

# Threats and Phantoms of Organised Crime, Corruption and Terrorism



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**Threats and Phantoms of  
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Corruption and Terrorism**



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*Critical European perspectives*

**Editors:**

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# Table of contents

<i>Fears, naming and knowing: an introduction</i> Petrus C. van Duyne	1
<i>The creation of a threat image Media, policy making and organised crime</i> Petrus C. Van Duyne	21
<i>Measure for measure Methodological tools for assessing the risk of organised crime</i> Tom Vander Beken and Melanie Defruytier	51
<i>Measuring Organised Crime A Critique of Current Approaches</i> Klaus von Lampe	85
<i>Illegal markets, human trade and transnational organised crime</i> Vesna Nikolič-Ristanovič	117
<i>Financial crime in the Czech Republic Some preliminary findings based on case analysis</i> Miroslav Scheinost	139
<i>Islamic fundamentalism and Western horror: Fear of the other or of oneself?</i> Marinos Diamantides	157
<i>In Defence of (Liberal) Democracy: the Machiavellianism of the 'War on Terrorism'</i> Nina Peršak	187
<i>Institutional reform and attempts to fight corruption: the Italian case</i> James L. Newell	201
<i>In the quest for essence: the principal-agent-client model of corruption</i> Matjaž Jager	227
<i>A critical analysis, from a Slovenian perspective, of Corpus Juris and the Green Paper</i> Katja G. Šugman	253

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## **Fears, naming and knowing: an introduction**

*Petrus C. van Duyne*

Fear is a state of mind which, under normal conditions, people seek to avoid. In this way it plays an essential role in human survival. Indeed, fearless persons may be admired, most of them do not die because of old age. People do not want to live in a state of fear and will seek to eliminate its cause. It goes without saying, that the first condition for successful elimination is to know the nature of the threat: it must get a name and identity, though sometimes only a name. If one does not succeed in this naming and identification, one may feel burdened with a psychological uneasiness and existential dilemma, for which one may seek assistance, for example of a priest or a psychiatrist. Both are professionals in managing the fear of other people, the priest even lifelong, and fostering the fear of the 'afterlife'. This ability to manage someone's fear may be a solid basis for acquiring power. It provides a longer-lasting basis than sheer pressure or violence, as the 'fear manager' is given his powers voluntarily. A successful fear manager has to fulfil two additional basic conditions: he must at least provide a credible identification by a smart *naming* of the fear arousing threat as a first step towards anxiety reduction. And he should never be fully successful: the threat may be reduced, but it still looms somewhere ready to act again. For a religion, the death of the Devil may be worse than the death of God.

What applies to an individual may also apply to society. Skilful politicians know how to harness popular uneasiness feelings by changing them into recognizable fears by naming and managing them. One of the areas in which fear managers abound is crime. Fear of crime is one of the most basic grounds for bestowing power to the state to safeguard 'life and property' of its subjects. States, which fail in this respect, even if only partly, lose credibility and legitimation. (South) Italy, the Russian Federation or Colombia are telling examples of (partially) 'failed states'. Italy and Russia have developed their

mafia brands of an illegal protection industry (Gambetta, 1993; Paoli, 2002, 2003; Varese, 2001). Colombia is torn apart because of guerrillas and paramilitary death squads, while its rule of law has disintegrated (Thoumi, 1995; Crandall, 2002).

In a complex society the state is not a passive receiver of powers or just reacting to the anxieties of its subjects, but in its fear management role it is expected to be (pro)active. However, not all criminal issues are equally fear arousing, self-evident or easy to name or identify. For example, environmental crime is little suited to instill fear, unless one has been a victim or lives nearby a dangerously polluted site. There are other 'abstract' criminal phenomena, that are difficult to identify, though having a name. One reason may be that they cover a wide range of penalized behaviour, without having a precise delineated meaning. Another reason may be the 'existential infrequency': they are not projected as (potential) daily experience. In principle, their fear arousing potential is low, unless they are properly 'loaded' with emotive associations. Examples, which are elaborated in this reader are 'organised crime', 'financial crime' and 'corruption'. Judging the clarity of these concepts by the volume of explanatory literature, we cannot maintain that these concepts are really self-evident. They are names, which evoke a variety of associations without crystallising into a distinct identity. Being poor 'fear arousers', they need special awareness raising and maintenance strategies by instilling a 'feeling' of a threatening 'identity'.<sup>1</sup> This does not come about without public relations management. On the other hand, fear of terrorism does not seem to need much management: the shocking events evoke sufficient emotions. Nevertheless, given the saturation effect of fear when there are no new events, to prevent a levelling-off a sustaining management is still required.

In Europe, 'organised crime' as one of the abstract concepts, has been the focus of such public awareness raising, or in our terms, fear management, during the last two decades. At first sight this seems strange as the phrase 'organised crime' has a tremendous emotive value. Internationally it catches

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<sup>1</sup> It is interesting to carry out a syntactic and semantic analysis of the ways the phrase 'organised crime' is used: getting the article 'the' and a verb, it almost becomes a solid being. 'Organised crime' marches, penetrates, makes alliances *and* is 'ahead of us'.

the attention of the media, the public and policy makers alike. Apart from sex, war, sport and natural disasters, the public media thrive on narratives with some organised crime plot, as the public tucks into such stories and its major intriguing evildoers. It is fair to say that in general the organised crime presentations arouse ambiguous feelings: moral rejection mixed with tacit admiration and a slightly shivering feeling of pleasant 'replacement' fear. Therefore, raising long-lasting awareness of the assumed organised crime threat as real and building a sufficiently broad political willingness to allocate budgets and get new legislation enacted, requires enduring public relations efforts. For these aims the name 'organised crime' does not need a precise definition, but has to be associated with easily recognizable threat images.

To raise political and public awareness, European policy makers did not need to begin with an empty slate: since the 1950s the US had set the tune and provided the accompanying organised crime images, which could provide a template. However, this succeeds only partly, as much of the US imagery hinges upon variations of 'alien conspiracy'. Organised crime is considered to be an un-American activity: by Italians and their descents, Latin and South Americans, black Americans etc. (Abadinsky, 1994; Woodiwiss, 2001).<sup>2</sup> Indeed, there seems to be no White Anglo-Saxon Protestant or WASP-organised crime. This implied that the European policy of shaping an organised threat image could use some of the US public relations experience, but had to follow its own course in most respects.

In chapter 2 Van Duyne gives an elaborated account of the creation of an organised crime threat image in the Netherlands. This was performed by senior law enforcement officers mobilising interested politicians, supported by a gullible press and television, later joined by a few scholars. Together they formed a small community of 'problem owners'. However, as problem owners they would be little effective if they did not develop the craft of fear management. In this process the public 'eyes and ears', the press and television, played an essential role. They got preferential 'leaks' and conveyed to the public what

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<sup>2</sup> Likewise, the drug menace was from its beginning in the 20th century considered a threat coming from abroad, as one of the anti-drug lobbyists formulated: 'Like the invasions and plagues of history, the scourge of the narcotic drug addiction came out of Asia' (Bewley-Taylor, 1999). It should be noted that the US movie industry produces more 'alien invasion' movies than anywhere else.

the problem owners wanted to release, which was a conventional organised crime image. Fitting their own and public image, this threat was invariably presented as coming from ‘below’ or from outside. Organised crime was primarily a ‘hoodlum’ or immigrant occupation.

From 1987 onwards, the public and parliament were worked on with repeating and quoted–requoted organised crime stories. Gradually they became convinced of the organised crime threat, sometimes pushed a bit by the publication of deliberate false statistics. Indeed, creating a fear image is rarely based on the pursuit of truth and veracity. It must be admitted that there is little new in that regard: the fear of money–laundering, another concept with a low fear–value, is equally based on deliberately hugely inflated figures (Van Duyne, 1994). Despite some setbacks, like a scandal around illegal investigative methods, the budgetary and legislative aims were reached: special well–equipped units were established and organised crime legislation was duly enacted. Otherwise little changed as far as the organised crime markets are concerned: the threat is still there and the illegal markets thrive as before.

While the Dutch problem owners succeeded in evoking sufficient threat images to keep organised crime high on the list of political priorities, scholars felt the need to provide a proper definition of the ‘phenomenon’, which existence was assumed *a priori*. Working for a Parliamentary Investigation Commission, Fijnaut, together with three other researchers, tried to draft an analytically definition which would end all discussions about the essence of organised crime (Fijnaut et al., 1996). The ambitious undertaking failed dismally, basically because of neglecting basic methodological principles concerning operationalisation. Apparently the Dutch definition did not convince the Council of Europe or the European Commission, which drafted another definition, with many components derived from the German one. Unfortunately, that definition containing like the other definitions many open terms, is not very satisfactory either. This unsatisfactory situation stimulated the Ghent researchers, *Vander Beken* and *Defruyter* in their paper *Measure for measure* to approach the organised crime concept from a risk–assessment based methodology.

Important components of this approach are the crime–enterprise and the criminal market, notions adopted from Smith (1980), almost twenty years ago. The area of application of this approach does not stop at the ‘traditional’

underground market of prohibited substances and services, like illegal drugs, gambling and sex, but also include organised business crime, providing legitimate goods and services. It is less directed towards ‘hunting Mr. Big’ than to addressing the ‘task environment’ in which crime-entrepreneurs operate. Methodologically the authors advocate a systems analysis, which should unravel the interdependences between criminal groups and the entrepreneurial surroundings.

Cautiously, the authors warn about the methodological problems of measurement, especially when it comes to quantitative measurement. Instead, they suggest a Risk Assessment Relationships, which plots the field of risk: ‘intent’ and ‘capability’ which imply a ‘threat’ to inflict harm, for which reason they constitute a form of social risk. The assessing of this risk is a complex multi-disciplinary task, which has been undertaken not only by the authors, but also in Australia. The Queensland Police Service developed an illicit market scan, not only for description, but also to determine where market conditions can be altered. Examples are also provided of a licit market scan by means of a sector description, environmental scan (macro level) and reference model (micro level).

Despite the undoubted value and innovativeness of this approach, many questions about the measurement problems of the organised crime concept remain open. This is not surprising as they include a plethora of concepts which each in their turn need to be defined in operational terms. What is ‘likelihood’? And how to define the behavioural attitude ‘intent’? Introducing new, undefined concept to clarify a phenomenon usually renders the phenomenon more shadowy. Apart from this flaw, which is difficult to mend, the concept of organised crime itself does not become more clarified than before. Actually, does one really need the concept of organised crime to apply this risk analysis approach (with all its defects)? And where the authors use the ‘OC-word’, it appears as a positively proven ‘being’, before it has been proved in the first place.

Given this observation, the scientific principle of *parsimoniousness* would require to drop this theoretical concept altogether. Indeed, the first book on ‘organised crime’ in the Netherlands used that phrase only once, so that the reader was informed about the scope of the study. Subsequently the term ‘*crime-enterprise*’ was used, as that time the author foresaw Medieval monkish,

Aristotelian discussions.<sup>3</sup> Dropping the ‘OC’ term and inserting ‘crime-enterprise’ did not create any confusion (Van Duyne et al., 1990). Nevertheless, the Ghent approach is valuable: it provides a method to obtain more insight into social threats stemming from criminal entrepreneurial conduct in illicit and licit markets, ranging from drug peddlers and Parmalat fraudsters.

Analytically we do not need the fear-name ‘organised crime’, at present extended with the additional fear-arouser ‘transnational’. Still, the word lingers on. Maybe we tacitly love scary concepts, even in the behavioural science, which explains why all textbooks on the philosophy of science or methodology make little impression. The abundance of mainstream literature confirms that methodological impression: the existence of organised crime is simply taken as proven, after which the authors set out industriously to draft a definition. Indeed, few know how to wield Occam’s razor, a skill we can witness in the analytical paper of *Klaus von Lampe* about *Measuring organised crime*. This author, having applied that philosopher’s tool before (von Lampe, 2001) displays little patience with scary foggy concepts exploited by the media or other interested persons. He first determines briefly what measurement is about, which approaches the axiomatic set theory. That is a strong baseline, to which were added the requirements of operationalisation, which hinges on a clearly determined *construct validity*. The latter requires (a) logical connection(s) between component (each defined) and with respect to contents, semantic coherent relationships. Next comes the essential test: predictive validity. Of any random sample of observations the operationalised concept must at least be able to predict whether these belongs to the set of the denoted phenomenon. From the theory around the construct also testable predictions about future or as yet unknown states of affairs should be deduced. That is how behavioural science works (De Groot, 1961). The elaboration of von Lampe’s paper indicates unambiguously that the theorising about organised crime is still far removed from these methodological principles. The author gives an example of decomposing the concept, for example he wonders what

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<sup>3</sup> See Van Duyne (2003), thirteen years after this observation. There is much Platonic reasoning in the assumption that a name (organised crime) refers to an entity, like ‘horse’ was supposed to refer to a real ‘horseness’.

the meaning and function is of 'hierarchy' of a crime group, when its nature and impact on society is ambiguous. He concludes that there is not a theory from which (a) to determine the nature of a supposed hierarchy as a composite concept and (b) to determine its effects.

Von Lampe's subsequent discussion of two approaches to the measurement of organised crime teaches us that their underlying methodological fallacies prevent us to take their outcomes at face value. This does not mean that the efforts to 'map' organised crime does not lead to some valuable results. The German Bundeskriminalamt designed an ambiguous valuation system by means of which the organised crime cases, investigated by the organised crime units, were ranked according to 'organised crime potential'. The complexity of this construction almost guarantees methodological problems: the concept comprises three components (level of organisation, sophistication and professionalism) measured by means of 50 indicators, rated by the police investigators themselves (an undiscussed source of bias). The weighed indicators are subsequently added up, the highest score being 100 points. What inferences can be drawn from this very refined rating system? The indicator 'hierarchy' ranks high, but why should that imply a higher 'organised crime potential', when for many crime-markets network relationships are more successful?<sup>4</sup> And what is the point of ranking 'internationality' so high, when for some commodities the only profit opportunity is the price difference between countries? The German examples of high ranking organised crime areas, which von Lampe quotes, are therefore little surprising. These were environmental and other business crimes. These are committed in a corporate setting, in which there is always a hierarchy. In cases of import and export there are customs violations, while the criminal bookkeeping invariably implies money-laundering and tax fraud. These indicators usually entail each other and being interactive they should be clustered and not added. Such business crime cases also lead to very skewed distributions. Business crime is an on-going affair generating a multitude of repeated offences, while wholesale drug smuggling has to be planned and carried out for each single project, which reduces the number. Thus, fraud cases with 50.000 to 100.000 offences were mentioned.

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<sup>4</sup> On network theory approaches to organised crime: see Von Lampe (2003), Morselli (2001), Desroches (2003) or Paoli (2000).

To this must be added that the scores are dependent on the time and resources of the police to investigate a case. The more time and resources, the more information, which entails more offences and indicators leading to a higher ranking. Von Lampe does not conclude that the BKA reports do not contain valuable information, but methodologically they cannot be used for the (quantitative) inferences they aim to present.

In the second approach, the Ghent risk based analysis, von Lampe also detects various analytical and methodological flaws. I mentioned already some of them in the section above, like taken as proven what yet has to be proved, like ‘organised crime group’. Von Lampe also indicates the opposing of organised crime to the rest of the (victimized) society. Organised crime develops also in the board chambers of the business elites: ENRON, AHOLD, PARMALAT and the Dutch top building contractors, which are now prosecuted for participating in a criminal organisation (Van Duyne and Van der Landen, 2003).

From the elaborated discussion of typologies of organised crime models and of criminal networks makes we may deduce that we are following the wrong tract altogether. The author agrees that the models are too divergent for making generalisations. Also the organised crime networks appear to be too heterogeneous to allow a single theoretical umbrella. This means that a proper, valid operationalisation from which also a typology must be deduced, is in principle impossible: after all, designing a typology is measuring too, though at a nominal level. If we cannot deduce any classification from a theory, we need to break up the organised crime discourse and look for specific topic-based smaller theories. That is the way experimental behavioural science works, heeding the principle of parsimony. In experimental psychology, no one shed tears over the old all-encompassing theories about the mind or the human being. When they proved to be unfalsifiable, they were simply abandoned as redundant.

Such a chilling analytic dissection of the organised crime concept and related approaches, will find little applause. Policy makers, as problem owners and fear managers, may be concerned about the undermining of their ‘possession’, while scholars may face reduced funds for research. Indeed, such an analysis may be a too good antibiotic to organised crime fear, which is perhaps secretly cherished.

The scholarly craft of analytically chilling what people feel as fearsome (or what policy makers want them to be afraid of), should not distract us from real threats by crime-entrepreneurs to the interests of society and individuals. One of these serious threats is described by *Vesna Nikolič-Ristanović* in her contribution about *illegal markets, human trade and transnational organised crime*. The trafficking of humans from or through the Balkan countries, is directed to Western Europe where it constitutes a sub-section of the underground economy. That underground market is not isolated, 'down there'. As a matter of fact it is well connected to the upperworld by providing cheap labour and frequented by many respectable citizens looking for sexual services. Inside the Balkan the smuggling or trafficking (which should not be equated) of humans is embedded in a wider informal market which was expanded after the break-up of the socialist regimes and the last 'Balkan War'. The ensuing economic and political liberalisation took its toll by loosening controls and thereby taking away the protection against the exploitation of the weaker elements in society. Some got adrift in search of a better life and ended in the hands of traffickers.

It is a commonplace that work creates work, which is equally applicable with the adjective 'criminal'. To get people illegally to a destination, much preparatory and supporting work and has to be carried out, like transport, temporary lodging or the forging of identity papers and residence permits. These services can be observed around crime-enterprises, that form the axis of much improvised wheeling and dealing.

Despite *Nikolič's* concern, it should be realised that we are dealing with an old phenomenon, at present described within the new semantic framework of 'organised crime'. For example, the American British colonies, and later the young United States, were provided with new worker by means of the system of indentured labour, which frequently came down to virtual slavery of kidnapped orphans. A similar policy was adopted by the Dutch administration after it abolished slavery in Surinam (1863), which created a labour shortage. To keep the plantations going, thousands of Javanese and Indian people were 'contracted' to Surinam, which proved to be a one-way ticket into bondage on the plantations. This relates to our methodological question: given this and similar phenomena, at present criminalized, how much is our understanding enriched by placing them under the conceptual umbrella

of ‘organised crime’ (now embroidered with ‘transnational’)? Or is that only instrumental in arousing the awareness?

The study of *Miroslav Scheinost* about *financial crime in the Czech Republic* introduces us into a criminal landscape, which usually has remained a case of borderline attention within the organised crime discourse. Does it matter to include business crime within this discourse? (See Levi, 2002a) Should the Czech financial and business crime be qualified as ‘organised crime’, even if the author does not even use the term? It must be admitted that the heterogeneity of the set of ‘organised crime’ will be enlarged. If we look at Scheinost’s interesting sketch of the characteristics of the financial offenders, we find megalomaniacs, manipulators and ruthless adventurer-entrepreneurs, next to naive ‘light hearted’ and ‘sportsmanlike’ perpetrators, but few of the unsavoury characters usually presented in organised crime narratives. The types of perpetrators he identifies all have legitimate business backgrounds and cannot be considered as specimens of ‘organised crime penetration’. Nevertheless, under the BKA definition at least the first three types can be qualified as ‘organised criminals’, though such a qualification would hardly add anything to the substance of Scheinost’s paper. If we want to use the organised crime paradigm at all, it appears to be applicable to the criminal conduct in the very board rooms of legitimate companies headed by respectable captains of industry. Their crime schemes wreak havoc on thousands of households, wiping off savings and pensions of numerous victims.

From the perspective of our theme it is interesting to observe that this form of crime has never been targeted for ‘fear management’ by organised crime problem owners. Indeed, there are not many problem owners in this area who strive for awareness raising by subsuming it under the organised crime banner. Measured according to the financial losses or the number of victims, the victimization rate in the drug market may pale into insignificance, though. The reason may be that the financial-economic crime is so close to us. In this regard Scheinost indicates at the ‘social nursery garden’ around high level financial crimes: the victims’ greed soothed by their gullibility; condoning colleagues around the perpetrators; inactivity of legislators; the tacit support of accountants looking at the wrong direction and the covering-up by all who haven been negligent in their control tasks (frequently the banks involved). These respectable persons, standing idly by while allowing so much so much

to happen, may be our neighbours (Levi, 2002b). Sure, that does not ‘feel’ like organised crime!

Indiscriminately ‘killing savings’ may be shocking, but is of a different magnitude than indiscriminately killing people, which is the frightening core of terrorism. At first sight the shocking events of September 11 did not need any fear management: the dramatic event spoke for itself. To a certain extent that is correct, also in the sense that much of the negative, fear arousing imagery of Islamic fundamentalism did not need to be shaped. It was already there, deeply ingrained in the consciousness of ‘the West’. In the post-modernist essay about *Islamic fundamentalism and Western horror*, *Marinos Diamantides* penetrates this imagery and raises the question to what extent we are afraid of recognizing traits of fundamentalism in our own Western society, which may underlie our fear of the (Islamic) ‘other’.

Declaring a War against (Islamic) Terrorism does not contribute much to mutual understanding, certainly when it leads to neglecting other aspects of Muslim history. For example, while in Europe the stakes were for centuries the common response to religious dissidents, the Islam showed unrivalled tolerance towards other religions of ‘the Book’. The author underlines the plurality within the Islamic religion, in which there is no pope to determine the only ‘canonised truth’, but a plurality of competing interpretative traditions. Some of these interpretations are religiously fundamentalist in the sense that they reject the rule of (secular) law to regulate social behaviour and argue for a ‘servitude’ of and submission to God. One of the authors, which *Diamantides* discusses, points at similarities with forms of Jewish and Christian fundamentalism.

An important angle for approaching fundamentalism is the relation between the secularised ‘state of law’ and religion. In Western Europe and North America, in the legislative era after the Enlightenment, legislation increasingly excluded religion, though it originated (partly) from religious values. Today the desire to maintain a purely secular state is clearly expressed by the French law, that prohibits the wearing of headscarves and other religious symbols in public buildings. Such an exclusion of religious feelings from the body politic is put forward as one of the grounds for Christian fundamentalism in the US. This is comparable to the policy in countries like Egypt and Turkey to keep (some) Islamic currents out of politics.

The author pleads for a better accommodation between state and religion, though it must be admitted that at present such an understanding does not solve the problem of fanatical young men and women prepared to act as suicide killers.

As remarked before, the shock of the Twin Towers attack did not need an immediate fear management, but much subsequent aftercare or fear maintenance. Unlike the organised crime issue, no fears needed to be evoked artificially by creating and fostering a demonising imagery. The image and fear of this onslaught on Western democracy were indelibly in everybody's mind. That eased the task of Western politicians to accomplish the next task: putting into place all legislative and law enforcement 'defence walls' against any further (Islamic) attack. Given the existing emotions in the Western community, the authorities and legislators had fewer obstacles to overcome civil rights inspired counter-arguments. After all, they, the authorities were the guardians of democracy now and those 'who are not with us, are against us'.

Regarding this point the paper of *Nina Peršak* about the *defence of (liberal) democracy* raises a number of intriguing questions. In the first place she reminds the reader of the fact that the state has the only legitimate monopoly of violence, though it has a long history of abusing it. In the second place, in deploying its powers for waging a *real* war against international terrorism, it still needed a public relations management to convey that any civil rights infringement, domestic or abroad, is justified on behalf of 'defending democracy'. The accompanying rhetoric reflects the basic feelings and nationalist orientation: *we* (the US in the first place) are the defenders of democratic values. So: *you* are also in danger and *we* help you in *our* way. In doing so, civil rights which may be an obstacle in making this rhetoric real, are likely to be brushed aside without demur or critical discussion in the press. Some even feel that the civil liberty of free expression is seriously restricted, as free debate is felt to be numbed by the general belief that the media should be harnessed to buttress the US president.

The War on Terrorism entails much 'collateral damage', indeed. It blurs the distinction between terrorism and liberation movements (often using indiscriminate violence themselves) and thereby justifies 'state terrorism' in local struggles for independence or greater autonomy, as can be observed in

Palestine, Russia and Indonesia. Equally important, to sustain this war any signs of 'fear saturation' must be countered by evoking new threats or maintaining a threat imagery of the peoples from whom the terrorism originated. This leads to enduring racism and xenophobia instead of finding ways to address the roots of the threats. Being geared to fear management, few administrations have the (mental) resources to take another course.

Not all threats are as literally explosive as terrorism: some menacing phenomena 'pussyfoot' in society. Corruption is such a silent societal threat which needs an enduring awareness raising by explaining its evil. Depending on the social traditions, corrupt relationship can be so deeply ingrained that 'counter offences' achieve only temporary success. The case of Italy, as elaborated by *James L. Newell* in his paper on *corruption mitigating policies*, is an interesting example. Objectively it is a threat, however in Italy without a 'fear component'. Indignation about corruption erupted among broad layers of the population, but without official management. However, this anti-corruption wave faded out despite attempts to put structural changes into place. Were there too few problem owners to manage, foster and fan the fear?

From the many social, cultural and political circumstances that may have an influence on pursuing an active anti-corruption policy (or the reverse), the author singles out the structural characteristics of the political parties: voting by means of a 'closed list' system or by means of an 'open list' system. In a closed list system with a proportional representation, the party leadership determines the order of the list of candidates. In that case (assuming that the party leadership is not itself characterised by corrupt patronage) there is little to gain from fostering clientelism. On the other hand, in an open system voters can express their preference between candidates of the same party, which makes it worthwhile to dispense favours and create a personal following. If the open system would be replaced by the closed one incentives for corrupt relationships would be reduced. Incidentally, this perspective clarifies what fighting corruption is all about politically: winning elections. From our *Leitmotiv* this is an interesting point, for despite its reprehensibility or its assumed connection to organised crime (a recognized 'fear factor'), in Italy fear appeared *not* to be the driving force, but rather the balance sheet of winning and losing votes. The globally well managed fear of organised crime corrupting its way to and within the underworld, due to the supposed billions

of laundered crime-money, apparently played no role in this Mafia ridden country regarding fighting corruption. The question at stake is banal and cynic at the same time: will the gains by advocating anti-corruption reform be larger than the loss from that part of the disenchanted constituency that benefits from the continuation of the corrupt patronage system?

Given this candid power-profit perspective the course of the Italian anti-corruption history is less amazing than it seems of first sight. After the fall of the Berlin wall and the Maastricht treaty, entailing that the cost of bribes could no longer be financed by increasing the public debt, popular discontent at the incapacity of the established parties set in. Public Prosecutors felt freer to investigate corruption and the ensuing scandals led to the implosion of the prevalent party system. Did a subsequent crusade against corruption emerge, as the IMF proclaims for any other country but the industrialised nations? No, as Newell describes, the measures taken were either few or ambiguous. Many measures were rather designed to streamline the unwieldy bureaucracy with the reduction of corruption opportunities as a side-effect.

In the end, the fight against corruption never got unambiguous high-level political support. From electoral point of view, there was little to gain from making the fight against corruption a campaign issue, because the voters hardly shifted their allegiance. Instead of a positive fear management the administration under Berlusconi opted for denouncing the judiciary and had legislation enacted on behalf of his own criminal procedures. The protest against this dubious conduct was little more than a passing demur, hardly wrinkling the political water. In this political and cultural climate, actions against corruption came slowly to a standstill. The institutional change of the electoral system apparently did not work. With so many beneficiaries of the spoils of corruption, and with no high ranking problem owners able to maintain an effective fear management, the outcome was completely different from that in countries in which such management was carried out with proper determination and perseverance.

