect countries with weaker telecommunication infrastructures. Poorer protection gives way to penetrating computer networks in developing countries, which are unprepared to face the new challenge.

For attaining significant progress in fighting transnational crime there must be a strong commitment among States, officials and others involved in combating it. If there is a new common international enemy, and crime in its new dimensions gradually assumes this position, there will also be such commitment. With it, the international criminal justice community will be able to quickly finalize a draft United Nations convention against transnational organized crime. Later, it can move on to develop new accessory, flexible and ingenious instruments which may help in the 21st century to better counteract crime related to computer networks.

VII. CONCLUSION

The potential of transnational crime to grow is very considerable and so are the illicit profits. This paper showed cases of transnational crime, increasingly legally and technically complex and in various dimensions. They are off and on the ground, in cyberspace and outerspace. All call for finding commensurate, consolidated and effective countermeasures, in the wake of the growing international security threat such crime poses. More concerted and comprehensive efforts on the search, seizure and confiscation of illicit profits is still required.

⁸⁰ First inroads in using space technology for control of transnational crime have already been made. See, for example, Panaiotios Xefteris and Maurizio Fagnoli, Using small satellite constellations to track and monitor the illicit trafficking in weapons and sensitive technologies, (in:) Péricles Gasparini Alves, Daiana Belinda Cipollone (eds), *op. cit.*, pp. 178-194; and B. Jasani, Relevance of outer space capabilities to international security (in:) N. Jasentuliyana and K. Karnik, *Space Futures and Human Security*, United Nations Office for Outer Space Affairs, Vienna 1997, pp. 21-27.