This outcome still leaves us with the open question of the nature of corruption. *Matjaž Jager* addresses in his analytical paper *In the quest of essence* the meaning of corruption. The basic model, as eloquently described by the author, is the *principal-agent-client model*. It means that a boss (the principal) cannot do and/or control everything and has to delegate tasks to staff, the

agents, while leaving them a certain degree of discretion. This delegation is a matter of balancing trust versus distrust. Full trust with broad discretions is a sure road towards corruption. Full distrust with stiff controls leads to inflexible working relations in which no one dares to take decisions. Given this balance, the agents may abuse their discretion or a client may seduce the agent to do so. In daily life the simple model can develop into a ramification of relationships, as principals can be agents themselves, while agents can be employed by various principals.

The principal agent–client model in its elegant simplicity has some problems of general validity. This is particularly the case in politics and private industry, in which (a) the principal may be difficult to identify and (b) decision rules are often vaguely described. Who was the principal of chancellor Kohl, who accepted millions Deutschmarks of undeclared party funds? And what about an entrepreneur who issues false invoices against 10% of the invoice sum? Here we need to have recourse to a kind of abstract ‘deus ex machina’ in the form of an abstract agency: the trust of the constituency, the public interest or the citizens. Such a ruse stretches the principal–agent model. Nevertheless, breaches of trust by acting against (the spirit of) decision rules for own or a third party’s advantage should not be left out of the orbit of corruption or put into another ‘parallel’ model of corruption.

At this level of corruption we meet its most serious manifestations with the greatest impact on the rule of law, as can be observed in the case of Italy. The way it is addressed also sheds new light on our *Leitmotiv*: the power play of/within the fear management. The rhetoric of the European Council of Ministers in the Finnish Tampere in 1998, contained a clear signal: *we* are going to fight crime, *organised* crime in particular and *transnational* organised crime above all, because, among other evils, it *corrupts* society. From these high-sounding, lofty aims the consequences for the member states are unevenly distributed, depending on their power status. Despite the big Mafia scare during the early 1990s, today nobody seems to be afraid of the present corruption situation in Italy, reopening a door to organised crime. Has the Mafia, the fear of it or both been managed away? Maybe, but few will believe in the disappearance of the Italian Mafia. Irrespective of that contingency, the political management tools to argue for more repressive law enforcement remained in place. Pressure to that effect is for example not applied to Italy,

but to candidate member states. As newcomers they have to accept the spill-over from other threatened interests, like the European finances. The results of such a 'fear spill-over' are critically discussed by *Katja Šugman* in her *critical analysis of the Corpus Juris and the Green Paper*.

European policy makers are unanimous that the European Union faces threat from all forms of law breaking: organised crime, corruption (sic: see the case of Italy), crime against the EU finances etc. This requires strong measures which should make law enforcement more effective and efficient. To this end eminent jurists drafted a *Corpus Juris*, which introduces a framework of criminal procedures for eight economic and financial offences, which infringe on the financial interests of the EU (Vermeulen, 2002). A cornerstone within the proposals put forward in the Green Paper is the European Public Prosecutor (EPP). As a kind of pivot he will be endowed with far reaching powers, which are greater than in some (candidate) member states, like Slovenia. Not everybody is happy with this new role, whose proclaimed efficiency is doubted by some critics. However, once a position in the fight against (EU)-crime has been adopted, one soon faces a non-negotiable issue. The author correctly points at the strange finding, that Slovenia emerging from a socialist state embraced the principles of human rights and the equality of arms in criminal procedures, but now find its achievements overruled, on behalf of the 'higher aims' of protecting EU-finances. She points at the proposed mutual admissibility of evidence. This enhances the powers of the EPP, but what about the defendant and the principle of equality of arms? The powers of the EPP are clearly laid out. The rights of the defendant are only covered by some references without explanation of how these may be upheld. 'Is this all justified by the (official) fear of the almost mythical EU-fraud?', the author wonders. She points correctly at the logic of 'special crime calling for special measures (...) conveyed to us by 'compelling logic''. The nature of this compelling logic is well known from the fear management related to organised crime or money-laundering: 'If you oppose our firm measures, you further the organised crime threat'.

This was the way how the debate on organised crime was numbed in the Netherlands, the US and elsewhere (Von Lampe, 2001). It should be realized, that successfully numbing a debate means that the actor who succeeds in doing so has a power position. So, we have come full circle from where we started

this introduction. Fear management is about the exertion of power, by finding the right sounding names and recognizable imagery as tools. To achieve that, one does not need *knowledge* of the relevant phenomena. 'Knowledge is power' is not a generally valid adage. Some scholarly knowledge about the extent or nature of the presented threats 'chills' the feelings aroused to obtain support and thereby weaken the power of the (assumed seriously) concerned problem owners involved. Like the God of the Old Testament, those in power will ordain: thou shall not eat from the Tree of Knowledge. No surprise that research on organised crime and corruption remains underfunded.

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# The creation of a threat image

## Media, policy making and organised crime

*Petrus C. Van Duyne<sup>1</sup>*

### Perception and stimuli competition

There is a strong similarity between the functioning of the media and the adage of the English philosopher Berkeley: ‘to be is being perceived’ or ‘*esse est percipi*’. This subjective approach to being and knowledge has been commented upon ever since (Warnock, 1969). Apart from the philosophical controversy around the nature of knowledge and reality, perceptions determine the social and psychological reality to which we respond. This is a truism, but an important one, because it leads us to the role of the senses, which cannot be neglected if we intend to describe the social reality in which we live and interact. This does not only apply to the individual, but equally to a whole community, which is likewise dependent on ‘eyes and ears’ through which the stimuli of ‘reality’ enter the collective awareness.

Given the simple fact that we can only observe a small slice of reality, a significant part of the daily perceptions are determined by other ‘eyes and ears’, particularly the press and the television. They determine to a large extent what will be perceived, though not directly. The individual senses differ from the public eyes and ears, because the latter deliver impressions, which still have to be ‘bought’ by the end users, the public. This usually entails a highly competitive selection process with a loss of much information simply because

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of limits in space and time. Moreover, if the individual human has a (protective) capacity to prevent impressions to 'enter' the conscience, impressions handed to him by other actors stand an even higher chance of being neglected or actively filtered out. In addition to this, there is a multitude of impression or news offering 'public eyes and ears' from which to choose.

The potential large stock of 'news', a limited space in terms of paper and time and the natural selectivity of the news consumers force the 'news maker' to ask himself daily: 'Will my selection of news reach a sufficient number of consumers?' The answer may be determined by a mixture of his hypothetical image of his news consumers and their feedback in terms of their buying behaviour. The latter is itself determined by what psychologists call the stimulus sensitivity: strong and crude news stimuli penetrate stronger and stimulate better purchasing behaviour than subtle ones. After all, *Bin Laden* sells better than a recently detected *Rembrandt*.

Within this rough and well-known framework, not intended as a summary of a social psychological theory of the news media, I will describe the interaction between the media, the agencies of law enforcement (police and public prosecution) and policy makers concerning the phenomenon of organised crime. I will focus on the recent history in the Netherlands, when from about 1986 till 1993 interested parties made every effort to get the stimulus 'organised crime' well above the awareness level of political decision makers and the public. In 1993/94 a scandal about improper police methods broke out, which changed the until that moment describable interactions into a different psychological climate with a hotch-potch of heated accusations, denunciations and suspicions.

### **The media seduction of organised crime**

Crime, particularly its more violent manifestations, is a stimulus with a high seductive value to make one shiver and thrill. The organised variety of crime guarantees even more excitement and sensation, for which reasons it has a higher seductive potential. This is not merely an abstract proposition, but something which in a very tangible way directs and maintains the media

attention. The seduction also applies to the harbinger of the organised crime news items: he is almost always assured of media attention.

Even if this interaction is centuries-old, it remains fascinating to observe how this mutual seduction hardly ever fails to be effective in creating long lasting collective memories. The Medieval monks duly copied Bede's description of the Great Army (*micel here*; Blair, 1970) of the many thousands of Vikings, who threatened the North-sea coasts, while the tonnage of the small druggers did not even have the transport capacity for such an achievement. Another example is William the Taciturn, who in his apology accused Philip II of Spain of having killed his feeble minded son. This has entered the history as the 'black legend'. Given this ancient 'news building', it would have been almost a miracle if the reporting of the organised crime issue would have been carried out with the cool eye of a hypothetical 'clinical' observer and processed by a critical audience.

A short review of the recording history of organised crime in the USA reveals a fascinating interaction between the media, law enforcement agencies and the public, which does not differ much from the historical examples mentioned above. The successive committees on organised crime, either convened by the Congress or the presidents Nixon, Johnson and Reagan, were publicity feasts, creating vivid memories of the Cosa Nostra (Abadinsky, 1991; Von Lampe, 1999, 2001). Important for the 'image building' was the testimony of the organised crime figure Valachi, which made history indeed. This lower rank soldier of a New York mafia-family, who could hardly look over the fence of his own neighbourhood, received exorbitant attention. He was considered the man 'who really knew' and every word he spoke obtained the aura of authority.<sup>2</sup> In particular the saga of the so-called 'Castellammarese War' in 1931 has acquired an authentic place in history. In this 'war', in which the old mafia boss Maranzano had his rival Masseria killed, after which he was eliminated himself by the more modern thinking Luciano and his associates, some 40 other old style mafia figures would have been slain. Nelli

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<sup>2</sup> The following situation was characteristic for the awe with which he was approached. Senator Curtis asked him about the organised crime in Omaha. Valachi turned to the official next to him and whispered something. Everybody thought that the question touched a sensitive point, for which he needed consultation. As a matter of fact he asked: 'Where the hell is Ohama?'

(1976) sifted through all the news papers of September, October and November of that year and found only three related liquidations in New York. It is uncertain whether this refutation also got a place in the organised crime history and was subsequently ‘perceived’ by the public opinion. Two years after this publication the *New York Times* still mentioned the historical ‘fact’ of the Castellammarese war.

More recently Russian organised crime has obtained a high level news value. Its strength and extent (in the mid-1990s some 8.000 criminal organizations have been recorded), as well as its supposed threat to Europe and the USA has been enlarged upon. The journalist Claire Sterling topped this threat by describing an even more sinister scenario: an alliance between the Russian and Italian mafia, which has been decided during a ‘top summit’ at Prague in 1992. ‘Delegates’ of the two organised crime syndicates would have agreed upon a kind of ‘*pax mafiosa*’, which was revealed by the Head of Interpol a year later at a police conference in Aruba (Sterling, 1994). It was a thrilling revelation, which is widely believed. However, Williams (1997) provided well founded reasons for the absurdity of this proposition: what is the meaning of ‘delegation’ with such fragmented and mutually warring criminal organizations; who would speak and act on whose behalf? Such a nuance is relatively powerless to the evoked image of the spine-chilling threat of a world wide octopus of evil, even if (some of) the producers of such news were aware of its falsity (Rawlinson, 1998). As Rosner (1995) formulated it earlier: Russian organised crime is sexy and people prefer to hold on to the gruesome image. A fact based moderating adjustment of such a threat image fall flat or is explicitly resented and resisted.<sup>3</sup>

Though these observations do not apply to all those involved and under all circumstances, the seductiveness of the organised crime theme enhances the likelihood of keeping or raising the awareness by making the phenomenon more creepy. On this point the agendas of the politicians, law enforcement

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<sup>3</sup> The author experienced a similar persistence in untrue reports, when during the mid-1990s a press report mentioned that the ‘Russian mafia’ or all kinds of shady Russians were busy with the acquisition of numerous expensive houses in London and South England. Directly inquiring with the National Crime Intelligence Service the author was assured that the purchases were mainly in the lower price ranges. The question whether this report would be corrected evoked the snappy answer: ‘Certainly not’.

agencies and the media converge. Their shared interest is a *big* social and law enforcement problem. One may call them interested ‘problem owners’. On the one hand there are the law enforcement problem owners, who –like every owner– cherish their possession while they tend to enlarge it, certainly not silently. On the other hand there are the media, which have an interest in selling newsworthy, i.e. exciting stimuli. This natural interaction around a shared interest will be elaborated in the next sections.

### **To seduce and being seduced**

The previous section indicated briefly the formation of the image of organised crime in the USA. Also in Europe the police, public prosecution and the media put the supposed phenomenon of organised crime as a *threat* image on the political agenda. This happened notably in Germany, the Netherlands, subsequently in the UK and then the Council of Europe and the European Union. In the first two countries this happened in the course of the 1980s. During this phase the initiative was taken by a few worried police chiefs, whose warnings were met by disbelief. Hence they set themselves the clear task of convincing the higher echelons of the police, public prosecution, policy makers and the politicians of the looming threat coming from organised crime against society. Subsequently, in the Netherlands as well as in Germany, the media played an important role in conveying the intended perception to the public and the political arena.<sup>4</sup>

In the Netherlands the debate on organised crime unfolded somewhat later than in Germany. It was first mentioned in the year 1985 in a policy paper of the ministry of Justice, ‘*Society and crime*’, which was about frequently

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<sup>4</sup> The German debate on organised crime started in 1973. The peaks of the media coverage went parallel with the debate in the police forces, later followed by some investigative journalists, like Behr (1985) and Lindlau (1987). According to Von Lampe (2001) the media also followed the contents of the police representation of the problem, which contained some degree of mafia connotations, until the BKA definition of organised crime dropped the classical mafia feature of a criminal hierarchy, like capos, dons and the like. This may have been less attractive to sell as ‘news’ and the media continued their ‘mafia track’.

occurring common crime. A small section was devoted to the importance of attacking wholesale drug trafficking. Another creator of the organised crime problem was professor Fijnaut, who on the one hand stated that we did not know anything about this phenomenon, but on the other hand warned against its immanent threat (Fijnaut, 1985; 1989). His warnings found little response at that time.

Under the influence of the prosecutor-general, Gonsalves, and the Amsterdam police force this would change. Gonsalves, a determined crime-fighter, became in 1987 the chairman of the 'task group Gonsalves', which had to deal with 'serious, organised crime'. This task group established a working group 'Crime Analysis', which got the task to make a quantitative national overview of the phenomenon. This task was carried out in 1988 by the National Detective Information Service, which sent the local Crime Analysis Units a questionnaire. In these questionnaires the officers had to rate the crime groups in their districts according to a number of distinctive features, usually based on *soft* information. According to the response there would be some 200 crime organizations, three of which were rated as 'highly organised'. The methodology and the presentation of the organised crime picture were very contestable.<sup>5</sup> However, a debate on the merits of this survey could not unfold as the report remained classified, though the contents and conclusions were immediately leaked to the media and broadcasted at prime time in the 8 o'clock news.<sup>6</sup> The tone was clearly set: we do have a really big organised crime problem in the Netherlands, against which firm action has to be taken.<sup>7</sup> The tone was amplified by the police as well as by two investigative journalists.

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<sup>5</sup> As a matter of fact, the number of 200 concerned the number of returned questionnaires, which were subsequently presented as crime-groups, which were then associatively elevated to organised crime.

<sup>6</sup> It was not 'really' leaked as the chairman condoned the conveying of the findings to the media. This was against the opinion of one of his senior prosecutors, who was the chairwoman of the working group crime analysis during six years. In a conversation with the author she qualified this 'leaking' as misleading, an opinion she also voiced in an interview with the newspaper *NRC-Handelsblad*, November, 3, 1993. That was to no avail.

<sup>7</sup> For the Research and Documentation Centre of the Ministry of Justice this course of action was embarrassing. It was said that 'The Research Unit of the police has won this battle' and has 'appropriated this issue'.

One journalist was permitted by Gonsalves – against the will of public prosecutors of the organised crime units – to snoop around in the criminal files of Turkish heroin wholesalers (Van der Roer, 1989). The focus of attention of the other journalist as well as of the Amsterdam police was the then Dutch ‘Mr. Big’, *Bruinsma*. This was a well-educated intelligent crime-entrepreneur, who succeeded with brains and violence in conquering a dominating place in the hash market (Middelburg, 1992). The Amsterdam organised crime unit produced impressive organization chart of this crime-entrepreneur, which were presented to numerous top-brass of the police and public prosecution as well as to parliamentarians. As a matter of fact these presentations contained a number of errors, which were known to the police at that time. For a sharing of ‘knowledge’ this misinformation was not considered objectionable.

This elaboration does not support Fijnaut’s claim that the media did not seriously respond to the issue of organised crime (Fijnaut et al., 1996). The point at stake was whether there was a sufficiently developed *collective* threat image that could be translated into a desired policy approach. The road to such an approach is usually long, though the initial impetus was already given. For example, in 1987 the report about the *Financial Aspects of Serious Crime* had been issued, in which proposals were made to recover the profits of crime. In addition, the (erstwhile) chief inspector of the Amsterdam police force saw his dream come true with the establishment of an inter-district detective unit of 60-90 officers, which had the prime target of bringing the organised crime figure Bruinsma to justice.<sup>8</sup>

Obviously, the police did not only want money and large organised crime units: many detectives hoped for some spectacular incident, which would induce the public opinion and parliament to pressure for more investigative powers. From this perspective the notorious kidnapping and murder of the brother of one of the captains of industry at that time had a disappointing ending. ‘If that had been carried out by an organization instead of a

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<sup>8</sup> Using the traditional police methods of surveying and telephone tapping the unit, instead of a more analytical financial approach, performed little. The problem was solved by the underworld itself: Bruinsma was killed summer 1991.

psychopath, we would have got everything (investigative powers) in the cupboard', was a complaint uttered to the author by the Amsterdam CID. The seduction of the police towards the policy makers, the media and the politics did bear fruit. The attention for organised crime increased, a result to which also the tireless activities of Fijnaut contributed much. For example, he organised the 'Dutch-American Conference on Organised Crime' in 1990, an event which he himself proclaimed a 'watershed' in the way of thinking about organised crime (Fijnaut and Jacobs, 1991). Nevertheless, irrespective of the contents of this thinking or the nature of the seduction, there was still no clear idea of what 'organised crime' was supposed to mean. The concept of organised crime was (and still is) obscure (Van Duyne, 1996; Klerks, 2000; von Lampe, 2001; Paoli, 2002), which did not prevent the developing of political driving power to put the organised crime menace on the agenda of politicians and policy makers and to alert the public.

In connection to this drive the working formula for the public prosecution and the police to set up special units was '*heavy/organised*' crime, the word 'heavy' denoting the crime committed by the traditional violent underworld, which was also the orientation of the media. This would not remain without consequence: organised *business* crime would only receive attention as *organised* crime when there was an involvement of 'heavy' criminals, the 'usual suspects' from the underworld.

If the time span till 1991 can be characterized as the era of seduction, in which strong measures were taken to arouse attention for this phenomenon, after the killing of Mr. Big Bruinsma there was no longer any need for seduction. The public attention had obtained the required impetus of its own and would reach extraordinary dimensions during the following two years. Brants and Brants (1996) described 1993 as the climax of this development. After January 1994 the interaction concerning the presentation of the organised crime image became obfuscated due to an affair between police units and the police commissioners of Amsterdam and Utrecht, the so-called IRT-affair. There were suspicions, jealousy and denunciations between the commissioners, the minister of Justice and Internal Affairs, the chief public prosecutor of Amsterdam and the police, until the orgy of organizational and personal fights led to the dissolution of the special organised crime unit and to a Parliamentary investigation. The elaboration in the following sections will therefore end

with the onset of this affair. It will be based on the press documents of the Ministry of Justice.

It should be noted that the number of persons involved in the creation of the image of organised crime was actually very small: just a handful of reporters who 'sniffed around' everywhere to find out whether there were interesting, 'nice' stories. Also the number of officials was not large, even if it became slightly larger over the years. A small number of scholars formed the third party in this ever more intriguing interaction.

### **The creation of a threat image**

Interesting, newsworthy stories do not necessary lead to a contribution in policy making in the fight against crime. To achieve there must be a *threat*, a big one, to the society to get all the parties involved in the same direction and to overcome resistance. The 'heavy' crimes, which are committed in an organised way, may be serious, but still fail to arouse a real, *experienced* threat. To evoke such an experience a fictitious border must be crossed: the border between upperworld and underworld. However, in this regard there is a chronic shortage of facts: very few organised crime *underworld* figures are actually spotted in the upperworld. As far as the Netherlands are concerned this state of affairs has not changed (Van Duyne, 2003).

Fortunately there proved to be an almost literally 'golden' key to make the threat story plausible after all: the *big crime-money*. Despite the absence of organised crime figures having intruded or being about to penetrate into the upperworld, the problem-owners could refer to the assumed financial strength of organised crime. As most people know little about finances and financial manipulations are shrouded in mystery, the image of wealthy criminals corrupting greedy politicians and other untrustworthy high mighty people strongly appeals to the imagination and facilitates the creation of the threat image. Thus it happened. Whereas the 1987 report on the recovery of the criminal profits was based on the legal principle of the *restoration of justice*, the gathering moral 'panic' about the 'march of organised crime' to the upperworld was based on sheer hypothetical numbers. The *Financial Action Task Force on Money-laundering*, established in 1989, played a key role in fanning

this scare. In its report, issued in 1990, the FATF described the threatening situation the (industrialized) world faced. The turnover of the worldwide drug trade was estimated at \$ 300 billion of which \$ 85 billion would be available for money-laundering in the USA and Europe. Just note the subjunctive 'would be', which was soon interpreted as 'is'. A year later the consultancy firm *McKinsey*, not having any experience in the field of crime and law enforcement, reported about the safety situation in the Netherlands. The report estimated that the Dutch turnover of the drug trade, arms trade and illegal gambling would amount to 10 billion Dutch guilders (€ 4,5 billion).<sup>9</sup> Though the foundations of what became accepted as 'facts' was shamefully poor, the *Leitmotiv* was set and the media would time and again go back to it. The initial amounts of crime-money would obtain its own inflation and increase to \$ 500 billion in 1997 (UNDCP-report). Obviously, with such staggering amounts of financial ammunition available to 'highly sophisticated' criminals, the threat image was clear: the 'organised crime marches to the upperworld' against which the forces of law enforcement had to wage a (preventive) battle (Heijder and Horbeek, 1991).

One can say that all the conditions for a further development of a threat were met: there was an interpretation framework, there were problem-owners and there were criminal 'data', which fitted within or could be constructed to fit within this framework. In addition there were the 'public eyes and ears', which were more than willing to make all this observable to a greedy and credulous public. It was the right chemic, which in the time span between 1991 and 1994 could lead to a heated atmosphere, in which a number of clear focusses of interest can be discerned. The first focus of interest concerned the already mentioned menace to the upperworld posed by organised crime. The second one was the relative impotence of the police and public prosecution to do something against this menace. The third focus concerned the

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<sup>9</sup> This is an interesting example of the 'myth of 10': the minister of Justice claimed that of every Dutch ten guilders one would be criminally tainted, the FATF estimated that 10% of the drugs transports is intercepted and that the business costs of the drug trade is 10%. This number, which is just as cogency as the Old Testament number of 40, was seriously taken as a starting point for policy making (Van Duyne, 1994,1993). As far as I could determine, the 10% interception rate was first mentioned in the 1930s, to be repeated ever since.

‘mobilisation of the forces’ of the police and the criminal justice system to win this ‘war’.

### **The threat image of the underworld**

The image of the threatening underworld was reinforced in 1991/92 by a number of incidents. In the first place a new confidential national organised crime survey report was –in an orchestrated way– again leaked to the press in September 1991. The methodology was again invalid and the conveyed image of the organised crime situation misleading. The organised crime situation would be much worse than in 1988: in that year there would be 200 organised crime groups, in 1991 the number had increased to 599. Though this was a case of intentional misinformation and manipulation, which was admitted a year later<sup>10</sup>, the false representation had its desired impact. In the parliamentary debate on the 1992 justice budget the Second Chamber passed a motion requesting the Minister to draft a policy plan on organised crime. The Minister responded to this motion by establishing a departmental task group, which had to draft a broad plan of action. When this task group proved unsuccessful, due to lack of expertise, the head of the Directorate of Crime Prevention, professor Van Dijk, was requested to perform this task. Informed by the police, mainly from cases which were still under investigation and which contained much soft information, the director succeeded in finalizing a draft policy paper in the early summer of 1992. To the dismay of the two responsible Ministers of Justice and Internal Affairs the draft paper leaked also to the press in June 1992.

In the first six months of that year there was only one newspaper article about the ‘grasp’ of the (organised) crime on the economic system. After the leak of the memo of the ‘top civil servant’ a wave of ‘grasp-on-the-upper-world’ articles followed. This was reinforced by the annual report of the

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<sup>10</sup> This was admitted by the police commissioner of the Inter District organised Crime Squad: ‘The number of 599 has been mentioned to attract political as well as societal attention to this problem’ (...) ‘While using the figure of ‘599’ all kinds of overlapping criminal cases have been counted as fully fledged organisations’. This admission of a leading police officer of twisting the facts in such an important policy area achieved only a tiny little article in an inside page of the local paper *Utrechts Nieuwsblad* (December 16, 1992)

Central Detective Service of the police, which under the headlines 'Organised crime thrived in 1991' or 'Heavy crime succeeds due to police failures', got sufficient media attention. A development of an autonomous mutual reinforcement had started.

The shocking events in Italy added fuel to the political fire. The murders of the judges Falcone and Borsellino in the summer of 1992 was followed by a Europe-wide fear of the Mafia 'crossing the Alps'. According to a classified (and leaked) report of the Bundeskriminalamt there were Mafia connections in Southern Germany, particularly in the pizzeria businesses. Bold headlines in the Dutch papers stated that 'the Mafia has no borders', a warning seriously adopted by some professors of criminology: Fijnaut, Schmid and Van Dijk wrote about the worrisome situation or conveyed the great concern in oral presentations. In September the quality news paper *NRC/Handelsblad* let loose in clear headlines: 'Ministers observe infiltration of the Mafia in the Netherlands', 'Cabinet sees crime surfacing in the legal economy' and 'Of every ten guilder one is criminally tainted'. The later 'observation' of criminologist and director Van Dijk that 'not the Mafia but the Camorra is active in the Netherlands' was a small 'expert' correction, but not a great comfort (*NRC/Handelsblad*, 26 September). Two weeks later the popular *Telegraaf* mentioned that the 'Justice professor proclaims the hunt on 'drug dollars' in trade and industry', in which Van Dijk referred to the dubious investigations of the FATF and the flimsy report of McKinsey. Even darker clouds were depicted by Schmid in his inaugural lecture at Erasmus University, September 1992 (Schmid, 1992). He depicted the combination of evil coming from the Mafia, Japan, South American cartels and, the newest threat, the criminal hordes from the Russian steppes. Against this background it did not make much impression that the Central Detective Service repeated its observation that the Mafia appeared to be unknown in the Netherlands.

In 1993 the media fire about organised crime in the Netherlands and its menace to the upperworld was fanned now and again. It was telling that the 8 o'clock news added a new icon when an item concerned Dutch organised crime was broadcasted: a pistol with the bullet-riddled Dutch flag, imitating an earlier symbol denoting the Italian Mafia. Focus was again on the 'grab of organised crime for the upperworld'. First of all the catering business, as far as the pubs were concerned, was declared to be in the grasp of crime

(*Telegraaf*, April 24, 1993). Later the Catering Association and some chief commissioner confirmed this image and stated that it applied to the whole sector: 'Crime in all sections of the catering business' and not only in pubs and snack-bars (*Algemeen Dagblad*, June 5, 1993). About this time in a closed meeting with young lawyers, the 'Justice professor' Van Dijk mentioned the existence of a list of the Central Detective Service, which contained 'at least ten shady barristers'. Against all agreements this message was published (*NRC-Handelsblad*, May, 7, 1993). A storm of protest from the Bar impelled the minister of Justice to reprimand publicly his top civil servant, who happened to be absent for a few days. It is doubtful whether this public rebuke could correct the reinforce image of the 'organised crime infiltration'.<sup>11</sup>

If the supposed handful of louche barristers raised already panic, the Amsterdam chief commissioner struck even more forcefully home while stating in a television interview that 'also within political parties' wrong relationships [with organised crime] are feared, though he did not want to become specific. It *could* concern a Turk, who *might* be available for the Party for Labour for a local representative body, which *could* become vulnerable to penetration by the 'Mafia' or its Turkish variety. Afterwards a conservative liberal was mentioned.<sup>12</sup> This news coverage caused a mixture of concern and indignation. The Second Chamber demanded in high tones chapter and verse. Van Dijk (1993) warned again solemnly that 'the Netherlands are sliding towards an Italian order' (*Trouw*, November, 2, 1993), but fortunately the minister could

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<sup>11</sup> Van Dijk had extracted this information in good faith from the crime-analysis of the Central Detective Service of 1991. In the questionnaire the crime-analysts had indicated whether the described crime group 'had connections' with juridical professionals. The response was based on soft information and a national score of ten 'shady barristers' (even if based on hard information) can hardly be considered worrying.

<sup>12</sup> The chief commissioner's remark was a complete blunder. As a matter of fact, during the author's investigation he and an inspector came across a barrister, who had a certain role in the management of enormous amounts of suspect moneys. Locally he was an important member of the liberal-conservative party. The chief commissioner could not have known about this case, as the two of us were the only persons informed. The top brass of the police became nervous and rank and file detectives were asked 'whether they happen to know other cases'. Finally, by referring to this barrister the inspector could save his boss, who could underpin his irresponsible statements after all (*De Volkskrant*, November 2, 1993).

declare that as far as the Second Chamber was concerned there was nothing wrong: ‘Minister: the Chamber is Mafia-free’ (*Telegraaf*, November 2, 1993). Even if in this case one could speak of the fanning of a fierce but short ‘media fire’, which was characteristic of the atmosphere of the time, the image of the threat of our financial institutions re-appeared regularly and is also still alive today. Given the dynamics of the crime-economy this is understandable. Crime trade turns around the illegal money, which must be placed or invested somewhere, if it is not directly consumed on ‘daily needs’. For that matter the regularly appearing money-laundering cases are quite predictable and generate time and again news coverage. The threat image which this yielded can best be summarized by the headline in the *Utrecht Nieuwsblad*: ‘Society is becoming a junk of crime-capital’ (May, 21, 1993). Also the stock market would be ‘attractive to criminals’, as was illustrated in the fall of 1993 by a small and only seemingly successful Amsterdam stockbroker’s firm, which appeared to have attracted crime-money for investment. As a matter of fact, it proved to be a costly financial adventure: the broker made the wrong assessments of the stock exchange trends and went bankrupt, destroying more crime-money than he laundered. The unfortunate intermediary was found dead in a burnt car. Thus far this is one of the few substantiated examples of interest from crime-entrepreneurs for the stock exchange.<sup>13</sup>

### **The investigative picture**

A threat image can lose its intensity and persuasiveness if it is not reinforced by new facts and revelations. In addition, law enforcement successes are important to make clear that ‘we are winning the war’: ‘trophies’ have to be shown to the people. In this regard some concern developed in 1990/91, because the biggest anti-organised crime investment thus far, the 60-90 detectives of the inter-district crime squad (nicknamed the ‘bunker team’

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<sup>13</sup> The author came across some (soft) information about one large investment portfolio (Van Duyne, 1995). Nevertheless, some crime-entrepreneurs do buy stocks and bonds, but the volume is very modest and concerns conservative investments, similar to most of the private buyers of shares (Van Duyne, 2003).

because of its social isolation), did not yield the desired results. The mentioned prime target, hash wholesaler Bruinsma, was not taken in and made a mockery of the police enterprise. Within the unit the detectives complained that they could not ‘score’. The depression within the unit did not diminish, when in the summer of 1991 its target was eliminated by four bullets of a fellow criminal instead of by the law. As a matter of fact, the murder resulted in a kind of identity crisis within the squad: it lost its *raison d’être*, while new criminal targets, which could meet the criminal criteria of the inter-district squad, did not present themselves. A large XTC case brought some temporary relief.<sup>14</sup> The identity crisis was subsequently solved by selecting the Bruinsma’s ‘second man’ as investigative target. He was supposed to lead the so-called ‘Delta-organization’. Afterwards it proved to be a fateful decision: in the unsuccessful chase of this ‘Delta-organisation’ secretive, ‘shady’ investigative operations were applied, resulting January 1994 in its disbandment and subsequent scandal, as referred to in the second section.<sup>15</sup>

Bruinsma (and his heirs) was not the only target of the organised crime units. All police districts had made ‘organised crime’ a top priority issue and many ‘heavy/ organised crime squads’ rounded up crime-organisations, mainly in the drug trafficking business. Apart from the regular arrests of Turkish heroin wholesalers, a special task unit of the Hague police arrested one of the most violent hash wholesalers.<sup>16</sup> In February 1992 the above mentioned *United Pill Peddlers* were rounded up. With a turnover of € 135 million and a net profit of € 45 million they were considered the largest XTC traders ever arrested. Somewhat later the large investments in the catering business of a hash smuggler trailer gang was unravelled. The investigation revealed a € 4,5 million investment in renown restaurants and pubs, which added to the image of ‘the catering business in the grasp of organised crime’.

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<sup>14</sup> The case, described in Van Duyne (1996) as the *United Pill Peddlers*, was big indeed, but would also be handled by the Belgian police, because of the paper trails of the purchase and transit of precursors and the required false invoices.

<sup>15</sup> After some time the political pressure resulted in the resignation of the Ministers of Justice and Interior and a Parliamentary Investigation. In a second prosecution the alleged leader of the ‘Delta organization’ was acquitted.

<sup>16</sup> Described in Van Duyne 1996 as ‘Boris Batterbrain’.

Despite these regular successes, no *public image* of success was created. The crime-trade continued as usual. This was explained by the assumption that above every arrested criminal organiser, there was an even bigger one, who simply continued the trade, while himself remaining in the shadow. The representation of the crime-trade as a *flat and cluttered delta* did not get adopted (Van Duyne, et al. 1990). Instead a *hierarchical delta* was assumed, which was reflected in the representation of the above mentioned ghostly ‘Delta-organization’. This image, but particularly the vast amounts of crime-money, which was supposed to be invested in the underworld (reinforced by the FATF report) kept the image of the ‘infiltration’ of organised crime in trade and industry alive.

This image was not very susceptible for corrections based on available evidence. The data of the criminal files of the United Pill Peddlers or the investing gypsies mentioned above showed that their underworld investments were smaller than reported in the press. As a matter of fact the investments were shallow, unprofessional and loss-making, a finding which hardly affected the prevailing image.<sup>17</sup> The simple reason for this omission was that this information did not reach the ‘media senses’: the police and the public prosecution did not bring it to the attention. And even if these facts were known, the reporters were busy with other news items and did not have the interest nor ‘editorial space’ for such nuancing. More editorial space was devoted to some sensational escapes from prison (among others of one of the leading Colombian cartel members Londoño, January 1992); the many prosecutorial technicalities and mistakes by the public prosecution during the trial of the United Pill Peddlers; the complaint of the head of the Central Detective Service that ‘the fight against organised crime hardly gets started’ or the mishap of the Dutch Telecom, which failed to include in its ‘\*21’ forwarding system a provision to tap the connected telephone number. This

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<sup>17</sup> The United Pill Peddlers’ attempted investment in used East German railway waggons (€ 2,25 million) was not realized, because the lot was not assigned; a sex lingerie boutique was loss-making. In the end the remaining investments were: two large sheds for cacao storage in Amsterdam, a Greek lemonade factory (value unknown) and an Indonesian holiday park for divers. Total value: € 2,04 million. The investment of the gypsies in the catering business was described by an independent accountant as a loss-making ‘toy for the gentlemen’ (Van Duyne, 1997).

was not interpreted as a management failure, but as evidence that ‘criminals are outsmarting the police’ (*Volkskrant*, July, 11, 1992). A year later the head of the Central Detective Service complained again that ‘it will certainly take three years before the police will be able to turn the tide’ [of organised crime], a remark which contradicted other more optimistic views in the same interview.

## **Mobilisation**

Amidst all the news coverage about the ‘marching of organised crime’, reports were made about the efforts of the police and the public prosecution to stem this ‘advance’. This does not only concern the exploits of the inter-district organised crime squad (against Bruinsma and his heirs), but rather the various announcements like ‘The police unifies against big crime’ (*Volkskrant*, February 17, 1992), proclamations which have been repeated in the Netherlands as well as abroad. A first token of the ‘closing of the ranks’ is the decision of the police forces of the big cities in the west of the Netherlands (Amsterdam, Rotterdam and The Hague) to unite in ‘one front’, which would later become layed down in a memo called the ‘*Randstadnotitie*’. Following the mafia-killings of the two Italian judges also a ‘ruthless EU-offensive’ against the Mafia was proclaimed. After these proclamations and some attention for the establishment of the new institution EUROPOL, it remained quiet for a while, at any rate in the media. Meanwhile the preparations for the extension of inter-district organised crime squads progressed steadily.

In February 1993 the first of a series of ‘super police’ and ‘tough approach’ reports was published (*Telegraaf*, February, 20, 1993). The coming into force of the Law on the Recovery of Proceeds (nicknamed the Pluck-them law), spring 1993, provided additional material to underline the ‘tough approach’. The Amsterdam police force invented an approach of its own in the form of a so-called ‘harassment team’ to sour the lives of the high level criminals: clamping down on every little transgression they committed (*Telegraaf*, March, 6, 1993). Whether this genius brainwave made any impact on the crime-market, history does not tell. All we know are the police raids on the exchange offices (operation *Golden Calf*), which were broadcasted live on television.

Actually, this was a ‘harassment’ to the (usually silently operating) Fiscal Police in the first place, who were unwillingly dragged into the show. Otherwise the success remained limited to the prosecution of the less important criminals, the actual money-changers. However, due to a too hasty drive for visible success the money-trail to the really important depositors of the many millions of Euros could not be followed.

Apart from this side show for the media (and the Amsterdam commissioner’s ego), the implementation of a new coherent law enforcement approach proved to be a matter of the organisationally patience of a saint, which reinforced the image of the impotence of the police: ‘Plans for combating crime hardly executed’ (*Het Parool*, June 7, 1993). This does not mean that the top echelons of the police had lost its fighting spirit. During a police conference of 130 countries October 1993 on the Caribbean island Aruba (also much favoured by criminals and their launderers), the three chief commissioners of Amsterdam, The Hague and Rotterdam told the interviewer of the *Telegraaf* of ‘giving a deathblow to the big mafia-like organisations in our country’. Two weeks later the Minister of Justice repeated, somewhat more subtle, but in a similar bellicose tone to ‘deliver the decisive battle (...) for the control of our society’. In the same month the prosecutor-general Gonsalves stated that ‘the whole society has to be mobilised for a kind of ‘Deltaplan’ against organised crime, which is advancing in high speed (*AD*, October 23, 1993).<sup>18</sup>

It looks like an irony of history that at the time of Gonsalves’ reflexions on his ‘deltaplans’ against organised crime, another ‘delta’, namely the alleged Delta crime-organisation and the responsible crime-squad would turn the whole criminal policy and the law enforcement agencies involved into the previously mentioned mudflow of quarrels and imputations (Middelburg and Van Es, 1994).

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<sup>18</sup> The term ‘Deltaplan’ means originally the large system of dikes in the Zeeland estuaries against the danger of large scale inundations, as happened in February 1953. Figuratively it can mean a huge (defensive) work against a some social wrong. Apparently the prosecutor-general used to think in terms of ‘delta-dimensions’.

## **Policy making and image building**

The previous sections described how a small number of leading officers of the police, the public prosecution, the ministry of Justice and reporters and editors in the media kept the issue of organised crime in the public attention, set the tone and saw to it that the drive wheel kept momentum and weight. As happens so often with social forces, the driving wheel obtained its own acceleration and angle of orientation, pushing everything aside which did not fit into its course.

As remarked above, the basic orientation was already indicated by the commission Gonsalves in 1987. It fitted in the rough mental image of The Organised Crime, as a matter of fact encompassing all 'heavy' crime committed by the illiterate lower class 'underworld' figures, with all the usual connotations of primitive *brute violence*, *corruption* and other *heinous* actions (Van Duyne, 1994; 1996). Large scale economic business crime was not felt to be a part of this scene.<sup>19</sup> To what extent this perspective of 'Heavy Crime' directed the media-senses became clear, when the author cooperated in two television programmes. The first concerned the 'increasing' rate of criminal 'settlements': the mutual liquidations in the milieu. My view that violence in the crime trade as a 'business tool' is rude and unpractical, generating evidence and informants, and that it indicates rather weak than strong organizations, was cut out, because the editors thought it 'too scholarly'. It would not fit in an entertaining programme on organised crime. At the second occasion, a *Nova* broadcast intended to show 'how serious the situation is', I pointed at the multi billion business of organised VAT and excise fraud schemes. This did not fit in their representation of seriousness. The assistant had to consult his editor, then phoned again several times, desperately urging me every time stronger to mention 'more serious cases' than the merely multi billion

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<sup>19</sup> In this regard it may be considered remarkable that the multi billion scam of the criminal duo Parretti and Fiorini, who operated in the Netherlands with two corporations quoted on the stock exchange, only received the silent attention of the Dutch Central Bank. That did not prevent them from acquiring a large interest in cinemas, skimming the Bank Crédit Lyonnais Neerlandais for billions of guilders, before going bankrupt in the megalomaniac plans in the American film industry (d'Aubert, 1993). No prosecutor ever considered an investigation by an organised crime squad.

organised business crime. *'Is there really nothing more serious?'* In the end the whole news item was cancelled (fall, 1992).

The political reception of the previously mentioned organised crime memorandum of the Ministers of Justice and Internal Affairs, presented to the Second Chamber in September 1992, illustrates the social psychological climate, which had developed at that time. In the opinion of the conservative Liberal and Christian parties the ministers did not go far enough. Only the Democrats and the Socialist Party showed some reserves concerning the required extension of the investigative powers of the police. This restraint did not last long. In the following six months the reserves had changed completely to the opposite. The debate of the permanent Chamber Commission for Justice at March, 23, 1993, which the author attended, made a heated and excited impression. As a matter of fact it was a sorrow display of little knowledge and much simplistic screaming-headlines-thinking: 'the organised crime is marching and so is corruption, society is being threatened' and similar exclamations dominated the debate. In the general call for a tough approach the Social Democratic Party even excelled the conservative Liberals, which led to the concerned reaction of a liberal spokesman, that 'there is the danger that the Socialists overreact and that it is our turn to pull the brake', because the rights and freedoms of the citizens are being jeopardized (*Het Parool*, March, 23, 1993).<sup>20</sup> Hence, the memorandum, (a 'weak piece', over which 'heavy crime is not going to lose any sleep') did not go far enough and the minister of Justice—who was in the opinion of his civil servants already a bit too energetic—was urged to do even more.

It is not surprising that among policy makers in the ministry of Justice there was hardly any susceptibility left for other, deviating perspectives. The only empirical research project carried out thus far, approaching organised crime from the angle of *crime-entrepreneurs*, did not fit into the created atmosphere of threat images (Van Duyne et al. 1990). Comments on the flaws in the alleged professionalism of crime-entrepreneurs or the need to develop a criminal market policy fell on deaf ears compared to the emphasis on the threatening advance of the Mafia made by mainstream scholars (Fijnaut et

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<sup>20</sup> In the Dutch political relationships their roles are usually inverse: the Liberals use to stress law and order, favouring more police powers, while the Socialists show more restraints.

al., 1996). At first there was the fear for the open borders between the so-called Schengen-countries (1992). At a conference in Maastricht Fijnaut announced that he had 'indications that the Mafia attempted to take over power in Western Europe'. Though the Mafia did not arrive, this image remained in the public conscience. After the killings of Falcone and Borsellino, he repeated his warnings: the Mafia was already in Belgium, near Liège and it was a matter of time before she would cross the rivers (Fijnaut, 1993). The similar apocalyptic mood, was expressed by Schmid (1992), warning against all sorts of Russian criminal hordes.

September 1992 at a symposium on organised crime at the Erasmus University, Rotterdam, the author gave a presentation of the history of the organised crime image building, which he compared with the way mutually copying monks created the image of the 'big' Viking invasions during the ninth and tenth century. This lecture was published as a news paper article beginning December 1992 with a cartoon of the threatening Viking longships (Van Duyne, 1993). Only three years later did I learn the reaction which this publication evoked, when one of the directors of the ministry conveyed to me that 'of course we do not talk with you anymore when you publish such an article after our memorandum'. Open-mindedness to other opinions or holding a debate on matters of contents concerning this high priority subject had actually stopped and had yielded to a form of group-think, which sets clear boundaries to the mental horizon of policy makers and politicians. The eyes and ears of the media, policy making and politics were tightly directed to the one socially correct direction and produced only one common perception of seriousness. Most mainstream scholars carefully remained within this socially accepted framework.

### **The long shadows of an image**

Historical 'insight' is hindsight. With what hindsight should we evaluate the interaction between the media, policy making and the politics? The finding that this issue with such a high degree of stimulus value has been very liable to steering and manipulation cannot be considered a real revelation: that would be the case if the opposite would hold true. However, not all the players in

the field were intentionally steering the media. I never established a systematic steering or even something like a mutual tuning between the actors at policy making level. Their clumsiness of later dealings with the media during another little scandal makes such an assumption very implausible. At the level of the police there was a clear manipulation in the sense that the reports about the organised crime situation clearly violated the truth. Truthfulness had been replaced by purposiveness, aimed at continuously putting the organised crime issue on the political agenda, silencing all classical civil rights objections against the demand for more investigative powers, repressive legislation and money.<sup>21</sup> A conservative Liberal member of the Second Chamber, Korthals (later to become Minister of Justice), remarked that the political brakes against the increasing power of justice (police and public prosecution) were clearly worn through. Few felt that way and even fewer dared to express such feelings.

The aims of the agencies of law enforcement have been reached. The legislation against organised crime gained momentum and critical comments on the increase of the state power are rarely heard of. Even when the legislation goes step by step into the direction of the reversal of the onus of proof, politicians as well as scholars appear to accept this development in a resigned mood. This is particularly the case in the area of money-laundering (Schalken, 1999; Van Duyne and Van der Landen, 1999), more accurately criminal financial management, recently enriched by terrorist financing (Levy, 2003).

Though the Mafia and other organised crime scares have abated in the media for the time being, the law enforcement agencies and politicians still beat the same drum nationally as well as in the international fora. At Tampere (Finland, 1998) the European Council elevated organised crime to a European priority, while at the level of the United Nations 'great steps forward' have been made by the convention against organised crime, which was ceremoniously and with much parrot-like rhetoric adopted in December 2000 at Palermo. These events do not imply that the threat image has faded away. As a matter of fact, the new attribute 'transnational' has been added

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<sup>21</sup> In an interview with the author Van Dijk remembered that the police presentations were characterized by an 'atmosphere of national menace in which one is easily considered a collaborator [of organised crime], a kind of quisling'.

and accepted by the UN as a new threat: *transnational* organised crime. Given the simple economic circumstance that since time immemorial the traffic of most illegal commodities implies the crossing of border, it is difficult to understand the added value of the adjective 'transnational'. Nevertheless, an elaborate official policy making theatre developed around this new fuzzy concept, being proclaimed a new threat, which found its countermeasure in the UN Convention against Transnational Organised Crime in 1999, defined in art. 3 (Mitsilegas, 2003; Shepticky, 2003).

Also in the area of money-laundering the FATF still succeeds in evoking the 'fear' of a criminal infiltration of the financial upperworld and its ensuing corruption. It should be noted that this 'fear' is a highly artificial and ritual matter, having nothing to do with any existentially experienced fear or observed states of affairs. These old FATF threat images continue to function as the mantras of prayer wheels and have in that capacity more impact on the legislator than any knowledge of facts and figures. Nevertheless this mumbling of the money-laundering mantras seems to be sufficient to overcome any resistance against proposals for tighter regulations against the 'menace' of laundering. In the previous section I mentioned already that the anti-laundering laws tend to reverse the onus of proof, while in the cases of a *reflexive* application they have technically already crossed the line of self-incrimination (Van Duyne, 2003), which appears to be taken for granted.

More than fifteen years have passed since the onset, or rather the orchestration of the organised crime scare in the Netherlands as well as in other countries of the EU. To what extent was this fanning of fear (the police call this 'raising the awareness') justified by the facts which were known or the reports that were available *at that time* and which parts of the threat thesis have been proven correct? Summarizing the findings of the empirical research projects in Europe since 1988, we have to come to the following conclusion: there was at that time no empirical foundation for the *intensity* of the threat image;

hardly any component of the threat image appeared to be valid.

The landscape of the crime-entrepreneurs was and still is a flat, shifty network-shaped trading 'delta' of prohibited services and goods or licit services and goods offered cheaply due to fraud and deceit. That has been the main picture in Western Europe even since. Paoli (2002) argues that this concerns mainly

*commercial*, trading types of organised crime, while the consolidated organised crime groups (like in Italy) have achieved a high degree of permanence due to their reliance on non-economic ties, for example familial bondage or ethnic relationships. The permanency of these groups does not necessarily imply a dominance of the illegal markets or a menace beyond their original reach. If these mafia-like groups enter the prohibited substances markets, they have to operate under similar constraints as the more flexible and ephemeral commercial entrepreneurial organizations, operating in flexible networks. This picture of flexible network organisations was already made public by the German research in 1988 (Rebscher and Vahlenkamp, 1988) and by the first and second research projects of the Dutch ministry of Justice (Van Duyne, 1990; 1995), to be confirmed (or rather, represented as ‘new’) by later research of the same ministry (Kleemans et al., 1998). Also the dreaded infiltration or penetration of the underworld into the upperworld due to the amassed crime-moneys yields the same picture as fifteen years ago. Despite all the investigations and the clear demonstrations that the illegal markets generate staggering profits, any *strategic* criminal economic planning and conduct have not been uncovered (Van Duyne, 1997, 2003). Even in such favoured economic areas as catering and real estate, the investment of crime-moneys (after laundering) does not reflect an economic strategy or far reaching aims to obtain a social and economic bridgehead in society (Van Duyne, 2003).<sup>22</sup> In short: even if the existence of large amounts of crime-money and the wealth of some successful crime-entrepreneurs is morally embarrassing, evidence of its menacing disruptive and corruptive impact in the industrialized world is scarce and usually restricted to (organised) *business* crime-entrepreneurs. However, in these fraud cases the angle of attention shifts to the upperworld and its materialistic values, which appears to have much in common with the underworld. It should be noted that *all* the big corruption cases in Western Europe in the last twenty years concerned licit moneys from legal, respectable corporations (like Agusta, Dassault) to leading political figures. However, that

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<sup>22</sup> This cannot be said of some of the production countries of drugs, like Turkey, Morocco or Colombia. The return money of the drug sales did contribute to some economic changes, which were not all favourable to the economic and social stability of the receiving countries (De Mas, 2001; Verbeek, 2001).

is not a threat image, but a *sickness* image. This sickness may attract the media attention for a while, as scandals have a good selling potential as well, but the interactive mechanism to create a continuous moral panic and to maintain the momentum of a law enforcement warlike pressure lacks an important component: the elite itself.

## **Conclusion**

This article began with the thesis that ‘to be is being observed’ and the importance of the ‘public eyes and ears’ in this regard. This is no revolutionary revelation. More important than this ‘old truth’ is the point of abusing the generated fear to increase the powers of state and to erode the willingness to weigh the requirement of ‘organised crime’ reduction against the maintenance of civil rights. This is not very new either. The history of the development of the awareness making of organised crime in America reveals a similar fear mongering, though mixed with national characteristics like xenophobia and outright racism. No public figure and only a few scholars dared to challenge the prevalent representation of the organised crime image, leading to what Woodiwiss (2001) called the ‘dumbing’ of the discourse. The history of the drug prohibition policy shows the same pattern of generating fear by fraud and deceit for legislative purposes right from the beginning of the anti-drug policy (Courtwright, 1982; Bruun, 1975).<sup>23</sup> This recurrent pattern does not make the pernicious consequences less grave. As a matter of fact, the long shadows of the threat images still make themselves felt, even if Europe has not come in the grasp of the Mafia and the Russian criminal hordes did not arrive. These ‘visible’ images have been reinforced by the image of an even more creepy, because stealthy, infiltration of the big crime-money,

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<sup>23</sup> In its report to the Senate (1910) the special commission raised the impression of a real drug epidemic, with estimates of 1.000.000 drug addicts, though Courtwright (1982, p. 29) demonstrated that the most plausible estimate was around 100.000 between 1919 and 1940. The rapporteurs appeared to be well aware of this false representation. Once taken for true, the imaginary figures continued to scare legislators into action. It would not be the last fraud in the drug policy portfolio: the marijuana scare (the ‘killer weed’) was equally based on deception (Himmelstein, 1983).

which requires new legislative inroads to keep society safe against organised crime. Given the attitude and zeal of the interested law enforcement agencies, like the *Financial Intelligence Units*, this carry-over of the original menace to a derivative can be considered an understandable, rational organizational policy, which may not be too worrying. What is worrying, however, is the relative docility of jurists and politicians, still under the long shadow of the old organised crime images, insensitive to the more detailed and differentiated empirical findings or even displaying plain arrogance (Naylor, 1997).<sup>24</sup> This may lead to a biased policy development without proper counterweights.

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<sup>24</sup> Naylor refers to the reaction of a senior UN officer, responsible for the original laundering estimates, who was questioned critically about its accuracy. Embarrassed he insisted in the end that the figure of \$ 500 million dollars was useful for capturing the public attention.

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# Measure for measure

## Methodological tools for assessing the risk of organised crime

*Tom Vander Beken and Melanie Defruytier<sup>1</sup>*

### Introduction

Since the end of the Cold War, the phenomenon of organised crime has been high on the policy agenda of both national and supranational governments. This type of crime is often described as an international threat to the democratic institutions, undermining the very foundations of modern society. Moreover, policy makers who can link their initiatives to the threat posed by organised crime can achieve major results. The underlying principle is that organised crime is to be fought by all means and requires a hard and drastic response.

This international political consensus on the importance and the threat of organised crime is nonetheless showing a wide scientific gap as far as the analysis of the organised crime phenomenon is concerned. Although data and information are compiled in national and international reports on organised crime phenomena and both academic and professional literature on the subject is available, none of these studies allow meaningful and reliable statements about the seriousness and threat of organised crime.

One of the reasons for this gap is that there is no agreement on the concept and definition of organised crime itself (Maltz 1976; Cohen 1977; Paoli 2002; Van Duyne et al., 2001; Von Lampe 2002) and that existing definitions remain vague and virtually useless for empirical application. Measuring such a

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problematic type of crime seems an impossible task, comparable to ghost hunting (Van Duyne 1996).

Nevertheless, the problem of definition and concepts is not insurmountable. As there is no general or objective standard, any definition, which is clear and allows us to delineate the phenomenon, can be used. However, the definition should be compatible with the chosen conceptual views.

Once a definition is chosen, quantifying information about organised crime is not the greatest challenge facing measurement. There is no lack of analyses on the number of criminal groups or offences and their nature. Studies in which organised crime is also approached *qualitatively* and in which soundly based judgments are made about the seriousness of the phenomenon are much more scarce. The consequence of this is that simple questions –so obvious to an outsider– can hardly be answered: ‘How threatening is organised crime to the society in which it thrives? How is organised crime different today than it was before? Which criminal organisations are the most dangerous?’ It is clear, as Levi (2003) writes justifiably, that the measurement of changes in organised crime and the assessment of whether these are beneficial or not are still in their infancy.

This article argues that a risk assessment-based methodology can help to make better and more transparent assessments of what is called organised crime, especially on the qualitative level. This contribution is based on the findings of four studies. First, the article draws from two Belgian studies in which attempts are made to develop a methodology, which should make it possible to make better qualitative judgments on organised crime (Black, Vander Beken and De Ruyver 2000 and Black, Vander Beken et al. 2001). The aim was to make a methodology which could help policy makers to set better priorities and to take more suitable (preventive) measures at an earlier stage. The methodology presented in the two studies was accepted by the Belgian Minister for Justice in 2001 and is now, albeit partly for the moment, applied. The risk assessment methodology, outlined in the two studies, has also influenced the methodology used for the Annual Organised Crime Situation Reports which are issued in the European Union. The methodological concept was accepted by the European Union Member States as the basis for developing the EU-reports into fully-fledged strategic analyses (Council of the European Union 2001) and aspects of it (e.g. the use of environmental

scanning) already have been applied in the latest EU-report (Europol 2002) and in the Council of Europe's organised crime report (Council of Europe 2002).

Secondly, the article takes into account the proceedings of a Hippokrates research project co-funded by the European Commission (Vander Beken, Savona, Korsell, 2002). The Hippokrates research is still in progress and studies the feasibility of a risk-based methodology across the European Union. Of special interest is the fact that the project further broadens the scope of analysis with a more explicit focus on the issue of impact (harm) in the discussion on measuring and reporting on organised crime.

In third instance, the findings of Belgian methodological research on licit sector scanning commissioned by the Federal Office for Scientific, Technical and Cultural Affairs (OSTC) (Vander Beken et al. 2003) will be used. This project was a multi-disciplinary study aiming at developing a methodological tool for assessing the vulnerability of legal economic sectors for (organised) crime. Thus it further elaborates on aspects of market analysis as put forward in the above mentioned two Belgian studies and the new EU methodology to study organised crime at European level.

## **Conceptualizing organised crime**

### **A. Spectrum of enterprise**

Though not everyone may agree with the choice of conceptualization, clarity is required in any attempt to measure and respond to the threat posed by organised crime. From the applied side of conceptualization, one can focus upon specific groups (e.g. the *Cosa Nostra* or Chinese triad organised crime), their specific activities (e.g. drug trafficking), or even more ambiguously, the threat that they pose to national security.

In the studies on which this article is based, Dwight Smith's spectrum-based theory of enterprise was used as the basic approach for understanding and conceptualising what is denominated 'organised crime'. Rejecting ethnicity (the 'alien conspiracy') as the primary explanatory element, Smith provides a clear understanding of organised crime by proposing that a common

denominator: the concept of the enterprise that has a broad a spectrum including legal and criminal businesses, which allows us to develop a unifying perspective (Smith 1980: 358). Eschewing the exclusivity apparent in so much of the debate to delineate organised crime, Smith argues that the three streams –*conspiracy*, *ethnicity* and *enterprise*– provide some explanatory value. However, his and our standpoint is that concept of enterprise has the best explanatory power.

In essence, according to Smith, regardless of the organizational style or ethnic background of organised crime, the dynamics of the market operating beyond the point of legitimacy provide the primary context for the illicit entrepreneur (Smith, 1980: 375). It is at this point where legitimacy and illegitimacy meet along a spectrum of enterprise. In providing a picture of economic activity that constitutes both the licit and the illicit, Smith has presented a concept which we consider useful in discussions about organised crime (others see e.g. Paoli 2002; Besozzi 2001, Beare and Naylor 1999; Edwards and Gill 1999; Schloenhardt 1999; Arlacchi 1998; Levi 1998; van Duynes et al. 1990 and 1996; Ruggiero 1996). Rather than presenting an economic system that has two distinct and disconnected parallel economies (an upper- and underworld) Smith provides the basis for a more sophisticated systemic understanding of ‘grey’ economies, or what Ruggiero refers to as ‘dirty economies’.

The perspective of the spectrum of enterprise leads to the analysis of structural forces that determine the logic of criminal forms and activities. Activity defined as organised crime can be located in a socio-economic terrain that is essentially unremarkable (Hobbs 1997). Although unremarkable and mundane, this environment defines the characteristics of the (organised crime) activity.

## **B. Focus on organisations and markets**

Focusing on the environment, rather than on actors or specific (organised) crime groups, is contrary to the practice of most existing organised crime analyses. Although this analytical focus is perfectly understandable –law enforcement agencies are primarily tasked to fight criminals and organisations and not the ‘environment’– we do not think it the best approach to the

problem. The (economic) environment of the criminal activity leads to a more fruitful analysis. According to market principles, profit and the pressures placed upon an actor (read organised crime group/network) by the external environment (or what Smith labels the 'task environment'), it can be argued that (organised) crime groups are exposed to forces similar to those confronting legitimate businesses. Customers, suppliers, regulators, and competitors constitute the 'task environment' or market. Andreas Schloenhardt (1999) for example, has used this understanding of the functional relationship between organised crime and the wider environment to examine illegal immigration and trafficking in human beings.

However, it is necessary to provide a cautionary note here. The assumption of comparability of legal and illegal firms or businesses allows the analyst to appropriate models and approaches suitable for the analysis of legitimate industries in an effort to gain clearer insight of those illegal ones. From such a position observers have argued that, like their legitimate counterparts, organised criminal groups expand following the two paths of maximization of opportunities and minimization of risks (e.g. Savona and Adamoli 1996). In other words it is assumed that if the group's task environment changes, the group or network does so too. Adaptability may act as a measure of sophistication, but it remains difficult to determine just how sophisticated and entrepreneurial criminal groups actually are, and economic and management models do not necessarily enable us to predict responses of possible groups (see on this Paoli 2002).

Probably the most critical outcome of attempting to understand and address the phenomena of organised crime within the framework of the spectrum of enterprise is found in appreciating its relationship with the market place. This avoids the overemphasis on the organisational approach as the conceptual focus point found in the strategy of 'head-hunting' in which individuals identified as 'management level' are actively targeted by agencies for prosecution. The spectrum of enterprise and a resultant widening of focus on markets would allow analysts to consider trends and developments in both legitimate and illicit markets. From here one is required to understand the ways in which markets (licit, illicit, and grey) and organised crime intersect. As a way of seeing organised crime servicing a market space, strategies against

organised crime could be expected to include attempts to alter market conditions rather than just to remove market participants.

## **C. Methodological consequences**

### **1. Systems-based analysis**

At strategic and policy level an understanding of the dynamics of particular classes of criminal activity –in particular, the forces which contribute in creating criminal opportunities and the means for exploiting them– will enable governments to address those dynamics in their policy and decisions about their resources (Wardlaw, 1995). The need to focus on dynamics directs the methodology towards a systems-based analysis. A system should be understood to be the assorted constitutive elements related by patterns of behaviour and actions that are shaped and influenced by conditions existing either internal or external to the system. Ideally, systems analysis provides a framework in which at a high level of abstraction the model of organised crime can best be described as including all of what is organised crime, all of what it is that affects organised crime, and that which organised crime affects. It is clear that such an ambition is unlikely to become entirely fulfilled. However, as is explained below, the basic principles are useful for rationalising and structuring our approach.

So far, based on the notion of an enterprise spectrum, this article has considered organised crime as a response to those (economic) opportunities made available through government (market) policy. In attempting to provide a holistic methodological approach, we have argued that what is required is a perspective neither of just organised crime groups in isolation, nor of illicit markets in isolation, but an analysis of the interdependencies between these elements and the wider economic spectrum.

In searching for interdependencies, given the information both held and potentially available, it is proposed that a systems approach founded upon the structural aspects of organised criminality will provide the fullest understanding of the phenomenon and its influence. In relation to the methodology, the elements (or constituent parts) are the related organisations, networks, individuals, sectors, regulatory authorities and the physical location of activities.

The trends determining the environment of organised crime phenomena and the ways in which criminal entrepreneurs react to changes in the market are of central concern since predictive models are predicated on their ability to demonstrate relationships between identified independent variables and the dependent variable.

## **2. Problems of measurement**

Regarding the issue of measurement, certain caveats must be stressed in the development of this methodology. Police data collection efforts that often provide the basis of assessments are predominantly focused reported offences, and thus are usually restricted by legislation and resource scarcity to already specified targeted areas. This raises the possibility of overemphasising the seriousness of one crime area and missing another, simply because of a historical commitment to enforce the law in certain ways. (McCardle, 2000). In addition, it is also likely to result in missing the emergence of new forms of offences.

As noted by Bruggeman (1998), quantitative measurement and analysis can have a variety of misleading effects. They can reduce the focus of attention to specific types and aspects of activity, and in relying on only a few key indicators, they can result in misleading over-generalizations. Furthermore, in the attempts to measure the size or impact of organised crime, according to Beare and Naylor (1999), crime statistics mostly have little meaning, simply because the actual numbers are not available.

Nevertheless the very same arguments against reliance upon quantitative data apply equally to qualitative research, as this produced descriptions, which are rarely an accurate presentation of the whole phenomenon. However, rather than retire from the field it seems better to acknowledge that both police data and other sources have their limits, and move on.

### 3. Methods of measurement

#### *a. Risk and security-based assessments*

A possible way out of some of the problems posed by concerns with the accuracy or otherwise of hard measurement is to turn to the notion of risk. Risk, both as a concept and as an area of application, has been developed most fully by industry (see on this Broder, 2000).

Interestingly, as the intelligence elements within law enforcement agencies begin to examine the utility of risk analysis in law enforcement, there has been an increased level of debate about its use in general policing. Europol, for instance, has identified risk assessment as a method potentially available to them for developing a proactive approach to informing both operational and policy staff.

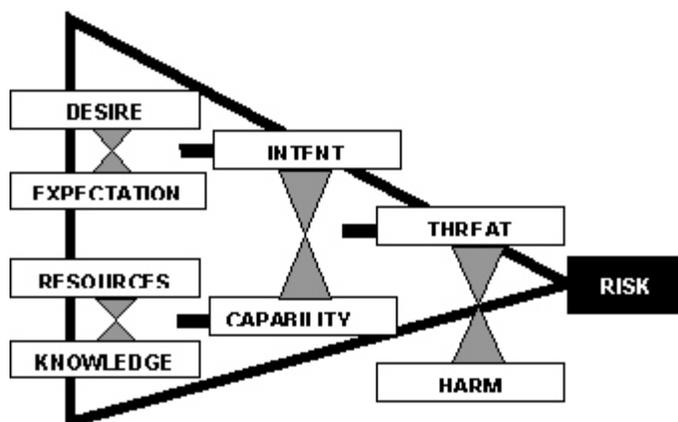
Criticism of this style of approach to policing is found with for instance Johnston, who contests the '*fundamental lack of concern about the causal preconditions of risk*' (2000:52). Although Johnston rightly points at the danger of simplification and superficial action, the processes underlying risk analysis have advantages. To achieve an adequate understanding of a phenomenon and its associated risks, organisations (regardless of whether they are private enterprises or providers of public goods) are forced to consider their operating environment and the manner in which they interact with it.

Risk can be broadly defined as the chance of something happening that will have an unwanted impact on objectives or interests. It is measured in terms of likelihood and consequences (Australia and New Zealand Standard 1995). A key feature of risk assessments is that they are designed to provide a rational and orderly approach to the identification of relevant problems and the determination of their likelihood. It is an iterative process using clearly defined sequential steps designed to use existing information (and in the process highlights gaps) and in making the process itself more apparent, makes decision-making processes and their subsequent treatment more transparent.

For organised crime measurement purposes, risk assessment can be seen as providing a systematic way of analysing socio-economic and political variables and their potential impact on organised crime. A competently performed risk analysis identifies existing conditions that impact on the issue under consideration. It describes and analyses the context within which the

problem is located and it also provides the opportunity to identify gaps in knowledge.

A Risk Assessment Matrix (RAM) provides a structured framework within which possible sources of threat can be compared, and risk may be measured. Those agencies responsible for public and national security (i.e. those that act in a protective capacity) generally, focus upon the *likelihood of threat* of something occurring (i.e. how likely the subject of interest is to succeed in carrying out an identified activity) and its harmful impact. For security services this is necessarily a defensive posture and the scheme below outlines its underlying logic.



**Source:** Brown (1998)

**Fig.1:** Security Risk Assessment Relationships

As illustrated, the likelihood of threat is a function of the intent and capability of identified actors to achieve specified aims, and where intent refers to the ‘*likely desire of a subject to engage in activities(...)and their confidence that they will be successful*’ (Brown 1998). Likewise, capability is the function of the resources and knowledge available to the subject in this pursuit. To each of these elements in the sets of relationships described above, can be attributed a value, either quantitative or qualitative. In essence the RAM is an attempt to plot

the field of risk and ‘*responds to the range of possible consequences through consulting with clients to identify the interests or assets that might be threatened and the harm that might result from an ill informed decision*’ (Brown 1998).

*b. Threat and harm*

The key obstacle to overcome in this assessment process is being confident that the measure ascribed to any one of the RAM’s elements is, in fact, relevant. For instance, in the case of threat, these key attributes of capability and intent are clearly derived from the social psychological area of the social sciences. The weight given to any one attribute is dependent upon the level of knowledge. Based on the methods used by protective services in their assessment of risks posed by individuals and groups against the security of national interests, individuals, and groups, the process relies upon a series of judgments that centre on the perceived intentions and capabilities of the groups.

What they also provide is the basis for the development of a wider range of law enforcement strategies. In this way, it may be possible for law enforcement agencies to impact on all four of the baseline attributes that are used to determine both intent and capability.

In the case of priority setting however, a determination of risk relies both on the likelihood of the threat and the assessment of the level of harm of that particular activity. For example, a group may be known to have a strong desire, and a corresponding level of confidence that they are able to achieve a certain proscribed outcome. Intelligence might indicate that they have the required resources and knowledge. The conclusion from this knowledge is that the threat posed by that particular group is high: however, the actual level of harm (as a negative consequence) affected by this act should make the response required by regulatory authorities.

When determining harm, social sanction for serious crime is generally based on perceived social cost (harm), yet the actual measurement of cost is less easy to quantify. An accurate cost estimate of organised crime poses similar difficulties. Assuming that organised crime exists, at least to a large extent, the ability to accurately assess the areas of supply and demand for goods and services that are either illegal themselves, or whose production and/or supply is illegal and thus hidden, is considerably reduced.

As a concept, harm covers economic, emotional, physical, intellectual, and political damage. However, the assessment of harm is not something that should be done in isolation. Ideally, in the case of determining the impact of organised crime on society, it needs to be defined by as broad as possible a range of interests, and must depend upon the offences being committed in the various markets. In particular, if existing costs of crime type studies have been conducted (e.g. Maltz, 1990; Porteous, 1998; Brantingham and Easton, 1998; Brand and Price, 2000), they could inform the individual harm rankings of the illicit markets. If, however, these studies are not available to analysts, it is recommended that (amongst the many approaches available) once the areas of interest have been firmly defined, a series of brief workshops were to be set up using the knowledge and expertise of nominated experts and policy-makers. These need not involve a significant outlay of resources, as a Delphi study could be used to establish baseline harm levels across the illicit market spectrum. Nevertheless, it is important to appreciate what marginal harm being inflicted in an organised way exceeds the same levels of illicit supply being realised in an ‘unorganised’ way.

### *c. Ranking*

There are two issues of relevance in ranking. The first relates to the primary function of the methodology. The whole point of this exercise is to generate a method for ranking the relative levels of threat posed by organised crime. However, given both the problems identified above regarding the ability to accurately measure these sorts of issues as well as the dynamic nature of organised criminality, this ranking must necessarily be revised periodically as well as be treated with caution. That is, it cannot be considered in an absolute way. The second point relates to the initial ranking process of organised crime groups as proposed below. Criteria and their subsequent measurement that are used to rank a phenomenon can be manipulated in any number of ways in order to weigh the significance of the measurement. In the literature there are a number of implicit and tacit ranking schemes evident. Two notable examples are the analyses by Klerks (2000) and the Royal Canadian Mounted Police’s project *Sleipnir* (2000). Both of these works will be discussed in more detail below.

## **The methodology**

### *a. General*

As has been discussed above, the proposed framework is based on three key assumptions. The first is that organised crime is a financial profit oriented business activity. The second is that the measurement of the threat posed by a (complex) phenomenon, requires as comprehensive and complete a picture as possible of the environment. The third is that the method must remain as simple as possible for its effective use. Consequently the integrative methodology developed in this paper describes a step-by-step and iterative analytic framework for organised crime threat analysis.

The proposed framework consists of three stages. The first stage requires the analysis of the system in the form of an environmental scan. This seeks to identify the major relevant trends in the external environment and the overall objectives, or posture, of the agencies involved. It is envisaged that as this assessment program develops, the processes that constitute scanning will also involve both a forecasting and a monitoring process.

The second stage involves a three-part assessment of the primary elements of analysis, namely known crime networks and groups and counter strategies used, the illicit economy and licit economic sectors.

Each part relies upon a different analytical approach to accommodate the differences in levels of accessibility and standards between information sources, as well as the desired outcomes. The methodological approaches applied to each of these parts will be discussed below.

After these three parts it is possible to consider the analysis complete. The third stage provides the opportunity to link these three identified elements back into a more considered whole that includes the efforts of the original environmental scanning process.

The ranking of organised crime groups can be compared to the findings of both the illicit and licit market scan. Similarly the illicit and licit market scans can gain further insight into the interconnectedness of the various market dynamics that facilitate those activities falling within the rubric of organised criminality. Finally, and if desired, the methodology can be used to accommodate a strategic policy (i.e., risk management) element, including evaluation and monitoring.

*b. Environmental scan*

The environmental scan is the gathering and subsequent processing of information about a firm or organization's external environment and is generally recognized as a crucial factor in the formulation, implementation, and assessment of an organization's strategies and tactics for successfully dealing with the challenges posed by the external environment (Miller and Cardinal 1994). It is a process that requires limited dedicated resources to identify major trends affecting an entity and enabling analysis to define potentially resultant changes. As such it contributes to the development of a proactive focus and makes more transparent the relationships between identified trends (convergence, divergence, change in speed etc) and the posture of the organization. The goal of environmental scanning is to alert decision makers to potentially significant external changes before they crystallize so that decision makers have sufficient lead-time to react to the change. Consequently, the scope of environmental scanning is broad (Morrison 1992).

There are numerous ways that environmental scanning can be done and its success depends predominantly upon providing a structure that reflects the broader environment. The most common method for examining the macro-environment capable of affecting organizational interests' (directly and indirectly) is to consider its theoretically discrete components or sectors. This generally means scanning for developments that fall under the broad headings of the political, economic, environmental, social and technological sectors (for an example see Williams and Godson 2002).

Environmental scans are often structured through the use of an artificial device that distinguishes between specific elements constituting the environment. PEST (or sometimes STEP) is such a standard mnemonic acronym for the division of the environment into the political, economic, social and technological domains. The artificiality of this domain construction does not necessarily cause problems for analysis, as the interactions between domains potentially provide a great deal of information on the effects of specific issues (e.g., the introduction of e-commerce technologies naturally spans the technology-economy divide). It is not necessary to structure an environmental scan along the PEST framework. This framework is more useful as a checking device for the analyst.

Environmental scanning can be done either formally or informally. Similarly it can also be done as either an iterative process or immediately prior to the actual analysis. Either way, the successful environmental scan is dependent upon two aspects: scope definition and information collection. If the collection process is done immediately prior to analysis it is highly likely that things will be missed. Ideally, if the scan itself is an annual event, the collection of information supporting the scan should be done throughout the year. Along with the greater amount of data collected, it also sensitizes those commissioned with collection to the possibility of other areas for inclusion.

*c. Organisations and counter strategies*

Regardless of the calls for focus to be turned towards those processes and situational factors involved in organised criminal activity, the crime group remains the central unit of analysis for law enforcement concerns. It is true that within the context of organised crime as a policy issue, it is the notion of 'group' that has traditionally held sway both in the law enforcement environment and academic circles. The predominant allocation of resources has been on the targeting of groups and their individual members. Similarly, this traditional emphasis on groups as the primary unit of analysis has included an arguably unhealthy focus on the specific characteristics of ethnicity and ethos to provide indicators of the activities, characteristics, motivations and methods of the identified groups. The common, critical explanation for this ethnic focus is that such a view is in agreement with the perception of external conspiracy that is embedded in the history of the perspective on organised criminality in the US and the subsequent export of this prevalent approach to other jurisdictions.

However, these flaws, as described above, do not in anyway neglect the fact that groups (networks and/or hierarchical structures) as a discrete unit of analysis, must be included in any threat assessment of organised crime to public interests. In relation to the issue of crime *groups* it is necessary to focus on the organizational facet of the phenomenon. Irrespective of legal or criminological definitions, the most important element to retain, which is common to all definitions, is the group that commits a crime rather than the crime itself. Aspects, such as structure, durability, and insulation, are the key elements to understanding organised crime.

Retaining organised crime *groups* as a distinct unit of analysis, and indeed a key focus of police targeting strategies, is a fundamental requirement for the success of enriching both analysis and law enforcement responses. The combining of organised crime groups and focus on markets and the wider environment allows for multiple approaches to be made (i.e., market disruption etc). It also directly contributes to the determination of levels of risks posed by the various markets to be considered.

To apply this in an analysis, an initial ranking of organised crime groups can be incorporated into a risk-based assessment of the markets (both licit and illicit). In order to achieve this one could partially follow the methodological lines of the Canadian project *Sleipnir* (Royal Canadian Mounted Police 2000) and the work of Klerks (2000). Following a survey of the available literature, the mining of the two most promising approaches produced an abridged list of attributes that were then tabulated.

Klerks' analysis depends upon a complex scoring system across 31 identified dimensions that, he considers, defines the character and threat posed by organised crime groups. Each of these dimensions was given a unique weight and scale, and the sum of which when placed against other groups provide a threat ranking. *Sleipnir's* methodology relies upon a far simpler four-point scale of nineteen attributes. Each of these has been ranked through a Delphi survey from most important to least important. Consequently, a matrix of attributes against groups makes it possible to develop a systematic overview of the relative threat posed by organised crime groups.

Contrasting the range of attributes in the study by Klerks against those utilized by the *Sleipnir* project it might have been possible to conclude that the greater the number of attributes, the clearer the overall picture presented. However, the rationale underlying the development of attributes is not description, it is task-focused and thus the utility of large numbers of attributes is uncertain. In fact a reduced number of attributes or variables, provided they have significant explanatory power, are preferable as they make collection and analysis more manageable. In other words the effort should focus on simplifying the mechanics of assessment while avoiding oversimplifying the analysis (Albanese 1987).

The central idea for this approach is to be able to incorporate the results into the RAM of the illicit market sector. Due to this requirement the

attributes developed to facilitate the ranking of organised crime groups should be collected and projected against the functions of threat. The following table, attributes adopted from both the RCMP’s project *Sleipnir* and Klerks’ book, illustrates such a possible application. However the eventual scope and attributes utilized still need to be determined by the end-user through consultation with relevant experts in their analysis units and elsewhere. Such a list is dependent upon existing knowledge derived from both the prevailing picture of organised crime, as well as the wider environment.

INTENT	CAPABILITY
<p style="text-align: center;"><i>Desire</i></p> <p>Discipline Intelligence Gathering Deadly violence Violence Monopoly</p>	<p style="text-align: center;"><i>Resources</i></p> <p>Corruption Size of group Working with other groups Local or global Scope Level of finances Mobility</p>
<p style="text-align: center;"><i>Expectation</i></p> <p>Sophistication Risk Attitude Accessibility for law enforcement Strategy Insulation</p>	<p style="text-align: center;"><i>Knowledge</i></p> <p>Expertise Infiltration Continuity Multiple Enterprises</p>

**Table 1** Example of Possible Organised Crime Group Attributes List  
Based on RAM Requirements (Black et al. 2001: 63)

As developed in project *Sleipnir*, the collection of data against these attributes allows for the ranking of organised crime groups along a matrix. This matrix approach provides a visual guide to the initial analysis and, in particular, generates a detailed and comprehensive comparison that allows for the determination of the relative levels of threat posed by organised crime groups, resulting in a classification of which the top crime groups are the ones which are most capable of realising their intentions, thus most likely to pose a threat.

The analysis of counter strategies is related to analysis of criminal organisations. However, keeping it analytically distinct from the analysis of groups and networks—as it is done e.g. in the Belgian annual report on organised crime—makes sense, because its current analysis provides what may almost be considered a ‘scorecard’ approach, in which the methods of both organised crime and law enforcement are contextualised by each other’s activities.

### *Sector analysis*

#### 1. General

As discussed above, the idea of a sector analysis is to provide coverage of the activities of organised criminality within the wider overview of the markets themselves in which such organised activity is suspected, known, and may possibly be expected to, take place. The focus of analysis is thus not on organised crime groups or their activities but on the task environment in which they are known to operate and take place, i.e. legal and illegal economic sectors.

While it seems logical from a spectrum of enterprise perspective to keep such a scan unified (i.e., examine the activity of banking from the sinful to saintly as expounded by Smith) such an ambitious approach is unlikely to work in the short to medium term. So far, it makes sense to distinguish—also from an analytical point of view—between licit (e.g. diamonds) and illicit (e.g. heroin) goods and markets.

The primary assumption, that organised crime is best conceptualized as a process embedded in the spectrum of markets for goods and services demanded by society, results in two critical questions that need to be addressed. These are respectively: What are the actual levels of organised criminal involvement in illicit markets? And how vulnerable are specific licit markets to (organised) criminality?

#### 2. Illicit market scan and the measure of involvement

Consistent with the study’s operating principle of the spectrum of enterprise Arlacchi (1998: 204) defines illegal markets as those places ‘*within which goods and services are exchanged whose production, sale and consumption are forbidden or strictly regulated by the majority of national states and/or by international legislation*’.

This understanding and subsequent approach reinforces the logic that where there is a diversity of firms in the clearly licit markets there are similar structures in the illicit. Thus we find buyers and sellers, wholesalers and retailers, go-betweenes, importers and distributors.

In summary this element of the methodology relies upon an initial assumption of illicit markets being subject to those same pressures and influences (although to varying degrees) faced by the licit markets. Following this it is logical to accept that since the removal of high level individuals or figures from licit markets does not appear to effectively impact upon these markets, the removal of corresponding figures from the illicit economy is equally unlikely to be profitable *key strategy* in the long-term.

Three recent and varied examples of this type of approach can be found in the work of David Brown on the synthetics market; Project *Lerna*, an the Australian Queensland Police Service illicit market scan of a geographically defined heroin and amphetamine market space; and Williams' analysis of the drug industry.

Following Brown's attempt to break down the synthetic-market process into the equation '*Knowledge + Raw materials + Money = Production*' (Brown, 1999), he provides examples of how analysts can identify opportunities/targeting strategies across the three fundamental elements of production. For instance, an obvious option for illegal drug market disruption arising from this understanding of the importance of knowledge is the targeting of chemists rather than core criminals.

It is difficult for us to evaluate this approach further, given that the paper is a conceptual exercise. However, two serious elements are still lacking from this proposed model. First, Brown has consciously removed the issue of demand from the equation, citing the complexity of socio-economic reasons as well as space and time constraints. Yet, if you cannot understand and explain even the rudimentary aspects of demand, it is very difficult, if not impossible, to grasp the wider market dynamics. Second, if countering illicit activity is of primary importance (this includes disruption and other approaches) then it is important from an intelligence and analysis point to attempt to understand the intent of market operators within a market.

By way of contrast, Williams' analysis is predicated on the very same fundamental assumptions as Brown (crime as a business/industry). Yet he uses

the profitability of industries as the dependent variable in which the emphasis is on identifying the basic, underlying characteristics of an industry rooted in its economics and technologies (Williams 1995). In so doing, Williams identifies core counter-strategies for law enforcement. Based on a second assumption, that government intervention is normally expected to take account of what is understood to favour industry success and profitability, Williams turns this around to try and develop policies that create inefficiencies in the targeted market. It is from this context of analysing competitive strategies that he applies an adapted form of industry analysis used by Porter (1980).

Not only do these two examples provide a clear direction from which to continue, but they also both serve to stress that apparently small differences in the fundamental assumptions underlying analysis can lead to quite different outcomes. Furthermore they emphasize the point made previously by Halstead (2000), that if the model and its accompanying assumptions are not made transparent in analysis and subsequent policy development, significant problems can appear.

By way of practical application, project *Lerna* is an example of the conceptual points discussed above appearing in law enforcement analysis. Developed by the Australian Queensland Police Service (QPS) *Lerna* is an illicit market scan of defined drug markets. *Lerna* is predicated on the assumption that illegitimate drug markets could be treated as legitimate commodity markets (Queensland Police Service 1999: 1). In an approach similar to both Brown and Williams, the QPS opted to utilize a market-based analysis to try and identify critical points where market conditions can be altered.

Their illicit market scan has two levels of analysis: macro and micro. At the macro level, analysis focuses upon influences such as demographics, ethnographic factors, health data and crime data. Naturally the selection of these influences is dependent upon the market under examination. Health data is useful for understanding and evaluating drug markets rather than, for instance, fraud. In a vein similar to that of Williams, the micro level analysis of the heroin and amphetamine markets is structured through the consideration of barriers to entry, the bargaining power of suppliers, bargaining power of customers and manoeuvring among market participants. These conditions provide an appreciation of the dynamics of markets, and as discussed

previously, directly contribute to analyst insight into the possible level of involvement of organised crime groups (clearly law enforcement intelligence, prior history of involvement, prosecutions etc., also significantly contribute to this level of understanding). As demonstrated by both Project *Lerna* and its successor, *Arko* (Queensland Police Service 2000), their successes were primarily achieved by the application and extension of market characteristics.

To achieve an effective level of understanding of the illicit market, data are needed in the form of the product (quantity/quality); prices (static/change); market dynamics (product innovation, technology impact, level of co-operation between groups); convergence with other markets; and actors (regulators, offenders, location, market share). Done well, this approach should enable an analysis that identifies the activities and transactions undertaken by criminal networks in the market under scrutiny, and the roles performed by particular players in the criminal network (Queensland Crime Commission and Queensland Police Service 1999). Making links between activities can lead to the identification of vulnerabilities and this enables more rational targeting by law enforcement agencies if they and those to whom they are accountable choose to avail themselves of this.

In relation to organised criminality it is necessary to determine the level of crime group involvement rather than to immediately assume involvement in the market. We have clearly delineated between the market, industry and firms and in so doing, presented a variety of approaches to understanding the actual character of specific market spaces. In particular we have advocated that the development of a macro analysis of markets will provide the requisite knowledge (and future collection needs) of principal characteristics, which enables the development of clear indicators (thus providing a tool to determine changes in markets). The use of a micro-analytic framework again provides clear and concise indicators for measurement, and possibly insight into future trends, while also providing a snapshot of market dynamics and features. Finally, with an appreciation of basic industry types, the long-term methodology is equipped with an available method to establish levels of criminal involvement across the market.

Once the level of involvement has been determined through the previous process, it should be possible to apply the risk/threat method as discussed above to the identified illicit market spaces. The combination of understanding

organised crime group attributes and process, combined with the market scan can generate a clear ranking and prioritization of organised crime groups/types and illicit markets.

### 3. Licit market scan and the measure of vulnerability

Unlawful activities that impact upon the economic processes of the state are of significant interest to regulatory authorities. The use of the term vulnerability is used as the conceptual focus point for this section, although with some reservation. Focusing on vulnerability above all has preventive objectives, as it must enable us to identify problem areas that have not yet been affected by (organised) crime. Anticipating the risk (probability) of involvement of organised crime groups in licit economy is not exact science and requires some kind of scenario analysis.

Vulnerability depends on the intentions of those criminals involved in the execution of acts that constitute organised criminality, on the state's regulations and the standards of the sector itself, and of course the intentions of those involved in the sector. Furthermore, economic sectors may well have attributes that make them attractive to criminal entrepreneurs, yet they are not necessarily vulnerable. What needs clarification at this point is that the 'flow' between criminal business and the licit economy is not one way (it is acknowledged that the use of 'vulnerability' risks such a misunderstanding). This multi-directional relationship between organised crime and licit economic sectors is recognized in distinctions between passive and active corruption, the blurred frontiers of 'white-collar crime', etc.

An area of analysis relating to connections between organised criminality and the legitimate economy is found in the type of work represented by the likes of Ruggiero (1996, 1997 and 2000), Van Duyne (1993), Hobbs (2001) and Edwards and Gill (1999). Ruggiero's analysis e.g. of 'dirty economies' is a conceptualization that focuses upon the common interests linking together official business and criminal conduct. Ruggiero has found that in some cases dirty economies are characterized by an exchange of services and a mutual entrepreneurial promotion between conventional organised crime and official actors. At other points it appears that those services usually provided by organised crime (Fiorentini and Peltzman 1995) may actually be made redundant as official economic actors tend to set up their own illegal practices

(Ruggiero 1997), or contact agencies that are removed from traditional organised crime activities to provide the same services. Amongst other things, in this work Ruggiero has raised the question of how to accommodate both the relationship and distinction between what is understood to be corporate (and enterprise) crime and what is organised crime.

The active interest and subsequent involvement of organised crime groups in the licit economy is assumed to be motivated by a variety of reasons. Williams and Savona (1996) have provided an assorted basket of reasons that explain this level of interest. These include the opportunities to launder and invest the proceeds of crime, the pursuit of respectability and social consensus for its members; and the controlling of territory to maximize economic and political advantages and minimize the risk of apprehension, arrest, and conviction.

This is an essential observation because, if we are to assume organised criminal activity in the licit economy being only predicated on profit maximization then quite naturally an analysis of vulnerability will potentially provide a different set of results to one that also incorporates risk aversion. However, the degree to which organised crime actively pursues a path of risk minimization is open to debate (Lasco 1997). Sophisticated criminality may indeed be more likely to devote a significant level of effort to risk minimization as it can be achieved by investing in the licit economy. However, personality and cultural factors also play a part in criminal decision-making, so the notion of the criminal as *homo economicus* should not be taken for granted.

In addition to the driving circumstances for organised criminal interests in licit economic sectors, the Dutch Parliamentary Commission on Organised Crime (Dutch Parliament 1996) has selected nine licit economic sectors as being likely candidates for victims of underworld interest. In this instance the nine sectors were transport, the used-car industry, the catering industry, legalized gambling, construction, waste disposal, insurance, wildlife, and nuclear materials trade. However, it should be noted that this selection only partly reflects reality, as the Commission began their analysis from the assumption that the relationship between the upper and underworld was one-way (Nelen, 1997; Hoogenboom and Hoogenboom-Statema, 1996; Van Duyne, 1997 & 2003).

Following the Dutch experience, the Belgian Parliamentary Enquiry Commission on Organised Crime (which utilized the Dutch research as their starting point) identified, through a series of interviews, seven sectors of concern regarding organised crime interest (Belgian Parliament 1998). These seven sectors were listed on the basis of their repeated appearance in organised crime investigations. In addition to this survey of investigations, the Belgian Parliamentary Enquiry Commission on Organised Crime was informed that six industries were aware of organised criminal activity within their own economic sectors. The initial seven identified by the Commission as likely infiltration areas were construction, diamonds, catering, meat, petroleum, transport, and waste disposal. However, the six sectors that actually reported organised criminal activity within their own sector were finance (particularly currency exchange and insurance), catering, meat, petroleum, video and compact disc, and waste disposal. So if the research was thorough enough to detect correctly what was happening, the false positives were construction, diamonds and transport sectors, while the false negatives were finance and music and film counterfeiting.

The disparity between the seven initially identified as high-risk industries and the six that turned out to be so raises questions about the validity of the initial indicators used to determine likely risks, especially in terms of areas missed rather than areas wrongly predicted to be vulnerable. Finally it raises the question of how one goes about defining the sectors of the legitimate economy. Both of these studies offer us considerable insight into a range of organised criminal activity within the legitimate economy, although neither readily offer a methodological approach that is applicable to the production of organised crime reports.

An alternative, yet complimentary, line of approach to these two studies that operate within the same conceptual framework is found in what Jay Albanese describes as '*an exploratory attempt to predict 'high-risk' business conditions, rendering businesses vulnerable to organised crime infiltration*' (Albanese 1987: 103). Similar to both the Belgian and Dutch Commissions, Albanese has based this model on the experiences and investigations of businesses exposed to organised criminality in the past, and extrapolated a number of conditions from basic commonalities.

Notwithstanding, certain dangers in attempting to extrapolate from known cases of activity to asserting that we know the true level of its activity must be acknowledged, eventually the objective of licit market scanning is to provide insight into the relative levels of vulnerability of the legitimate economy to external and internal organised crime. With this knowledge it should then be possible to utilize more intensive investigative techniques against the highlighted sectors.

Where it differs from the other two approaches is that Albanese's methodology offers a predictive framework that can be applied in the pursuit of the preventive screening of industries, thus a tool for guiding resource allocation.

By way of practical application, the OSTC research (Vander Beken et al. 2003) is an example of the issues discussed above. The methodology proposed in the research is based on a *cluster model* and a diagram of somewhat sixty different (market) indicators, introducing a tool, which enables the identification of the vulnerability of legal economic sectors for (organised) crime initiative.

Since the multidisciplinary character of the research required specific conceptualisation combining aspects of both criminology and economic science, a *cluster model* was developed. Moreover, as essential to any vulnerability analysis the cluster model allows the broader environment to be incorporated into the analysis. The model is based on two approaches. On the one hand the spectrum of enterprise idea (Smith, 1978) is followed, considering organised crime to a large extent as another player on the market. On the other hand the economically extended diamond model and cluster approach (Porter, 1990) is used to describe the environment of organised crime and the context of its interaction with the legal economy, in particular the licit sector. This allows to cover the interaction between crime and the broader environment in which it thrives.

The central element in this conceptual framework is the core sector (for which a specific working definition was created). The other elements that make up the model consist of: nationally related and supporting sectors, foreign related and supporting sectors, social and other sector organisations, local/regional/ (inter)national governments, financial and legal players, relations outside the cluster (coincidence factor) and external organised crime. Important

to the vulnerability assessment is the proposition, that the elements of the cluster model function in a dynamic framework where there is strong interaction. By using this conceptual model an (economic) boundary is drawn, making it possible to differentiate between internal organised crime and criminal initiatives external to the licit sector.

Next to the focus on the sector and cluster as important elements of analysis, on mid-level and macro-level respectively, the methodology further zooms in on the micro-economic aspects of the sector, more in particular the corporate structure of entities in terms of *business processes* (see on this Rozebrans and Emde, 1996).

In summary the proposed methodology consists of five phases, of which the first three mainly collect and process as much relevant information as possible:

1. description of the sector (mid-level);
2. environmental scan and cluster model (macro-level);
3. reference models (micro-level);
4. width and depth scan;
5. conclusions and recommendations.

The fourth phase of the methodology is to be considered the 'core' of the vulnerability assessments. On the basis of a diagram of (market) indicators the information that is compiled and processed during the first three phases is evaluated and analysed.

In contrast to the traditional threat assessment the focus is not on organised crime groups and/or their criminal activities from which stems the threat, but the *task environment*, namely the market (sector) where the threat is likely to occur, forms the object of analysis.

More concretely, during the information processing phase, the diagram of indicators is used to assess the vulnerability of the licit sector under study. Mindful of meaningful analysis, the diagram is structured into five dimensions which in turn are further developed separately and in the end are broken down into one or more (market) indicators relating to the task environment:

1. the *threshold*: every entrepreneur with the intention to enter a legal economic sector is required to meet certain legal, socio-cultural and economic conditions. Threshold is further broken down in the following

branches of indicators: legislation and regulations; corporate culture; and market structure and concentration.

2. the *viability* of the entity: this sheds light on the financial situation of the entities in the sector and is considered important to evaluate the likelihood of financial fraud, white-collar crime, money laundering etc. This dimension is further broken down into: solvency; transactions; and costs.
3. the *nature* of the product: this refers to a series of qualities of the product, which can make it particularly interesting for the exploitation for criminal profits. The nature of the product is further broken down in the following indicators: product mobility; stability of value; integrity of the product; product differentiation; (price) elasticity; and compatibility/flexibility. The evaluation of each of these indicators is made separately following the acknowledgement of three distinct product functions: as a merchandise; as a means of payment; and as an investment.
4. the *international context*: this refers to the international trade network and broader context in which the sector functions.
5. *alternative markets*: this takes into account the options open to criminal entrepreneurs to invest in other legal sectors, the parallel economy or the 'black market'.

Belgian follow-up research allowed the testing of the feasibility of the above outlined methodological framework in a case study of the Belgian Diamond Sector. Notwithstanding that the application of the methodology points out that some elements still need fine-tuning and the reference models in particular require further scientific elaboration, the application of the methodology allowed relevant conclusions to be drawn about the vulnerability of the diamond sector on the basis of the diagram of (market) indicators.

## **Conclusion**

Taking a standpoint in and reporting on issues surrounding organised crime regarding to its extent, influence, evolution and seriousness, often is considered a precarious undertaking. Indeed reports and literature without a clear concept and methodological framework risk being exposed as self-fulfilling prophecies that measure nothing else than the mere perceptions and presuppositions of the masterminds who have created them.

Consequently the practice of measuring and reporting on organised crime demonstrates a great need for a knowledge-based framework within meaningful and relevant analysis on the organised crime phenomenon.

This article reported on attempts to answer this need by introducing a risk-based methodological framework for measuring organised crime.

The proposed methodological framework does not provide universal solutions or final conceptual clarity. Its only ambition is to offer a method to gather and systematise information in order to rationalise the decision making process about crime that is defined as organised crime.

We believe that the tools and issues surrounding a risk-based approach can enable an integrative analysis of organised crime in terms of groups, counter-measures, the licit and illicit market places, the various interactions between these areas and the impact of these activities on society. It is envisaged that the findings of the analyses of all of these constitutive elements (i.e. organisations, countermeasures and markets) eventually are used conjointly to evaluate the threat posed by organised crime. As the concept of harm is introduced, the same constitutive elements can be ranked or prioritised again by their relative levels of impact/harm. Bringing together both elements of the risk assessment (i.e. threat and harm), should make it possible to establish issues of concern and consequently prioritise regulatory attention more rationally.

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# Measuring Organised Crime

## A Critique of Current Approaches

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### Introduction

The process of establishing the concept of organised crime as a corner stone of criminal policy doctrine has entered a new phase. For decades, concerns had been centred on the question of definition. Interagency and international law enforcement cooperation called for a common understanding, while differences in fact and in perception hindered such an agreement. Moreover, sceptics maintained that organised crime was largely a figment of imagination, conjured up by law enforcement lobbyists to legitimise infringements of civil rights and liberties, while proponents of the organised crime concept hoped to stifle the criticism with a generally accepted definition.<sup>2</sup> In recent years the emphasis of the official discourse has shifted from the definition to the measurement of organised crime, implying that the old squabbles have been left behind for good. Measuring organised crime not only presupposes the existence of organised crime, it inevitably requires conceptual clarity and certainty. The irony of history, however, lies in the fact that the project of measuring organised crime has been launched before an agreement on the definitional issue has been reached. In fact, as Toon van der Heijden (1996), in a review of the developments on the EU level, has observed, the priorities shifted to the issue of measurement only after ‘the EU member states

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<sup>2</sup> For a discussion of the organised crime debate see Van Duyne (this volume) and von Lampe (1999; 2001a).

concluded that particularly the aim to reach a common definition offered (too) many problems for the time being.’

This chapter sets out to explore how the unresolved conceptual issue impacts on efforts undertaken by agencies on the national and EU-levels to measure organised crime. It will be argued that assessments of organised crime that are intended to provide an orientation for strategic law enforcement planning and policy development have to be grounded in a clear and empirically based conceptual framework. After examining two approaches in particular, the ‘organised crime potential’ assessment of the German police agency Bundeskriminalamt (2002) and the ‘risk-based methodology’ developed by the Ghent University’s Crime Research Group (Black et al., 2000, 2001; Vander Beken & Defruytier, this volume),<sup>3</sup> some cautious suggestions for improvement of the current approaches will be made.

## **Organised Crime and the Problem of Measurement**

Measurement means linking unambiguously delineated concepts to empirical events. Empirical phenomena are mapped onto a system of numbers, which, depending on the mapping rules, allows statements on the nominal difference between phenomena, on a more or less sophisticated ordinal ranking of phenomena, or, ideally, on quantities relative to an absolute zero point (Maxim, 1999; Zeller & Carmines, 1980). Measuring organised crime can potentially be of practical use for government and legislature in various respects, provided appropriate methods of measurement are available.

The first potential benefit would be to clear the smoke created by media induced imagery and to obtain some understanding of the overall scope of the problem by determining how pervasive and how serious organised crime really is. This, in turn, would facilitate rational decisions, for example, on the allocation of scarce resources between law enforcement and other branches of government, or it would help to weigh the costs and benefits, say, of anti-organised crime legislation that negatively infringes on defendants’ rights. The

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<sup>3</sup> For other approaches see Queensland (1999), Porteous (1998), Reuter & Petrie (1999), Van Dijk et al. (2002).

same applies to the detection of hot spots within the overall picture of organised crime. By discriminating between different manifestations or areas of organised crime, measurement could help to set the right priorities.

Another desirable objective of measuring organised crime would be to identify trends over time. Measuring organised crime in certain intervals could be employed as an early warning device which would provide a rational basis for strategic planning on the administrative and legislative levels.

Finally, the ability to measure organised crime implies the ability to evaluate the effectiveness of counter-measures. So far, only very indirect indicators of success have been employed, for example, the volume of assets seized in organised crime proceedings.

Measuring organised crime requires three steps: the specification and definition of key concepts, the operationalisation of these concepts by translating them into variables, and the linking of these variables to empirical data (see Black et al., 2001, pp. 17, 42).

Since there is no agreed-upon and established definition and the issue as such is complex and embraces different levels and quite diverse units of analysis, it is crucial which phenomena are specified as empirical referents. Depending on the basic understanding of the nature of organised crime, the process of measurement can take on completely different directions from the outset. When one equates organised crime with certain types of criminal activities, namely the provision of illegal goods and services, then illegal markets might be chosen as the key concept which needs to be operationalised (see Porteous, 1998; Reuter & Petrie, 1999). When, in contrast, criminal structures are considered the essence of organised crime, the measurement will focus on factors such as the number, size, composition and structure of criminal groups, while the nature and extent of illegal markets would be treated as no more than contextual variables (see Albin et al., 1995; Galeotti, 1998). Other approaches might emphasize systemic conditions such as underworld power structures (Reuter, 1987, 1994) or corrupt alliances between criminals and public officials (Block, 1983; Chambliss, 1978).

It is important to stress that from all we know, choosing between these approaches and selecting certain variables for measurement is not merely a technicality, because the indicators that may be specified for each of these three dimensions (activities, structures, and systemic conditions) are not

interchangeable. The volume of an illegal market, for example, does not determine how market participants are organised. The same is true, though perhaps to a lesser degree, for indicators within each dimension. There seems to be no fixed relation, for example, between market volume and profitability, or between the size of a criminal organisation and its structure.<sup>4</sup>

Moreover, whatever salient features of organised crime one specifies, they cannot be expected to always have the same impact on their environment, just as certain environmental factors can be assumed to have different consequences for organised crime in different constellations. To come to a meaningful assessment of organised crime, then, entails conceptualising a complex set of internal and external factors and to view them in mutual relation.

This leads to the identification of a second major problem for the conceptualisation and subsequent measurement of organised crime: the problem of construct validity. Construct validity, generally speaking, refers to ‘the assessment of whether a particular measure relates to other measures consistent with theoretically derived hypotheses concerning the concepts (or constructs) that are being measured. (...) Construct validation involves three distinct steps. First, the theoretical relationship between the concepts themselves must be specified. Second, the empirical relationship between the measures for the concepts must be examined. Finally, the empirical evidence must be interpreted in terms of how it clarifies the construct validity of the particular measure’ (Zeller & Carmines, 1980, p. 81). With regard to measuring organised crime, construct validity does not seem to be attainable, at least not at present. Given the paucity in theory and data, there is no certainty regarding the relevance of any one indicator in terms of the interrelation between various features of organised crime and in terms of social impacts, apart from the question how to conceptualise social impacts. Take, for example, the aspect of hierarchy. It is not clear in what way vertical differentiation influences the capacity of criminal groups to, for instance, inflict harm or avoid prosecution. Consequently, the observation that more and more criminal groups develop a hierarchical structure would not, as such, justify the conclusion that the

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<sup>4</sup> For a tentative discussion of the interrelation between environmental factors and the size and structure of criminal organisations, see Southerland & Potter (1993).

seriousness of the organised crime problem is on the increase (or on the decrease). There may be differences in the level of threat depending, for example, on the functions these groups perform. A hierarchically structured criminal fraternity may well have a different impact on society than a hierarchically structured criminal enterprise, just as the consequences may differ depending on the area of crime or the social context. A burglary gang will tend to constitute less of a threat in monetary terms than a group of sophisticated white-collar criminals, but to the citizen the former will appear more threatening.

In the end, leaving aside the practical problems of collecting information on organised crime, there are many ways one can think of to measure certain aspects of organised crime. But without proper theoretical underpinning, the resulting data will most likely not bring us beyond a purely descriptive level. A statistic on the number of hierarchically structured criminal groups, for example, for the time being will tell us just that: how many hierarchically structured criminal groups there are. In a research context this piece of information might provide a useful starting point for further inquiry, whereas in a situation report on organised crime such statistic would only provoke undue conclusions before the background of stereotypical imagery of sinister crime syndicates.

## **Two Current Approaches to the Measurement of Organised Crime**

In light of the fundamental methodological difficulties and limitations any attempt to measure organised crime is an ambitious and daring endeavour that has to be viewed with due methodological scepticism. At the same time, these efforts deserve respect insofar as they venture to go beyond simplistic conceptions of organised crime. It is interesting to note that the impetus for these efforts has not so much come from within the scientific community but from government and law enforcement agencies, as is also the case with the two approaches that will be examined in greater detail in the following sections.

## **The Annual Situation Reports by the German Bundeskriminalamt**

Since 1992, the German federal police agency Bundeskriminalamt (BKA) has been drawing up annual situation reports on organised crime, based on ongoing criminal investigations during a given year. The idea of the situation report is to bring together the entire knowledge generated in proceedings that are classified as organised crime related in accordance with the official German definition of organised crime.<sup>5</sup> The information contained in the published versions includes the number of organised crime cases, the number and types of offences committed by the suspects under investigation, the nationality of the suspects, the possession and use of firearms, and the amount of damages and (estimated) profits. The classified, extended versions of the situation reports contain descriptions of individual cases and additional analyses. The following discussion pertains only to the published version.

Originally, the importance attached to the annual organised crime reports was similar to that ascribed to the official crime statistics with regard to the overall crime picture (Gehm & Link, 1992). In the public debate the reports continue to be interpreted in this fashion by treating changes in the number of organised crime related investigations as equivalent to changes in the extent of organised crime. Among law enforcement officials and scholars, however, the view has gained acceptance that the reports primarily reflect on the allocation of investigative resources (Falk, 1997; Meywirth, 1999; Pütter, 1998). After an initial period of growth in the years 1991 through 1993, the total yearly number of organised crime related investigations has remained on about the same level of around 800. A trend is discernible only insofar as the share of newly opened investigations has more or less steadily decreased while the share of investigations that are continued from previous years has increased. This implies in broad terms that new cases could be initiated only to the extent old cases were closed (von Lampe, 2002).

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<sup>5</sup> Organised crime is defined as ‘the planned violation of the law for profit or to acquire power, which offenses are each, or together, of a major significance, and are carried out by more than two participants within a division of labor for a long or undetermined time span using a) commercial or commercial-like structures, or b) violence or other means of intimidation, or c) influence on politics, media, public administration, justice and the legitimate economy’ (Levi 1998:335).

Other data contained in the situation report may also be influenced by organisational factors. Since most reported investigations (66,1% in 2001) are conducted by specialised units which typically focus on specific types of offences or, most notably, specific ethnically defined groups of offenders (Pütter, 1998), the types of offences and the nationality of the suspects that appear in the reports are likely to reflect these specialisations more than actually underlying variations. The largest share of any offence category has consistently been that of drug trafficking with 35,2% in 2001, followed by property crimes with a share of 13,6%, vice offences with 11,3%, business related crime (including various types of fraud) with 11,2%, and customs and tax offences (including smuggling and VAT fraud) with a share of 9,5% (Bundeskriminalamt, 2002). Another consistent feature of the organised crime reports is that a majority of the recorded suspects (52,1% in 2001) are foreign nationals. What comes as a surprise, given the commonly held belief about ethnic homogeneity in organised crime is that most cases (80,7% in 2001) involve ethnically heterogeneous crime networks, although it is not clear on what level the cooperation across ethnic boundaries actually occurred. Among the foreign suspects the three largest minority communities in Germany are also those most strongly represented in the organised crime reports, Turks with 8,7%, former Yugoslavs with 5,6%, and Italians with 4% in 2001.

In certain categories of the organised crime reports, such as the number of offences and the amount of damages, the distribution is skewed by a few extreme values. The number of offences per organised crime related investigation, for example, varies greatly without a discernible pattern over time. The overall numbers have ranged between some 31.000 offences (in 1998) and about 104.000 offences (in 1991). The high relative and absolute number for the year 1991 emanates from two investigations with a combined total of 82,000 offences, including one complex fraud scheme involving some 50.000 victims (Pütter, 1998). A recent increase from 42.693 offences in 2000 to 69.574 offences in 2001 is largely due to one investigation into investment fraud involving 21.000 victims. Fraud cases have a similar effect on the amount of damages in terms of material losses. In 2000, for example, an elaborate business fraud scheme accounted for 4,6 billion DM out of a total damage figure of 7,3 billion DM, compared with 1,4 billion DM in the previous year, 1999, and 2,3 billion DM in 2001 (Bundeskriminalamt, 2002).

In recognition of the various reservations that have to be made regarding the meaningfulness of the statistical approach of the conventional organised crime reports, efforts have been undertaken in recent years to add a more qualitative dimension (Falk, 1997; Meywirth, 1999). These efforts have led to the introduction of a 'structural analysis' which centres around the description and ranking of group structures according to what is called their 'organised crime potential' (Bundeskriminalamt, 1999; Meywirth, 1999). The 'organised crime potential' is essentially a composite index. It is devised to capture the level of organisational and operational sophistication and 'professionalism' of criminal groups. The index comprises 50 indicators that had originally been formulated to assist investigators in detecting organised criminal structures. For the purpose of the 'structural analysis', these indicators have been weighted on the basis of a survey among officers of central organised-crime units who were asked to rank the importance of each indicator according to individual evaluations using an ideal typical professionally operating criminal group as a yardstick (von Lampe, 2002). The values assigned to the indicators as a result of the survey add up to a sum total of 100 points. The more indicators correspond with the characteristics of a given criminal group and the higher the individual values of the corresponding indicators, the higher the scores on the scale from 0 to 100 and the higher the assumed 'organised crime potential' (Meywirth, 1999). The highest ranked indicator is 'hierarchical structure' with a value of 4.35, followed by 'international' (3,49), 'an at first glance inexplicable relation of dependence or authority between several suspects' (3,36), 'payment of bribes (...)' (3,03), and 'measures to launder money' (2,96). The lowest ranked indicators are 'assumed names' (1,17), 're-admittance after release from prison' (1,17), 'work on demand' (1,23), 'disappearance of formerly available witnesses' (1,28), and 'use of relatively expensive or difficult to implement scientific means and findings' (1,29).<sup>6</sup>

The 'organised crime potential' of criminal groups is measured with reference to areas of crime and ethnicity. In 2001, the groups with the highest average 'organised crime potential' were found in the area of environmental crimes, followed by tax and customs violations, business crimes and violent

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<sup>6</sup> The unpublished list of indicators with the ranking factors has been kindly furnished to the author by the Bundeskriminalamt in August 2002.

crimes, and among those groups with Yugoslavian, German, Turkish or Italian membership. In 75,5% of the cases the score was below 50 points (Bundeskriminalamt, 2002). The highest score in 2001, 90,9 points, was reached by a criminal network involved in the trafficking of contraband cigarettes.<sup>7</sup>

The Bundeskriminalamt (2002) has pointed out the fact that there is a strong correlation between the average duration of investigations and the score on the 'organised crime potential'-scale. This may be seen as a confirmation of the assumption that cases involving criminal groups with a high 'organised crime potential' are especially complex and time consuming. But it may just as well imply the opposite. The longer an investigation lasts, the greater the likelihood that details become known which correspond to indicators of 'organised crime potential'. This means, for example, that crime groups involved in criminal activities that demand more time consuming investigations, such as business crime, have a greater chance of being classified as having a high organised crime potential than groups engaged in less difficult to investigate criminal activities.

As has been argued elsewhere (von Lampe, 2002), the 'structural analysis' appears to combine the shortcomings of an analytical approach that lacks the necessary theoretical underpinning with those of a statistical approach that promotes the collection of data not because they are meaningful but because they are available. To begin with, neither the list of indicators nor the relative weighting of the indicators are derived from a comprehensible analysis of the functioning and dynamics of criminal groups. If the selection and ranking of indicators were based on empirically grounded theory, the aspect of 'hierarchy', for example, would most likely be found toward the bottom of the list. The evaluation of particular factors aside, the methodology seems to be more fundamentally flawed. The 'organised crime potential'-index implies that the indicators are empirically independent, that the relevance of every indicator is known, that the occurrence of an indicator, such as for instance 'hierarchical structure', has the same significance under all circumstances, and that any combination of indicators has similar implications as long as the individual values add up to the same score. It seems safe to say that this is not the case.

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<sup>7</sup> This information was kindly furnished by the Bundeskriminalamt in August 2002.

Therefore, the ‘organised crime potential’-index can at best be taken as a meaningful measure in extreme cases with either very high or very low scores, provided the low scores are not the result of limited information.

But even with these reservations in mind it is doubtful whether any relevant inferences can be drawn from measuring the ‘organised crime potential’ as long as this is done with regard to particular areas of crime or certain ethnic groups, given the diversification and multi-ethnic character of many of the criminal networks included in the organised crime reports. In 2001, about one third of the groups were active in more than one area of crime and on average scored higher on the ‘organised crime potential’-scale (44 points) than groups that were only engaged in one type of crime (37 points).

In sum, the situation reports may contain valuable information, but a number of flaws regarding the collection and presentation of the data diminish the validity for an assessment of organised crime and, more specifically, of organised crime groups. The ranking of organised crime groups by their ‘organised crime potential’, using the current methodology, in the end appears highly arbitrary.

### **The Ghent University’s ‘Risk-Based Methodology’**

In comparison to the approach taken by the Bundeskriminalamt, the ‘risk-based methodology’ developed by the Ghent University’s Crime Research Group is more far reaching and scientifically more ambitious. There is, however, a common core. The ‘risk-based methodology’, like the ‘organised crime potential’-index, has been designed to improve the meaningfulness of organised crime situation reports, in this case the Belgian Annual Report on Organised Crime. Moreover, the Ghent approach is similarly based on an analysis and ranking of organised criminal groups. The main difference lies in the fact, that the ‘risk-based methodology’ has a much broader scope of analysis by also including environmental factors (Black et al., 2000, 2001; Vander Beken & Defruytier, this volume).

Briefly summarised, organised crime is conceptualised as ‘a function of the market for illicit goods and services’ (Black et al., 2001, p. 23), i.e. market principles are seen to significantly influence the way criminals and criminal

activities are organised. Criminal groups and illicit activities, in turn, are considered in a systemic context with regard to how organised crime impacts on society and how organised crime is affected by law enforcement and regulatory efforts. To this overall framework the risk-based methodology is applied.

Risk assessment is understood to be a method to systematically analyse socio-economic and political variables and their potential impact on organised crime with reference to the likelihood of threat and the levels of potential harm. The analysis comprises three stages. The first stage includes an environmental scan which seeks to identify relevant social trends by collecting and processing information from all available sources. The second stage involves a three-part assessment of the primary elements of analysis: criminal structures, counter-measures, and licit and illicit markets. The analysis of criminal structures aims at ranking the threat of identified organised crime groups based on a matrix of attributes. The market analysis, in turn, entails the examination of actual levels of organised criminal involvement in illicit markets and of the vulnerability of specific licit market sectors. The third stage is intended to provide an opportunity to link the three elements (structures, counter-measures, markets) back into a more considered whole. The basic assumption of the 'risk-based methodology' can perhaps best be summed up in the hypothesis that the higher the capacities of criminal groups, the greater the opportunities in illegal markets and the higher the vulnerabilities in particular sectors of the licit economy, the higher the risks for society to incur damages.

The Ghent approach marks a departure from conventional conceptions of organised crime in two important respects. On the one hand, the emphasis on the contingency of criminal structures helps to overcome the fixation on cohesive organisational entities and gives room for the appreciation of the dynamics of patterns of criminal cooperation. On the other hand, the holistic perspective allows viewing organised crime in a broader social context and, in fact, as an integral part of society.

However, the Ghent approach in its present form does not really follow through on the chosen path, because in the end it does not spell out a consistent overall framework that would equally account for the various manifestations of organised crime across the spectra of organisational structure and socio-economic embeddedness. What is provided is a specification of a set

of factors that are assumed to be relevant for the assessment of organised crime in one way or the other. But the selection of factors appears to reflect conventional conceptions of organised crime more than the complex, multi-dimensional conceptualisation implied in the general theoretical discussion supplied by the Ghent Research Group.

In order to take the contingency perspective seriously and to go beyond narrow conceptions of criminal structures, for example, the analytical framework of the Ghent approach would have to capture myriad forms of criminal cooperation, including transactions taking place in a pure market setting, embedded within social networks, or within the internal structures of hierarchical organisations, because conceptually, they all are on the same level (see Smith, 1994). However, the Ghent conceptualisation as it pertains to criminal groups seems to have been developed only with clear-cut organisational entities in mind, as evidenced by the list of attributes used to rank 'organised crime groups'. Items such as 'size of group', 'working with other groups', 'mobility', and 'continuity' would be either tautological or ill-fitting when applied, for example, to criminal actors who flexibly use webs of personal relations for the commission of crimes, i.e. to those patterns of criminal cooperation that seem to be characteristic of much of the 'organised crime' observed in Europe today (Bruinsma & Bernasco, 2002; Van Duyne, 1996; Hobbs & Dunnighan, 1998; Johansen, 1998; Junninen & Aromaa, 2000; Fijnaut et al., 1998; Gruppo Abele, 2003; Kleemans & Van de Bunt, 1999; von Lampe, 2003b; Paoli, 2002, 2003; Pearson & Hobbs, 2001; Ruggiero, 1996; Zaitch, 2002).

Similar reservations must be made regarding the systemic dimension of organised crime. The relation between organised crime and society is primarily conceptualised as a dichotomy of two separate spheres with organised crime constituting an external force. While it is stressed, for example, that the relationship between organised crime and the licit economy is 'multi-directional' (Black et al., 2001, p. 77; Vander Beken & Defruyter, this volume), the concept of vulnerability of licit economic sectors provides no framework for capturing criminal networks within the business elites. Likewise, the kinds of impacts ascribed to organised crime are addressed only in very broad terms of 'economic, emotional, physical, intellectual, and political damage' (Black et al., 2000, p. 36), which would account for a wide range

of constellations, including those not in line with a dichotomic view of organised crime and society. But at the same time, symbiotic relations between legal and illegal structures are not specifically accounted for.

Finally, the conceptualisation of the link between particular manifestations of organised crime and their impact on society is such that stereotypical imagery is not challenged. The 'risk-based methodology' is not straightforward regarding the assumed linkages between the highlighted empirical phenomena and their perceived significance in terms of threat and harm. Rather, the enumerated group attributes and environmental factors are treated as if their relevance were more or less self-evident. Just as in the case of the Bundeskriminalamt approach, interrelations are subliminally implied rather than derived from empirically grounded theory. Even though the need for developing causal explanations is stressed 'to provide an adequate understanding of the phenomena and their associated risks', such explanations are not systematically provided, especially not regarding the assumed relevance of group attributes. Even more so, the selection of some indicators is left up to police experts and policy makers (Black et al., 2001, p. 63; Vander Beken & Defruytier, this volume).

Regarding the assessment of criminal groups, the Ghent approach, like the Bundeskriminalamt's 'organised crime potential'-index, relies on the meaningfulness of a list of attributes for determining the capacity of criminal groups. These attributes are ordered in a matrix of categories that are designed to capture the 'intent' and 'capability' of 'organised criminals' to achieve specified aims. But, to begin with, the assignment of certain attributes to particular categories is not always plausible. For example, 'violence' and 'deadly violence' are placed in the 'intent'-category, whereas 'corruption' is listed as an aspect of 'capability' (Vander Beken & Defruytier, this volume). Moreover, the choice of attributes is not always convincing. Although 'hierarchy', the highest valued group attribute in the Bundeskriminalamt's 'organised crime potential'-index, is not included in the Ghent catalogue of indicators, there are some other questionable items. It is not clear, for instance, in what respect the intent to use 'violence' and 'deadly violence' should signify a high level of sophistication. Quite the opposite may be true, when one thinks, for example, of the disastrous consequences the Sicilian Mafia had to suffer from the campaign of terror that was staged under the ill-fated leadership

of Totò Riina (see Stille, 1995). Another highly ambiguous indicator is the 'size of group'. Again, it seems farfetched to assume that such a property, to the extent it can be discerned at all, is positively correlated to the capacities of a criminal group regardless of the circumstances. On the contrary, far from being an asset, a large group size can very well become a liability in a hostile environment (Reuter, 1983). So when large criminal groups are detected by the police this does not necessarily expose a particular source of threat, but rather, it could be seen as a confirmation of the notion that the vulnerability of criminal groups increases with size.

In sum, the 'risk-based methodology' has the potential to advance the analysis of organised crime to a higher level. It demarcates a broad area of investigation for further research. But for a tool that aims at assessing and measuring organised crime in an administrative or policy context, it is incomplete. Crucial elements in the conceptual edifice are missing, for example, to account for the diversity and elusiveness of criminal structures or the embeddedness of criminal networks in high status groups. It is likely that in the practice of strategic planning and policy development the conceptual void will be filled once again by conventional stereotypical conceptions and imagery so that in the end not much will have been gained.

### **Some Suggestions for Improvement**

The weaknesses of the two approaches appear to be rooted in the fundamental difficulties of measuring something as elusive as 'organised crime'. However, the critique does not necessarily have to exhaust itself in emphasising these limitations. Some alternatives may be available to the approaches taken by the Bundeskriminalamt and the Ghent Research Group, namely regarding the choice of empirical referents and the underlying model of organised crime.

### **Empirical Referents**

Measuring in the social sciences requires conceptual clarity and much can be gained for the measurement of organised crime by clearly stating what

exactly it is in empirical terms that is supposed to be measured (Black et al., 2001, p. 17; Reuter & Petrie, 1999, p. 22). The BKA and the Ghent approaches, in any case, leave considerable room for improvement in this regard.

Both approaches take collectivities of offenders in a broad sense as the basic unit of analysis. The Bundeskriminalamt treats all suspects in a particular organised crime investigation as members of a 'grouping of offenders' (*Tätergruppierung*). The Ghent Research Group uses the term 'organised crime groups' as a generic concept to include 'networks and/or hierarchical structures' (Black et al., 2001, p. 53) and stresses the diversity and elusiveness of the phenomena that fall into this category: Organised crime groups 'are predominantly dynamic and fluid' (Black et al., 2001, p. 23), and they 'exist in different forms, geographical locations, and (...) exploit (or service) different areas of socio-economic activity (both licit and illicit)' (Black et al., 2001, p. 5). In the end, both approaches are similar in that they attempt to avoid a restriction of the analysis to stereotypical crime syndicates. This inclusiveness, while certainly desirable, comes at a price, because a wide range of phenomena are lumped together without a clear conceptualisation and without considering the empirical and analytical differences between various types of criminal structures. In consequence, no objective criteria are at hand to delineate 'criminal groups' as the basic units of analysis, and different structural patterns are prone to be treated as equal so that the assessment is likely to be skewed by comparing apples and oranges.

### *Groups and Networks*

Perhaps the most profound flaw is rooted in the failure to treat the concepts of 'criminal network' and 'criminal group' as analytically distinct categories. Implicit in the BKA and Ghent approaches is the notion of a one-dimensional spectrum of structures from loose networks to hierarchically structured criminal groups (see e.g. Black et al., 2001, p. 55). While such a conceptualisation may make sense in some ways, when it comes to assessing crime structures in a given geographical area or market, a more appropriate perspective would have to account for the partial or complete overlap of network and group structures, i.e. the fact that webs of criminal relations may constitute, at the same time, networks and groups.

An example may illustrate this point. Take the trafficking in stolen motor vehicles. A typical scheme involves the theft of cars, the alteration of the cars in appearance and possibly the forging of documents, and finally the sale to more or less unwitting customers. Theoretically, all tasks could be performed by one person alone, but most commonly a number of actors will be cooperating. There may be specialised thieves, car mechanics, document forgers and procurers who get involved either as individuals or as members of small task forces. A number of individual thieves, for example, may sell to a group of mechanics who prepare the stolen cars for resale and pass them on to different procurers who, in turn, obtain false documents from various forgers. In this case, only the car mechanics would constitute a 'group' in the true sense of the word, assuming that they collaborate on a continuous basis as an integrated structural entity, while the overall structure constitutes a network consisting of sets of business relations through which the group of car mechanics, their suppliers and their customers are connected.

The BKA and the Ghent Research Group only go so far as to say that not only the core group of mechanics but the entire web of illegal business relations can qualify as organised crime, but they provide no objective criteria for dissecting the conglomerate of direct and indirect relations between the participants into manageable units of analysis.

Given the emphasis both approaches place on group-specific indicators it would seem plausible to distinguish clear-cut organisational units from less integrated structures. In the example, therefore, the core group of mechanics would most likely be taken as one 'organised crime group' whereas the suppliers and customers, since they by themselves are not directly connected, might be disregarded altogether.

On the other hand, especially the Ghent approach stresses the primacy of market forces over organisation (Black et al., 2001, p. 23), a view that is also reflected in the Bundeskriminalamt's definition of organised crime which takes the planned, continuous commission of crimes as the key reference point. Before this background, it would be inconsistent to orientate the selection of the basic units of analysis to organisational criteria, because organisational (or group) structures are seen as the result of market dynamics. Instead, the notion of the primacy of market forces would call for a focus on specific sets of actors who participate in a particular complex of criminal activities. Thus,

in the given example, all directly or indirectly connected car thieves, mechanics, forgers and procurers could be treated as one 'organised crime group' because they are all involved in functionally interrelated criminal activities.

When one compares the two alternative approaches it should become apparent that a distinction between groups and networks in terms of competing forms of criminal organisation is not always helpful. Where individual actors and small groups of offenders cooperate in the commission of crime, as is the case in the example given above, a dividing line would have to be drawn quite arbitrarily between structural units and individuals who - seen from a functional point of view - belong to one overall entity.

A better alternative seems to be an approach which considers groups and networks to represent different structural dimensions in an analytical sense. A network consists of a set of relations among criminal actors that allow them to collaborate opportunistically with others most appropriate to the specific opportunity presented (Reuter & Petrie, 1999, p. 10). The concepts of group and organisation, in contrast, while also referring to a set of relations between actors, imply integrated, stable and durable structures that have an existence and behaviour independent of the behaviour of their members (Hall, 1982), treating the terms 'group' and 'organisation' here as merely differing in the degree of complexity, formalisation and size.

In comparing the two concepts of 'criminal network' and 'criminal group', that of 'criminal network' appears to be the more elementary and more concise one. It is more comprehensive and inclusive than that of 'criminal group' because network ties, i.e. relations that can be used for the commission of criminal acts, are inherent in any type of criminal cooperation, regardless of the organisational framework. Thus, criminal networks constitute 'the least common denominator of organised crime' (McIllwain, 1999, p. 304; see also Potter, 1994, p. 116). Furthermore, the network concept is less bias-prone than that of criminal groups. Since the existence of criminal groups as super-individual entities is linked to factors that are not immediately visible, the assessment becomes susceptible to misinterpretations and an overrating of collectivities that are defined by superficial characteristics such as ethnicity. In contrast, it is a comparatively less difficult task to ascertain the existence of networks because criminally exploitable ties are manifested in every collusive

criminal act (von Lampe, 2002), although some methodological problems do remain. Determining the boundaries of a network, for example, is partly a matter of definition and partly it is a practical problem of identifying and accessing network members (Knoke & Kuklinski, 1982, pp. 22–26; Scott, 1991, pp. 56–60; Sparrow, 1991, p. 262). Likewise, the assessment of network structures is sensitive to missing data and bias in data collection (Knoke & Kuklinski, 1982, pp. 34–35; Sparrow, 1991, pp. 256, 262). For example, the focus on particular individuals may lead to the false conclusion that they form a cohesive clique or sub-network within an overall low-density network, whereas a more complete picture might reveal that the entire network is dense, i.e. all network members, not just those receiving the most attention, are connected through a high number of ties.

Still it seems that it would be a step forward in the direction of greater conceptual clarity and methodological soundness to take criminal networks, not ‘criminal groups’, as the key empirical referent. This does not necessarily mean that the existence of group structures in the true sense of the word has to be ignored. Group structures can be captured within the framework of network analysis through concepts that pertain to the form and content of network ties (see Knoke & Kuklinski, 1982, p. 15–16).

### *Economic, Social and Quasi-Governmental Functions*

A further conceptual clarification can be reached by taking into account that criminal structures may serve different functions and purposes, namely social, economic and quasi-governmental (von Lampe, 2001b, 2003a). Economic structures aim at material gain, such as, for example, a cigarette smuggling ring or a gang of burglars (Van Duyne, 2003). These have to be distinguished, analytically, from criminal structures that serve social functions which support their members only indirectly in illegal economic activities, for example, by facilitating contacts, giving status, reinforcing deviant values, and providing a forum for the exchange of information (Haller, 1992). Quasi-governmental structures, in turn, support illegal economic activities in a more abstract way by establishing and enforcing rules of conduct and by settling disputes in a given territory or market (Anderson, 1979). While these functions may empirically coincide, it should be obvious that they have to be distinguished

in order to come to a concise analysis (see also Block, 1983; Ianni, 1975; Paoli, 1998). Take, for example, the case of an illegal enterprise that is operated by members of a criminal fraternity such as the Sicilian Mafia (Paoli, 1998) or the Russian *vory-v-zakone* (Varese, 2001). It would neither be adequate to interpret the structure of the enterprise in terms of the structure of the criminal fraternity. In fact, both structural arrangements are most likely to differ greatly. Nor would it be adequate in this example to interpret the enterprise as a subdivision of the criminal fraternity. Instead, the analysis of the links that connect participants in a given criminal enterprise would have to include a consideration of the possible co-existence of business relations and other types of ties, for example social ties rooted in a fraternal association, kinship or community, to account for a certain degree of cohesion (Bruinsma & Bernasco, 2002; Kleemans & Van de Bunt, 1999).

#### *An Underlying Model of Organised Crime*

Taking a network approach to the assessment of organised crime entails the application of a wide array of conceptual tools that relate to, broadly speaking, two levels of analysis, the egocentric network, consisting of the relations of one particular actor, and the complete network which embraces the overall web of actors under investigation (Knoke & Kuklinski, 1982, pp. 16–18). It is widely assumed that meaningful insights can be gained by applying network analysis to criminal structures (Coles, 2001; Davis, 1981; Ianni, 1975; Lupsha, 1983; McIlwain, 1999; Morselli, 2001; Sparrow, 1991). These insights, however, pertain mostly to the understanding of the inner functions and mechanisms of criminal structures. In contrast, the questions that need to be answered in the context of assessing and measuring organised crime for the purpose of strategic planning and policy development is how specific network properties and attributes are indicative of the way criminal structures impact on and are affected by their broader environment. In this respect, not much is gained *per se* by opting for a network approach in contrast to a vague concept of ‘organised criminal group’. In the end, what is needed is a model which represents the interrelations between, on the one hand, the characteristics of criminal structures and, on the other hand, factors such as the type and volume of crime or the intensity and effectiveness of law enforcement. As

has been stressed above, such a model does not seem to be available at the moment, given the paucity in theory and data that continues to characterise the general knowledge on organised crime.

### *Typologies of Organised Crime Models*

Where ‘models’ of organised crime have explicitly been developed or categorised, in many cases they are really only perspectives, i.e. certain ways to look at organised crime (see Albanese, 1994). Some ‘models’ are more sophisticated in that they are meant to explain the emergence and development of criminal structures, so that organised crime, not its impact on society, is treated as the dependent variable (see Halstead, 1998). Finally, some ‘models’ are also perceived to predict social consequences, although this aspect tends to be stated only in very broad terms (see Williams & Godson, 2002). In their discussion of a methodology for anticipating ‘the further evolution of organised crime’, Williams and Godson distinguish several potentially predictive ‘models’ that emphasise causal relations between certain environmental conditions, certain manifestations of organised crime and certain outcomes. ‘Political models’, they argue, can explain the increase in particular types of crime and the emergence of criminal structures as the result of a weak state, an authoritarian form of government, and a low degree of the institutionalisation of the rule of law (Williams & Godson, 2002, pp. 315–323). ‘Economic models’, in their typology, include those approaches which attempt to predict organised criminal behaviour with a view to the dynamics of supply and demand and the levels of control of illegal goods and services (Williams & Godson, 2002, pp. 322–328). ‘Social models’, the third type of models defined by Williams & Godson (2002, p. 328), emphasise the cultural basis for organised crime, the idea of criminal networks as a social system, and the importance of trust and bonding mechanisms as the basis for criminal organisation. The ‘strategic or risk management model’, in turn, conceptualises the activities of criminal enterprises, for example the corruption of public officials or the exploitation of safe havens, as means to minimise risks emanating from operating in a hostile environment (Williams & Godson, 2002, pp. 335–339). Finally, Williams & Godson’s typology includes ‘hybrid or composite models’ which variously combine political, economic, social, and

strategy factors to predict, for example, that in certain states characterised by weak government, economic dislocation, and social upheaval, transnational criminal organisations will take control of much of the domestic economy to use it as a basis for operating in host states where lucrative markets and supporting ethnic networks exist (Williams & Godson, 2002, pp. 340-347).

All of these 'models' have in common that they tend to be closely related to concrete historic cases and, therefore, it is problematic to generalise from them, especially when it comes to combining different 'models' in one analytical framework.

As has been discussed elsewhere in greater detail (von Lampe, 1999, pp. 315-331), complex models of organised crime face two interrelated difficulties. On the one hand, it has to be determined what aspects of the social universe to include in the model at all, and, on the other hand, the relations between the model elements have to be established. By looking only at particular dyadic sets of model elements, these relations usually take the form of causal links in one or the other direction, but viewed in a broader context the relation may become more complex, ambiguous and a matter of chance. For example, the size of a criminal group can be related to increasing economies of scale in the corruption of public officials and the resulting neutralisation of law enforcement. At the same time, visibility can be expected to increase with size, thus creating additional vulnerabilities to law enforcement intervention. The outcome in a particular case, it can be hypothesised, may depend on the combination of such diverse factors as the degree of social homogeneity in a given geographical area, the organisation and social prestige of law enforcement, and the bias and journalistic qualities of the media.

### *Typologies of Criminal Networks*

While at present there is no sufficient knowledge to construct a general model of organised crime that could account for the complex interplay of myriad factors under various circumstances, it seems worth contemplating the possibility of achieving some degree of analytical sophistication on a smaller scale, by distinguishing certain basic constellations or scenarios of organised crime and by trying to establish the interrelations between model components for each of these constellations.

One typology which aims at a meaningful distinction of organised crime settings has been developed from an analysis of the American organised crime literature. It emphasises variations in the social embeddedness of criminal actors and variations in the degree of social and cultural homogeneity even within one country (von Lampe, 1999, pp. 332–334). Two main types are identified, (1) criminal structures rooted within marginalised subcultures, such as those described by William F. Whyte (1955) and Ko-Lin Chin (1990), and (2) criminal structures that exist in an environment which is not marked by severe social and cultural cleavages, such as those described by William Chambliss (1978), John Gardiner (1970) and Gary Potter (Potter 1994; Potter & Gaines 1995). The cited studies suggest that criminal structures tend to be larger and more complex in marginalised subcultures than in more homogeneous social settings, while the involvement of the political and administrative elite in illegal activities tends to be more direct and more intense in the latter case. When it comes to measuring organised crime, these observations, to the extent they are accurate, could help to come to more accurate and meaningful assessments because they introduce an empirically grounded notion of normalcy into the assessment process.

The typology of ‘organised crime settings’ has been revised to accommodate the conditions in Europe (von Lampe, 2001b, 2002, 2003a). In its present form it is premised on two tentative assumptions, the relative social homogeneity of criminal networks, and a positive correlation between the social position of criminal actors and the quantity and quality of criminal opportunities.

The typology distinguishes four basic constellations. The first involves criminal networks with no social support structure within the country of operation, as in the case of burglary gangs that use home bases in Eastern Europe as a hub for crime sprees in Western Europe (Benninger, 1999). The recruitment and training of group members and the formation of teams apparently takes place under relative immunity from law enforcement. These conditions seem to be conducive to the emergence of complex organisational structures, including a military-like hierarchy and a division of labour within and between teams. The lack of social support in the countries of operation, in turn, corresponds with the predatory nature of the crimes and to the seemingly unrestrained willingness to use violence.

The second category refers to crime networks which are rooted in marginalised subcultures. In these cases criminal actors can rely on a social support structure which is larger than that provided by their immediate criminal network, but one more or less set apart from mainstream society and its institutions. While the seclusion is used to shield criminal activities from detection, criminal actors are familiar enough with the host culture to take some advantage of its infrastructure, including communication, business and finances (Van Duyne, 1996; Pearson & Hobbs, 2001).

The third constellation includes criminal networks that are rooted in mainstream society. These networks comprise outwardly law-abiding actors who are not restricted by any practical, cultural or legal obstacles in taking advantage of the legitimate social infrastructure. Mainstream crime networks are typically involved in organised business crimes. In comparison with subculture-based crime networks, they have a number of strategic advantages, including 'natural' interaction with office holders that may translate into crime opportunities or reduced risks of law enforcement interference (Van Duyne, 1997).

The fourth type, finally, pertains to criminal networks consisting of members of the power elites. In contrast to the former category, actors have direct access to socially relevant decision-making processes. Examples are provided by a long series of scandals involving the abuse or misuse of competencies for profit or power (see e.g. Newell 2003).

The value of this typology, I would argue, is threefold. Firstly, it sensitises the observer to the potential existence of organised crime in all social spheres. Thereby, it works against some of the bias characterising conventional assessments of organised crime. Secondly, like the previously discussed typology, it allows to develop tailor made analytical frameworks for particular social settings. This is an avenue that might be worth considering for the Ghent approach which already acknowledges potential differences between social settings by structuring the analysis along the lines of particular licit and illicit markets. However, in comparison, the social embeddedness of criminal actors seems to be the more fundamental and therefore the more meaningful distinctive criterion.

A third benefit might be derived from the typology of criminal networks under the assumption that the capacity of criminal actors increases with social position. This would provide a crude measure of the 'dangerousness' of

criminal networks. The higher up in the social hierarchy a criminal network is located, the higher the level of dangerousness which can be ascribed to it (von Lampe, 2002). On the aggregate level, it could be quite informative to determine the share of mainstream and elite based criminal networks in comparison to those criminal networks that tend to receive the most attention in the media and also by the police: criminal networks embedded in marginalised subcultures and criminal networks without any social base in the country of operation at all. But given the bias in media coverage and law enforcement, the presently available data would not yield a realistic picture. This leaves the question to what extent the analysis of individual cases could contribute to the assessment of the extent and seriousness of organised crime. Here, for the time being, case studies might be a valuable alternative to statistical approaches by using them in the form of 'litmus tests' to determine, for example, the ease with which members of the political elite can form cooperative relations for the commission of crimes, or how easy it is for members of marginalised subcultures to bridge existing social and cultural gaps to access public officials for arranging a bribe or for entering into a more long term collusive relationship. One case alone of an extensive criminal network in the political establishment or of an alliance between socially marginalised criminals and office holders could give sufficient grounds, for example, for fundamentally questioning the integrity of the political elites and thereby confirming or undermining prevailing beliefs about the relation between upperworld and underworld. In the end, the analysis of individual cases might be more informative than the collection of quantitative data within an analytical framework of questionable validity. This does not mean, however, that collecting quantitative data should be neglected. Such data may provide a statistical bird's-eye view from which selections for in-depth qualitative studies can be made. Together they may justify assessments that go beyond mere descriptions of the phenomena which are lumped together under the umbrella term 'organised crime'. But it cannot be stressed enough that organised crime itself cannot be assessed, let alone measured, without valid operationalisation of this concept.

## **Conclusion**

Measuring something as complex and elusive as organised crime requires a clear understanding of the object of study. It takes a great deal of conceptual clarity and deep insights into the processes and mechanisms at play to know what empirical referents to choose for the measurement and how to interpret whatever data are collected. While the study of organised crime has made some progress in recent years, I have argued in this chapter that there is still no sound basis for a meaningful measurement of 'organised crime', if alone because the proposed measures lack construct validity.

Current efforts in that direction have been borne out of legitimate interests of law enforcement agencies on the national and supra-national levels to come to a more precise and more rational understanding of the nature and extent of what they consider organised crime. These efforts have brought the discussion of the conceptualisation of organised crime to new levels of complexity, but in the end they cannot replace an empirically grounded theoretical framework developed through arduous scientific exploration.

The scientific process is framed as much by what we know (or believe to know) as by what we do not know. Strategic planning and policy development, in contrast, have to rely on whatever knowledge is available and often appear to be inclined to disregard how narrow a basis of knowledge there is. The two approaches discussed in this chapter illustrate this fundamental contradiction. Although there are elements of sound methodology and theory incorporated in both frameworks to assess organised crime, in the end many loose ends remain and leave ample room for lay theories, stereotypes and institutional interests to shape the course and outcome of the measurement process.

The conclusions to be drawn from this discussion, I believe, are twofold. Firstly, the study of organised crime should be aimed at developing a conceptual and theoretical framework that permits to measure 'organised crime' in a more meaningful way; even though it is less than certain that the complex and multifaceted phenomena associated with the term 'organised crime' do indeed yield to a positivistic scheme based on a single holistic concept. Secondly, as long as there is no sufficient basis for a meaningful measurement of 'organised crime' on a grand scale, methodologies should

be devised to assess the nature, extent and social relevance of more concrete phenomena. In this chapter I have tentatively outlined some avenues towards greater conceptual clarity. The proposed improvements centre on criminal networks as key empirical referents and on a typology that aims at meaningfully distinguishing criminal networks by differences in their social embeddedness.

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# Illegal markets, human trade and transnational organised crime

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## Introduction

Transnational organised crime in general, and human trade in particular, have recently become the subject of many criminological studies. At the same time, the study of crime in the social context of globalisation rather than within the boundaries of individual nation states has started to attract the attention of criminologists (McDonald, 1995; Findlay, 1999). Moreover, the approach from the market perspective (van Duyne, 1996; Williams, 1999; Ruggiero, 2000), apart from studies looking at it from human rights, organised crime, migration and labour perspectives, have tremendously improved our understanding of the trends and dynamics of the human trade in the contemporary world.

However, not so many authors tried to combine a global and a local approach. As well observed by Hobbs and Dunnighan (1998: 289), 'a serious shortcoming of global-transnational-international studies of organised crime is that they ignore or substantially underestimate the importance of the local context as an environment within which criminal networks function'. Consequently, for better understanding of transnational organised crime it is necessary to study the dynamics of the local context of 'trading networks and transformative systems of criminal and legitimate commercial activity' as well as the dialectic between the local and the global. The use of a 'glocal' approach (Hobbs and Dunnighan, 1998: 291) seems inevitable.

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It is of special importance when human trade and transnational organised crime in, through and from Balkan countries are analysed. Having in mind both its geographical position as a bridge between East and West and the high level of interdependence between Western demand of illegal labour and the supply of people from Eastern Europe, the Balkan is playing a very important role in connecting local and international markets. Thus, market and 'glocal' structural approaches are inevitable if we want to understand causes and build adequate prevention and repression strategies.

The main aim of this paper is to explore, focusing largely on the example of the Balkans, the connection between the expansion of neoliberal market economy and war, and related to it the growth of illegal markets and the shadow economy, on the one hand, and the victimisation by human trafficking, on the other. By locating human trade within expanding local and global illegal markets, I am arguing that, without taking into consideration wider social contexts, which create structural incentives for illegal markets and transnational organised crime, we can hardly understand the causes, let alone build effective strategies to combat and prevent it. Consequently, on the basis of the analyses of human trade as a form of both transnational organised crime and illegal markets, I am suggesting some strategies (short-term and long-term) for the prevention and control of human trafficking on both the micro and macro level.

### **Overview of the most important notions and global context**

Bearing in mind that there are different definitions and sometimes a confusion of terms in relation to transnational crime, particularly concerning human trade, for a better understanding of the text which follows, it is necessary to start with a clarification of the concepts I am using in this paper. In addition, since, as already mentioned, an understanding of the local context of trafficking in people from, to or through Balkan countries, is not possible without a consideration of the global context, in this chapter I am also providing an overview of the main global factors which contribute to development of illegal markets in general and human trade, in particular.

The meaning of the notion of transnational crime, which seems to have been developed over the last decade, is described by Mueller (Mueller, 1999, quoted by Williams, 2001: 61) as ‘criminal activities extending into and violating the laws of several countries’. Thus, the most common and distinctive feature of transnational crime is that it ‘involves the crossing of borders or national jurisdictions’ (Williams, 2001: 61). However, as well observed by Williams (2001), the notion of transnational crime is much more complex than it looks like at first glance, since there are several components of border-crossing, which appears to be multi-dimensional. These components include border crossing by perpetrators, products, people who are treated as commodities, profits and digital signals. Transnational crime may take form of organised crime, but it may also be committed by individuals.

Transnational crime involves the existence of illegal market, which Arlacchi (1998: 203, 2001: 5) defines as ‘a place or principle within which there is an exchange of goods and services, the production, selling and consumption of which are forbidden or strictly regulated by the majority of states and/or by international law’ (drugs, arms, human beings). However, for organised crime in North-western Europe (Van Duyne, 1996: 341) and even more in the Balkan countries, it seems more appropriate to make a distinction between two kinds of criminal markets: illegal trading in goods and services that are themselves forbidden, i.e. whose trade is strictly prohibited (e.g. drugs and people) and illegal trading in otherwise legal goods and services (e.g. goods such as cigarettes, liquor or petrol and other scarce goods during embargo in Serbia). This latter form of crime market is sometimes called informal market or informal (shadow) economy (UNDP, 1998: 4; Ruggiero, 2000: 66) and this is how I am going to call it in this article. Also, similarly to Ruggiero, I will define as the ‘hidden economy’ the social and productive space where both informal and illegal economies operate.<sup>2</sup> It is the part of the larger context of the shadow economy, which is expanding not only in developing, but in developed countries as well. For example, in most of OECD countries, the shadow economy was far below 10 per cent of GDP in 1970, while in 1990s it increased in some of them, such as Belgium, Denmark, Italy, Norway, Spain

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<sup>2</sup> However, unlike Ruggiero, I use the term illegal rather than criminal market since, having in mind the social context of Balkan, both informal and illegal markets are criminal.

and Sweden to almost 20 per cent of GDP (Schneider and Ernste, 2000: 41, 44). The understanding of both distinction and connection between these two markets is especially important for understanding the trafficking in people in Balkan countries. In these countries the distinction between legal and illegal is very loose and as such serves as an incentive for organised crime.

Trafficking in people, as a form of transnational crime, is often confused with people smuggling. This is not unusual, having in mind that they often are done in connection and by same criminal groups. However, it is very important that a distinction is made between these two phenomena in general, and in the study of the connection between illegal/informal markets and human trafficking, in particular. But, since both smuggling and trafficking in people are connected to illegal migration and illegal markets, there is a need for studying both their commonalties and distinctions. While smuggling is bringing someone across the border for money, trafficking can be done within the same country. In addition, and more importantly, unlike people smuggling, trafficking always include the wish to exploit someone or bringing someone in conditions of slavery. Thus, a smuggled migrant wishes to be smuggled, while trafficked persons usually do not have a choice (IOM Pristina, Situation report, 2000-2001), since they are deceived or pressurised into economic dependence. Also, while people smuggling may be connected to criminal markets, trafficking in people is the form of criminal market itself, often connected to other criminal markets as well. However, the fact that people smuggling can easily turn into trafficking should not be ignored. In fact, as illegal migrants, smuggled people most often do not have much choice but to turn to illegal markets for job opportunities. This brings them into conditions of exploitation or slavery, often turning them into victims of trafficking. In these situation, the distinction between smuggling and trafficking becomes blurred, so that in reality the major difference is in the amount of money that the person is paid prior to departure from the country of origin. The distinction may be determined only after the individual has arrived in the destination country: a smuggled person pays the whole amount in advance and after coming to the destination country he/she can walk free. However, trafficked person pays either percentage or nothing and is kept in debt bondage, i.e. cannot walk away from the smuggler. This is the point when the smuggled person may become a trafficked victim (Aronowitz, 2001: 167).

This usually happens when a smuggled person cannot afford an independent life as an illegal migrant and remains dependent and exploited by the smuggler or the person in whose service he or she is brought.

Although transnational (organised) crime has always accompanied economic regulations, its increase in the 1980s and 1990s has been accompanied and influenced by global trends, among which the most important ones are:

1. increasing inequality on the global level, and development of a global 'market society';
2. significant population movement;
3. more lax exit border controls connected to the dissolution of the Soviet Union and the Warsaw Pact, as well as to the democratisation of a number of African, Asian and Latin American countries;
4. globalisation of trade, technology, transportation, communication, information and financial systems;
5. global 'market culture' and colonisation or commodification of sexuality;
6. expansion of the hidden economy (illicit markets and informal economies) and the incorporation of the informal within the formal economy (Ruggiero, 2000: 94).

Leading to both a significant increase in inequality and the process which generates quite destructive concentrations of very pronounced economic deprivation (Taylor, 1999: 53), 'market society' (as defined by Currie, quoted by Taylor, 1999: 52) had furthered crime both nationally and internationally. In addition, the increasing gap between rich and poor countries generated significant population movement, driven by a mixture of push and pull factors.

Push factors are ranging from ethnic conflict and environmental degradation, the desire for material survival or economic improvement, to the escape from increasing gender inequality, family problems, domestic and sexual violence and homelessness (Kelly, 2002: 24; Nikolić-Ristanović, 2002a: 136). The increase in migration and the growth of ethnic networks that transcend a whole range of national borders has proved valuable to the operations of criminal organisations (Williams, 2001: 68). This especially became evident in the 1990s with the collapse of communism and ethnic conflicts in Eastern Europe, since the increase in migration was not accompanied with the increase but rather with the erosion of the tolerance of receiving countries.

The development of global ‘market culture’ contributes as a strong pull factor. According to Taylor (1999: 62), ‘market culture’ ‘trades openly with the idea and the range of possibilities of globalisation’, feeding the fantasy that the ‘solution’ to problems of material poverty ‘may live not within individual nation-states but *within a global market place*’. In addition, in contemporary ‘market society’ everything is for sale: everything is ‘commodity’, including human body and sexuality. Moreover, colonisation or commodification of sexuality is now playing an increasing role in the public culture of marketised societies throughout the world (Taylor and Jamieson, 1999: 264). This includes not only developed but developing countries as well, where commodification of everything was imported as a new way of life and offered as a norm of civilization or normal life (as opposite to what was reality of communism). (Kotzeva, 1999: 87). As a consequence, increasingly more jobs for women became available within the sex industry. All that serves as a strong pull factor for trafficking in people from undeveloped countries in general, and for trafficking in women in particular, either through feeding their unrealistic expectations about the West<sup>3</sup> or by luring them into local prostitution and other dubious jobs. And although this trafficking is not a new phenomenon, what is new is its geographical distribution as well as the growing involvement of organised crime in the market and its specialisation in smuggling and trafficking of people (Aronowitz, 2001: 170).

Transnational crime can in part be seen also as a response to interdependence and globalisation, or as ‘the dark side’ of it (Williams, 2001: 66,67). The importance of interdependence and globalisation in terms of facilitating transnational organised crime is especially evident in the field of trade, technology, transportation, communication, information and financial systems, where globalisation provides new opportunities for criminal enterprises to operate across national borders. It is not unusual that illicit trade develops a parasitic relationship with licit trade. However, the free trade system has made it especially easy to insert illicit products in a number of (licit) imports

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<sup>3</sup> One of the very strong pull factors is the myth of independence and emancipation supposedly awaiting women in the West (Wijers and Lap-Chew, 1997: 44). The other is connected to a better life and easy access to employment. The picture of the West comes from the global media, cinema, advertisements, etc., where everything seems possible and everyone is happy (Konig, 1997:87).

and exports, comprising at present international trade (e.g. illegal aliens transported with legal goods). Thus, as observed by Williams (2001, 66), ‘as licit business has become transnational in character, so has much enterprise crime’.

The development of organised crime, and trafficking in people as a significant part of it, is also connected to the expansion of the hidden economy, since it seems that there is a very clear interdependence between illegal and informal markets. The consequence is that the tolerance toward the latter one is feeding the development of the former. This can be observed especially in Balkan, but it exists in Western countries as well. Consequently, ‘informal economies and conventional criminal activities end up almost coinciding’ (Ruggiero, 2000: 64).

However, an especially important aspect of trafficking in people is the absorption of the informal economy into the formal in ‘the sense that hidden practices, parallel procedures, and forms of illicit economic conduct are increasingly required to bear fruit for the official economy’ (Ruggiero, 2000: 64). Illegal markets emerge partly ‘as the result of the growth of the instruments aimed at protecting society from the destructive effects of market forces themselves’ (Polanyi, 1974, quoted by Arlacchi). However, the alleged treats posed by the informal economy tend to be turned into opportunities for the formal as well, having in mind that ‘some official industries are able to set up their own illicit services to boost their economic performance (...) the official economy adopts illegitimate practices, while illegitimate entrepreneurs strive to gain access to the official economy’ (Ruggiero, 2000: 105). One of the best examples for that observation is found within illegal labour market in Britain, which provides cheap labour and increases the profits of main British supermarket chains like Tesco and Sainsbury.<sup>4</sup> Other examples are the horticulture in Spain and the Netherlands to produce cheap vegetables. Not surprisingly, those who seek employment on the illegal labour market are illegal migrants, who often enter the countries through smuggling channels and sometimes end in slavery-like conditions.

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<sup>4</sup> This is very well described in BBC Panorama program on illegal migration.

## **Transition, war and illegal markets**

Social changes in Eastern and Central European countries connected to political and economic transition led to the creation of conditions favourable to the development of illegal markets. In addition, in the Balkan countries, influences of the transition are interlaced with negative influences connected with war. The example of the Balkans is very telling in that regard, since it shows how illegal markets are developed in connection to the demand/supply ratio in scarce goods, cigarettes, drugs, weapons, illegal migrants etc., influenced by a combination of war, transition and globalisation related factors (Nikolič-Ristanović, 2002). Among the conditions created by the transition from communism, political and economic liberalization played the most significant role.

The political transition in Eastern Europe led to the opening of borders of East European countries and to an increased mobility of people. However, at the same time, the EU closed its borders. EU restrictive immigration policy mirrored in the Schengen agreement (1985), known also as ‘Fortress Europe’ or ‘Fortress EU’ (Goody, 2002: 135) led to an increase of illegal and criminal penetrations – a well known effect of prohibition on the emergence of illegal markets. In addition, it also contributed to the organised crime’s penetration of legitimate economy, which, however, seems to remain ‘limited to small companies’ (Van Duyne, 2003).

As observed by Rees and Webber (2002: 89):

‘The EU’s model of internal security has arisen in response to perceptions of an increased threat to the Union from organised crime. The EU has recognised its vulnerability as a region in which there is free movement of goods, services, money and people within the boundaries of the single market. Organised crime exploits this situation and involves itself in the creation of illicit markets as well as the penetration of legitimate ones.’

Economic liberalization, i.e. the replacement of a state-planned economy with a market economy, enabled the easy flow of goods, including drugs and human commodities. Thus, as Andreas puts it, ‘loosening of government controls over the flow of goods, services, information and capital encourages both legal and illegal economic activity’ (Andreas, 1995, 1996, quoted by Lewis, 1998).

In conditions of poverty, increasing unemployment and severe tax policy, many people are forced to look for either a primary or additional (second) job within the informal sector which, together with its associated labour markets, is growing in many transition economies. Not so rarely, the informal sector offers better paid jobs than the formal one and a section of the population earns significant additional income from such activities (UNDP, 1998: 4). The growth of the informal labour market entails that more people (both women and men) are relatively unprotected and vulnerable to exploitation in their jobs (inappropriate wages, prolonged working hours, lack of any rights etc.). (UNICEF, 1999: 6; Efremov, 1998: 138; Vaknin, 2000: 1).

The upheaval of transition, on the one hand, and the growth of the sex industry as an informal sector most interested in attracting women, has led to a rapid rise in the number of women who are, willingly or unwillingly, working as prostitutes, with a high risk of becoming exposed to violence and exploitation.

All above-mentioned conditions are further aggravated by armed conflicts, 'when criminalised paramilitary and state-intelligence organisations invest in, sponsor, or directly enter' (Lewis, 1998: 217) criminal markets. Consequently, war zones become centres of organised crimes related to the illicit trade of drugs, fuel, weapons. There were also allegations of trafficking in human organs (Nikolič-Ristanovič, 1998: 466). In the Balkan countries, war related economic sanctions against the FR Yugoslavia and Greek sanctions against Macedonia also contributed to the development of a large scale informal economy in the whole region. The informal economy offered both labour and scarce goods (Nikolič-Ristanovič, 1998: 462) and as such compensated for the non-existent or ineffective formal economy.

The economic crises in FR Yugoslavia, for example, which had resulted from both the war and UN sanctions, led to a criminalisation of society as a whole. During the war, almost every citizen in the FRY was involved in some kind of illegal activity. Enormous inflation and the impossibility of earning a significant income legally, encouraged a large number of people to acquire and use foreign instead of national currency, smuggle and sell scarce goods on the black market or resort to other illegal activities in order to survive (Nikolič-Ristanovič, 1998: 471). The hidden economy included both

criminalised businessmen engaged in major import-export deals, and a small-scale or street-corner economy, involving 'thousands of impoverished 'ordinary' individuals who are trying to earn their elementary living' (Bolcic, 1995: 153). As observed by Bolcic (1994: 143), everyday life of people became a painful struggle for survival, leaving not much room for thinking about the legal status of one's actions. Moreover, the scale of illegal activities was so extensive that it was useless to threaten people with sanctions. The law seemed to have become non-existent, while destructive individualism spontaneously established itself as the dominant cultural pattern. In this way, the state of anomie reached an extreme point and in 1990s illegal markets became cornerstones of economies of many Balkan countries (Derens, 2000: 186).

In sum, political destabilisation, war and militarisation of the region proved advantageous for development of illicit businesses, at the same time offering a number of specific incentives for organised crime to go transnational: low risk, high profit, high demand for drugs, arms, women, a large supply in people willing to cross borders illegally etc. (Williams, 2001: 69). For example, militarisation and the large presence of international organisations and businesses, as a strong pull factor, has created a significant demand for the products and services that criminal organisations (can) supply. For example, the establishment of military bases in the Balkans created a demand for a sex industry. At the same time, highly developed sex markets in Western Europe and the revenues that they promise play a significant role as well.

Apart from being destination countries, Balkan countries are also important transit and supply countries for Western countries. On the one hand, this means that criminal organisations operating on the Balkan use the existence of a large 'supply' of desperate refugees and economic migrants from both Balkan and other post-communist countries to meet the huge demand from Western sex industry and other illegal labour markets. On the other hand, the traffickers misuse the myths about the West by giving women and men from Eastern Europe false promises of well paid jobs there, and then traffic them to the Balkan as temporary or final destination.

Similarly, the increasing demand for cigarettes and drugs in the Balkan countries, connected with the lack of perspective of large parts of the population and small supplies available on local markets led to the development of other illegal markets as well. Drug trafficking, weapons and cigarettes

smuggling and other illegal businesses are often combined, but criminal organisations also shift to the human trade as a less risky but highly profitable alternative. Black markets of all sorts of commodities, from fuel and food to drugs, weapons and illegal migrants are a reality in Bosnia (for example, the well-known Arisona market<sup>5</sup>), Montenegro (e.g. Tuzi) and in the border areas of Serbia, Romania, Macedonia and Bulgaria.

Differential regulation and laws, as well as differential risks, are especially important factors of development of illegal businesses. Lax and poorly implemented regulations, especially in critical sectors such as financing and banking (e.g. in the post-conflict Balkan countries like Bosnia and Kosovo) are especially attractive for organised crime, as it tends to move from jurisdictions with stricter regulation to more lax ones. Thus, the criminal organisations try to contain or minimise the risks by continuing to operate primarily from a low-risk jurisdiction. Good examples are found in Serbia and Bosnia which, especially during the war, have been transit countries for the smuggling of Chinese, Kurdish and Romanian migrants, women from Eastern Europe, as well as of cigarettes, drugs, etc.

## **Human trade and illegal markets**

As mentioned above, human trade is one of the most profitable illegal markets. It exists on a global, regional and national level, with a black market for illegal immigration adjusting 'permanently to changes in the legal framework of immigration within Europe' (Albrecht, 2002: 17). The markets in migrants, women and children are similar to any other illegal market, since, from the point of view of criminal organizations, people, mostly women and children,

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<sup>5</sup> The irony is that the Arizona Market, established by peacekeeping forces after the war to foster trade between Serbs, Croats and Muslims, has grown 'into five square miles of sinister black facade, where women from the former Soviet Union and elsewhere in Eastern Europe are sold to the highest bidder'. The Market is situated near the towns of Brcko and Tuzla, which boast 'one of the highest concentrations of the international police force created to establish law and order in Bosnia, one of the largest American army bases and one of the biggest UN-administered aid packages of the post-war years (K.Holt 'Captive Market', *The Sunday Times Magazine*, February 18, 2001).

are commodities, like any other (Williams, 1999: 147). However, there are also some distinct features of trafficking, such as slavery, and some specificity of the dynamics of supply and demand. Women and children are treated as ‘consumer durables to be used and abused repeatedly by clients, and to be passed on from one trafficker or brothel owner to another or as modern form of slaves’ (Williams, 1999: 148).

The dynamics of supply and demand are manifested in different combinations of push (economic problems, political instability, conflicts, violence against women) and pull factors (employment opportunities, including sex industry, myths about Western countries, presence of military and international organisations and businesses).<sup>6</sup> The main incentives for the development of both demand and supply are found in the very structural context of the present day world: the demand for illegal labour in general and for commercial sex in particular is increasing, while the opportunities in licit sectors are limited, both in post-communist and in Western countries (especially for illegal migrants, with women being particularly vulnerable). Moreover, the mapping of main channels of trafficking in women shows (Global Survival Network, 1997) that it is always market oriented, going from the countries with large supply to countries with large demand: East–West, East–East or from developing to developed countries, from war affected to developed countries, but also from poor to less poor developing countries and even from poor to war affected countries.

Structural changes in post communist and war-affected societies are the source of criminalisation risks as well. Criminalisation is connected to unemployment, poverty or the desire to become rich over night, to marginalisation and social exclusion etc. As many authors suggest, both victims and perpetrators usually belong to the same ethnic communities (Ruggiero, 2000: 54; Fekete and Webber, 1997: 71). According to Ruggiero, ‘it is extremely rare that immigrant criminal entrepreneurs manage to recruit West European sex workers, who are instead more likely to be self-employed or employed in the protected luxury sectors of the sex economy.’ (Ruggiero, 2000: 54). Also, according to strain theory, crime is organised along ethnic lines, and, whenever

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<sup>6</sup> For more details about how these factors are functioning in Balkan countries see V.Nikolić-Ristanović (2002a).

American authors apply this theory to empirical research, it always pertains to immigrants who attain the American way of life (Bovenkerk, 2001: 119). As pointed out by Taylor, 'immigration is one of the contexts in which criminalization and social exclusion are coalescing' (Taylor, quoted by Coutin, 2002: 20).

Although history provides such examples as well, in the present day world immigration waves are followed by criminal organisations on a more global scale, and to a large part they include both victims and criminals from Eastern and Central Europe. For example, in Europe, Asia and North America, Albanian, Chinese, Colombian, Nigerian, Russian, Chechnyan, Ukrainian and other ethnic criminal groups can be found working within new immigrant communities (Friman and Andreas, 1999: 12). According to Albrecht (2002:7), 'the price immigrants pay today for a safe place in European countries in many instances consists of a prolonged period of uncertainty, illegality and an enormous risk of criminalisation'. This is not surprising, having in mind that they are totally marginalised. Thus, they are ready to co-operate with organised crime for obtaining services, like mediation on the labour market, getting greater rewards than those available in the licit economy in their home country (Williams, 2001: 68). Entering Europe through clandestine routes makes them also exposed to all sorts of criminal and other victimisation. The connection between victimisation, criminalisation and social exclusion is evident in East European countries as well, where both prostitutes and pimps/traffickers tend to come from the marginalised poor. A good illustration for this is the quotation from an interview I have conducted with Julija, a prostitute from Budapest:

'Many pimps would not work in prostitution if the economic situation were better. If they were employed. Many of them are not criminals like in the Western countries. They are unhappy people who are not able to find a job. Sometimes, they live from the prostitution of their wives, girlfriends and daughters. Sometimes, they do not earn anything for several days. Poverty is common for pimps. There are a few who have a network, a good car, etc, but the majority live only from the prostitution of their wives or daughters.' (Nikolič-Ristanovič, 2002a:127).

Another connection between unemployment and development of criminal networks is also shown in the example of Russia. According to the findings of the Global Survival Network, many members of the Russian mafia are former employees of the Russian national security agency, the KGB, which was replaced after 1991 by the FSB (the state intelligence bureau). As a consequence of this (transition-connected) change, thousands of people, highly skilled in intelligence work and the use of force, became unemployed. Because security police often have 'political connections, access to weapons, and knowledge of the banking and business worlds, they are well-positioned to participate in international criminal activities' (Global Survival Network, 1997: 33).

It is obvious that socio-economic changes in the everyday lives of both women and men in post-communist countries (e.g. unemployment and/or loss of previous social positions/privileges) play an important role in them becoming involved in prostitution and human trafficking (Feher, 1995: 76). The labour distribution is strongly gender biased, so that among recruiters (who get the least profit<sup>7</sup>) women participate in equal measure as men, while men dominate in higher places in the hierarchy.

There is a connexion between victimisation and criminalisation as well. For instance, drug addicts, refugees, illegal migrants and victims of trafficking often become drug dealers or recruiters. In these cases, crime is used as survival strategy, i.e. the way of coping with drug addiction or slavery-like position.

Human trade, as a manifestation of illegal market, cannot function without the existence of other connected (illegal) markets of both goods and services. The most important connected markets are black market in documents (passports, visas, work and residence permits) and black labour market. Some traffickers limit themselves to the provision of smuggling service, but some provide addresses of prospective employers along with smuggling services. The second type of traffickers act as intermediaries between migrants and small businesses, and can be regarded as hidden employment agents (Ruggiero, 2000: 94).

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<sup>7</sup> For example, criminal gangs buy women from recruiters for small amounts of money such as \$ 50-150 and resell them for \$ 5.000 and more.

Criminal organisations, in the form of criminal enterprises, are an integral part of an illegal market, but ‘they are certainly not the only players’ (Williams, 2001: 79–81). The essential point about these markets is that criminal enterprises are at the core of the supplier networks. These networks are then extended along functional lines to include all other components necessary for a smoothly operating trafficking process: brokers and agents who recruit women, brothel owners, corrupt officials who assist in the provision of passports, corrupt police officers, officials who take payoffs for turning a blind eye to the sex trade in their jurisdiction etc. To veil their intentions, some of them are legally registered firms and individuals to whom victims have confidence (e.g. tourist agencies, friends acting as recruiters, employment agencies that offer both registered and clandestine jobs etc.). Ruggiero (2000: 95, 96), for example, reported on a variety of agencies specialising in the recruitment of men and women from developing countries who seek employment in developed countries and co-operating both with illegal traffickers and state officials. In some cases, legally registered agencies and illegal traffickers entered into temporary or long-term partnerships with police officers assigned at airports, acting as ‘visa dispensers’, and with consulate employees, in an effort to obtain visas for their customers (e.g. in France, Italy and Britain). Trafficking in servants often involves officials of foreign embassies and international organisations (e.g. Switzerland and France). Moreover, legally registered agencies may attempt to monopolise the business. For example, in above mentioned case of immigrants from Eastern Europe found without a legal permit in some workshops and middle-sized factories operating in the food industry in Britain, none of the individuals and agencies involved (e.g. tourist agents, employment mediators, transport entrepreneurs etc.) had any affiliation with crime. This may suggest that ‘the functions elsewhere performed by criminal groups were taken over by legitimate business groups’ (Ruggiero, 2000: 99).

### **Instead of conclusion: building control mechanisms and prevention**

Structural causes connected to the development of a liberal (global and local) market economy and to war have played a significant role in the rise of various

illegal markets, including the trade in humans. The market and 'glocal' approach that I have used in this paper not only appears to be useful for addressing the problem of human trafficking as the darkest side of globalisation. It also seems to be very useful for assessing the possibilities for building control mechanisms and devising preventive measures on a long term and short term basis.

Long-term goals should include, in the first place, a closer control of global markets and a decrease in the gap between rich and poor countries worldwide. Also, and in close connection with that, is the need for real democratisation, state sovereignty and independent economic development of developing, but also developed countries. These, of course, are goals that need time and a lot of efforts of different (progressive) actors world-wide, committed to regenerate the welfare state in both Western and East European countries.

At the same time, short-term goals should include a number of measures to be undertaken on either European or nation state level.

Since 'Fortress EU' has proved to be a strong incentive for the development of illegal markets, one of the most urgent measures to be undertaken on the European level is obviously removing barriers to free movement of people across EU and non-EU borders, with the tightening of the border control for criminals. The usual fear of high costs of migration deregulation in terms of the uncontrollable influx of economic migrants and refugees is unfounded, especially having in mind experiences so far: lifting or loosening of visa regime for some East European countries (e.g. Bulgaria and Romania), did not cause any spectacular increase in migration.<sup>8</sup> Similarly, the deconstruction of myths about migrants and Eastern Europe as dangerous 'others', which only furthers marginalisation, social exclusion, victimisation and criminalisation, is very important as well. In addition, when the Balkan as destination of human trafficking is involved, demilitarisation and de-internationalisation of Bosnia and Kosovo are the condition sine qua non for the elimination of the

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<sup>8</sup> Of course, the cost/benefit ratio needs to be researched carefully before the decisions are made. However, my own experience of traveling from the country with strict visa regime shows that visa regime is much more effective in humiliating law abiding citizens than in preventing illegal migration, let alone organised crime.

demand for cheap labour in general, and for cheap sex work in this region in particular.<sup>9</sup>

Among the measures, which are needed on a nation state level, two groups are of special importance:

1. creation of market barriers at all stages: supply, trafficking, and demand (Williams, 1999: 157);
2. development of democratic institutions and rule of law.

The creation of market barriers include a range of measures such as:

- Education/prevention programs that alert women and men to the dangers and increase of training and employment opportunities for women, more opportunities for licit jobs in general etc. (supply level);
- Awareness raising among officials, legal and policy changes, prosecution of perpetrators and protection of victims, co-operation between officials in EU and non-EU countries (trafficking level);
- Changes in policy regarding prostitution and illegal migration (decriminalisation or/and partial legalisation, delay in deportation etc.) and more opportunities for licit jobs for women in destination countries as well (demand level).

So far many education/prevention programs, awareness raising campaigns and legal/policy changes have been undertaken in a large number of countries, including the Balkan and other post-communist countries. Moreover, these measures, which are largely undertaken by or upon the initiative of non-governmental organisations, seem to be more widespread in developing than in developed countries (Kelly, 2002: 54; Copic, 2002). However, the pressure that the international community is exerting on the governments of post-communist countries to undertake decisive steps toward prosecution of offenders, without having enough resources for that policy, let alone for addressing causes and protecting victims, is one more proof of hypocrisy of this same international community, as it is unrealistic relying on women's NGOs in the struggle against powerful criminal networks (see Kelly, 2002:54). In addition, the threat of transnational organised crime is exaggerated when

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<sup>9</sup> This is not to be understood as the critic of the presence of international forces or organisations themselves, but the critic of their role in development of illegal markets on the Balkans.

it comes from Eastern Europe and particularly from the Balkans, while, on the other side, the danger of the 'groups that originate and operate throughout Europe' is underestimated in spite of the reports that suggest that they 'pose the significant greater threat' (Rees and Webber, 2002: 81, 95).

All above-mentioned measures may be effective only if the proper legal and political measures toward a distinction between licit and illicit activities are undertaken on both the global and nation-state levels. This is especially significant in post-communist countries in general, and in war affected Balkan countries in particular. As shown in the above analyses, the overall criminalization and the status of anomie have been among the main incentives for transnational organised crime to operate from the Balkan countries. However, these changes cannot be effective if they are not accompanied by appropriate legal and political measures in developed countries as well. Thus, it appears that development of strong social welfare state, democratic institutions and the rule of law is a *conditio sine qua non* for the prevention and control of transnational organised crime, illegal markets and human trade in contemporary world.

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# **Financial crime in the Czech Republic**

## **Some preliminary findings based on case analysis**

*Miroslav Scheinost<sup>1</sup>*

### **Introduction**

There is little doubt that economic crime represents a phenomenon whose extent and relevance in Czech society has grown considerably over the last decade. It is not possible to compare its present level with its level before 1989 due to the fundamental changes in the economic landscape that took place in concomitance with the fall of the socialist regime. In the first half of the 1990s the share of economic crime as a proportion of the total number of recorded crimes remained below 5% despite its constant spread. However, in the second half of the 1990s the situation changed: in 1997 it reached 7,5 % and in 2001 almost 10 %. These figures are dwarfed by the damage caused by economic crime. In 1998 about 60 % of the total damage caused by crime was due to economic crime, rising to 80 % in 2001. Moreover, we may assume that a substantial part of the economic crime that has taken place has remained hidden in the dark area of unreported or undiscovered crime.

Thus, the social peril of economic crime is evident. It is not only a question of the damage inflicted, although this is very high. It is also a matter of the destructive impact of economic crime on social attitudes. Citizens are either directly damaged by economic (or financial) crime, for example as depositors at targeted financial institutions, as the employees of 'tunnelled' companies etc., or they critically observe the very difficult processes of investigation and evidence gathering and the subsequently very slow and often unsuccessful

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<sup>1</sup> The author is director of the Institute of Criminology and Social Prevention in Prague

prosecutions. The negative impact may be reinforced by the fact that among economic criminals a new type of offender has emerged: qualified professionals, often so-called 'first offenders', occupying (and abusing) responsible positions at senior-management levels in plants, companies and institutions and who are therefore perceived to belong to 'high society'. This may evoke the general conviction that this kind of offender is almost untouchable, which may result in a loss of trust in the authorities' ability to protect citizens as well as themselves and to maintain law and order in the society. On the other hand, these cases also damage the general reputation of entrepreneurs in Czech society, the social group that has hardly begun to establish itself and urgently needs credibility.

It is a paradox – but only seemingly – that the number of victims of economic crime is higher than the number of victims of common crime. The victims of economic (or financial) crime are not the direct targets of criminal conduct, as these are usually legal entities operating in the economic sphere, or the state. Nevertheless, citizens too – not only as depositors, shareholders or employees but also as customers – are damaged by price manipulations and low-quality products or services. As the inhabitants of areas affected by environmental damage, and as citizens who have to bear the consequences of shortages of public funds due to tax evasion, or publicly-funded financial injections into bankrupt banks and savings-banks, they are indirectly victimised too.

Thus, the social dimension of economic and financial crime is broader than it may seem; especially in the Czech Republic, which is still in the process of developing the basis of a new economic system.

## **Development**

The spread of economic crime in the Czech Republic in recent years can be illustrated by some selected statistic data. While these data present only a very rough overview of the situation, they nevertheless convey the rapid growth to 2000.

**Table 1**

<i>Crime rate - total number and economic crime in 1996-2001</i>						
	<b>1996</b>	<b>1997</b>	<b>1998</b>	<b>1999</b>	<b>2000</b>	<b>2001</b>
total number	394,267	403,654	425,93	426,626	391,47	358,58
economic crime	25,539	30,156	36,031	42,907	37,632	35,262

**Table 2**

<i>The share of economic crime in the total number of crime in 1993-2001 ( % )</i>									
<b>year</b>	<b>1993</b>	<b>1994</b>	<b>1995</b>	<b>1996</b>	<b>1997</b>	<b>1998</b>	<b>1999</b>	<b>2000</b>	<b>2001</b>
<b>share</b>	4,64	4,95	6,77	6,48	7,47	8,46	10,06	9,61	9,83

**Source : Statistic of the Czech Police**

These figures show the increasing share of economic crime in the total numbers of recorded crimes - a share that stabilised at about one tenth during the period from 1999 to 2001. These figures for recorded cases do not reveal their financial impact. The extent of known damage may serve as a more significant indicator. It demonstrates that despite the decrease in recorded economic crime in 2000 and 2001, the damage caused by it reached a peak in 2000, when it was more than twice as high as it had been in 1999 (21,1 billion Czech crowns in 1999; 50,2 billion Czech crowns in 2000 and 44,1 in 2001). The total damage caused by crime was estimated to be about 63,4 billion Czech crowns in 2000 and 55,7 billion in 2001. This means that the damage caused by economic crime constituted about 80% of the total damage caused by crime in 2000 and 2001.

The available data do not allow us to distinguish financial crimes according to the types of target involved. Therefore table 3 only shows figures concerning the number of offenders sentenced for financial crime in general.

The figures in table 4 show the numbers of recorded cases of fraud and embezzlement across all sectors of the economy. The figures in brackets for

2000 and 2001 show the numbers of offenders sentenced for serious forms of fraud, defined as fraud that causes damage beyond a specified threshold.<sup>2</sup>

**Table 3**

<i>Recorded cases of fraud and embezzlement 1997-2001</i>					
	<b>1997</b>	<b>1998</b>	<b>1999</b>	<b>2000</b>	<b>2001</b>
false accounting	9	20	17	23	32
breach of bankruptcy orders	0	1	13	26	37
misuse of information	0	3	1	8	2
tax and insurance evasion	0	13	105	303	382
tax curtailing	101	168	240	226	233
credit fraud	0	7	82	243	652
handling dishonestly acquired goods	14	7	5	6	3
dishonest administrations of property	30	23	34	33	36

**Source : Statistical Yearbook of the Czech Ministry of Justice**

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<sup>2</sup> Until the end of 2001 this threshold was defined by the Criminal Code as damage amounting to at least five hundred times the value of the minimum monthly wage (that is, damage amounting to about one million crowns); since 2002, the threshold has been set at five million crowns.

**Table 4**

<i>Recorded cases of fraud and embezzlement 1997-2001</i>					
	<b>1997</b>	<b>1998</b>	<b>1999</b>	<b>2000</b>	<b>2001</b>
Embezzlement	2,311	2,255	2,62	2.951 [36]	3.015 [29]
Fraud	3,635	3,664	5,138	6.034 [185]	5.491 [172]

It is hard to assess to what degree the number of sentenced offenders reflects the true extent of economic crime. But it is evident that the numbers of convicted offenders have not been very high, except for tax crimes and, recently, for credit fraud. This probably reflects a reduction in the tolerance of Czech banks towards debtors, and the pursuit of more stringent policies – which could in turn be due to the changes of management that have taken place in large numbers of Czech banks in recent years.

It should also be noted that the laws relating to some of the above-mentioned offences have been amended, or else introduced into the Czech Criminal Code only since 1997. The greater part of the current legislation relating to economic crimes or offences of a financial nature was enacted in its present form only at the end of the 1990s as a consequence of improved knowledge and understanding of criminal phenomena in the economic sphere. This may also account for the rise in recorded economic and financial crime.

Of course one may consider the legislative response to have been slow and belated but it is necessary to bear in mind that the fraudulent activities took place in economic circumstances that were quite new (see, for a comparison, Osyka, 2001). Theoretically, it was perhaps possible to anticipate the new types of crime. This did not happen because for practical reasons the new economic institutions and regulations were established first. Subsequently, the criminal inroads that emerged were slowly recognised, and one by one, were solved. This lack of foresight was matched by low levels of sophistication on the part of the perpetrators. On the basis of the initial research results it seems that their offences were not characterised by highly sophisticated methods, but rather by misuse of the new economic institutions

and relations, something that involved taking advantage of the credulity and lack of experience of staff and ordinary citizens, and of gaps and contradictions in the relevant legislation.

### **The nature of fraudulent activities**

We have completed the first phase of a research project on economic crime in the Czech Republic by carrying out a pilot study consisting of an analysis of 25 court files concerning economic crimes. Notwithstanding this limited sample the research yielded some interesting results and enabled us to formulate hypotheses regarding both typical forms of fraudulent activity and the perpetrators of financial crime (Kaderabkova, 2001).

Five of the 25 cases concerned financial crime, that is offences against financial institutions. In four such cases considerable damages were inflicted. To find out about the methods used to commit the crimes, we will consider these four cases. They were prosecuted under different articles of the Penal Code but it turns out that all of them can be subsumed under the category of ‘tunnelling’: that is, they can serve as typical examples of the phenomenon described by Baloun (2001a and b) and by Baloun and Scheinost (2003).<sup>3</sup> The typical and common features can be described as follows:

- In all cases the crimes were committed by the founders of the financial institutions themselves (the term ‘financial institution’ encompassing various types of financial institutions like investment funds, mutual savings and co-operatives, and pension funds).
- In all cases, the capital invested by the founders themselves was much smaller than the total value of the financial assets they controlled.
- In all cases the founders themselves, acting alone, or in concert with other managers, siphoned off money from the financial institution.

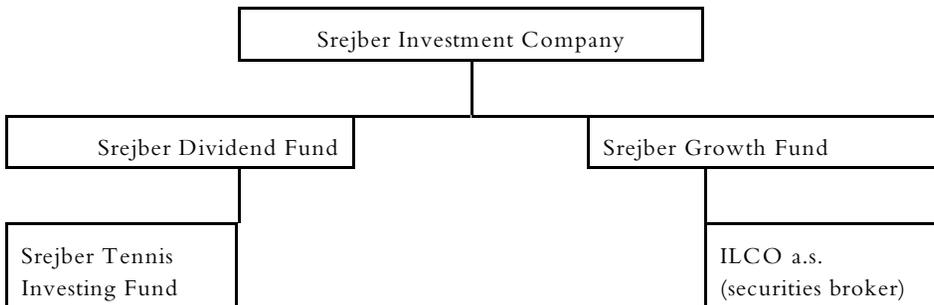
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<sup>3</sup> ‘Tunnelling’ can be defined as a fraudulent operation, usually carried out by persons in control of a firm or financial institution, whose purpose is to siphon off the assets of firm or institution.

• Complex and opaque financial flows between the victimised firm and other firms were created, such that it was difficult to unravel the pattern of financial movements. However the core of the operation was rather simple. The method involved establishing one, two or more companies within the orbit of the parent company. These ‘secondary’ companies were connected between themselves and with the core company through the founders themselves or through closely connected persons or accomplices. Then the assets (money) were transferred from the core company to the connected companies, by which means the former was deprived of its assets. The following example may illustrate this pattern.

A similar pattern is to be found in the case of the Pension Guarantee Fund. This fund was connected through the person of its founder and manager with two other corporations owned for the most part by himself. This individual (a former Communist Party functionary) drew up various contracts between the Pension Fund and his firms. Based on these contracts advance payments were made that amounted to 37 million crowns but none of the contractual obligations was fulfilled in return for the money paid. The money paid by the companies was placed, not in the account of the Pension Fund, but instead was transferred to the US and Switzerland. Sometimes dubious persons were involved, either in these operations or as shareholders in connected companies. The total value of the claims amounted to 94% of the assets of the Pension Fund.

**Figure 1**  
*The case of Milan Srejber*



M. Srejber was the managing director of all the companies shown in figure 1. The Srejber Investment Company (consisting of two funds) administered on behalf of shareholders, property that had been acquired as a result of the so-called coupon privatisation, while the Srejber Tennis Investing Fund managed its own property.<sup>4</sup> The scam worked as follows: the shares managed by the Investment Company were sold – either directly, or indirectly through the ILCO securities broker of which M. Srejber was chair of the board of directors – to the Srejber Tennis Investing Fund and bought back again. The difference in the value of the shares between the time at which they were sold and the time at which they were re-acquired resulted in a loss to the shareholders of 20 millions crowns and a profit for the Srejber Investing Fund of about 14 millions crowns.

The third and fourth cases involve mutual savings and credit co-operatives. In the case of so-called *Francouzská záložna*, the founders of the co-operative provided their accomplices with fictitious credits earmarked for commercial activities that were also fictitious. Credits were taken from the accumulated assets of the co-operative and in this way about 24 million crowns were misappropriated.<sup>5</sup> These accomplices (straw men) were known as ‘white horses’, which in Czech means people who give fraudsters their names and signatures for credit contracts, bills of exchange, purchase orders and so forth, not in exchange for some share of the contracted money, but a fixed payment. In this case the transfers of money took place between the co-operative and its subsidiary company. Finally a third company was established as a ‘safe haven’ for money siphoned off from both the co-operative and its subsidiary company.

The fourth case (the case of the First Prague Mutual Co-operative) was extraordinary in terms of the scale of damages it involved – damages amounting to more than 276 million crowns. The scam involved a massive advertising campaign with the participation of well-known and popular personalities in the field of sport and culture (the campaign itself being paid for using the

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<sup>4</sup> ‘Coupon privatisation’ was the expression used to refer to the privatisation carried out after 1989 as the quickest means of transferring ownership of enterprises out of the hands of the state at a time when ordinary citizens by and large had no capital. People were given a limited number of the so-called coupons that they could use to invest in firms earmarked for privatisation and that were then converted into ordinary shares.

<sup>5</sup> In 2003 two of the leading organisers were sentenced to eight years imprisonment.

deposits of ordinary members). The Co-operative's founders also established a company called 'Czech Film', which seemed to have some relation to the film industry, but was in reality an empty shell without any real activity. Nevertheless the perpetrators had the firm valued by a qualified expert for one billion crowns and subsequently used it as a guarantee for new members recruited to the co-operative. Their undertaking showed from the beginning the characteristic features of the so-called 'pyramid game', because the initially copious assets of the members who joined earlier came from the deposits of later members. The tunnelling operation followed the usual pattern: subsidiary companies were established and the money of co-operative members was transferred to them. It should be mentioned that one of the companies was registered in Gibraltar and therefore there is a suspicion that money laundering was also taking place, but the investigation did not follow this lead. Apart from this, the managers of the co-operative engaged in very risky financial speculation on the foreign exchange markets – a type of activity that had been forbidden to co-operatives.

## **The Offenders**

As part of the pilot study, court and state attorney office files were analysed to obtain data concerning not only the character and the methods by which the crimes had been perpetrated but also the characteristics of the offenders. 13 cases – representing different kinds of criminal economic activity including financial crime and containing more detailed data on offenders – were selected. The cases can be classified as ones involving 'common economic crimes' like fraud or embezzlement perpetrated using rather primitive methods (five cases and eight offenders); tax evasion (three cases and three offenders each using rather simple methods); cases within the financial area (five cases and 14 offenders). In ten of the cases only one offender was prosecuted and sentenced, while in three cases several offenders were prosecuted, but in none of the cases was anyone prosecuted as the member of an organised group. In this way we obtained data concerning 25 offenders in total. Of course the sample is very limited and only a few preliminary hypotheses (or rather questions for further research) may be formulated upon this basis.

We recorded the ages of the offenders at the time their prosecutions were initiated; their educational levels; their occupations, and details of any previous criminal convictions. Where possible we also noted the characteristics of any other persons involved in the criminal activities even if they were not prosecuted.

Comparing the ages of the offenders we found that the majority of the perpetrators of 'common' economic crimes (mostly common fraud) were less than 30 years of age, while offenders and their accomplices involved in financial crime were predominantly within the age range of 31 to 40 years. It seems that the higher positions in the financial institutions that enable this kind of crime to be committed are usually reached after 30 (even in the Czech Republic where the economic reforms following the collapse of communism opened the way to high positions in business to relatively young people). In general it seems plausible to assume that economic crimes are committed by people who are early middle-aged (that is aged up to 40). This means that they are predominantly committed by people who started their entrepreneurial activity only after 1989, when the changed economic conditions opened up new opportunities. This partly confirms the general evidence that economic criminals tend to be older (between 30–45 years: see Van Duyn et al., 2001) than offenders committing common crimes, but in part it also reflects the specific circumstance that due to the impossibility of carrying on business activities before 1989, economic offences are in general committed by people who are younger than those committing such offences in other countries.

Comparing the education levels of the offenders we find that those who commit economic crimes tend to have intermediate levels of education (seven offenders of a total of eleven had a secondary school diploma), while those who commit financial crimes are more likely to have a university education. This is more the case with the seven principal offenders (four of whom had graduated from university) than with the seven accomplices (two of whom had a university degree). These data more or less show the expected result: perpetrators of 'common' economic crimes tend to have the intermediate levels of education corresponding to those most commonly found among smaller entrepreneurs and traders. An interesting detail was the following: several of the perpetrators of this type of crime were originally skilled waiters or barmen or were somehow linked to work in restaurants, bars and pubs.

This may suggest the existence of a certain level of criminal activity in this area even before 1989, and therefore the availability of useful contacts, accomplices and so forth.

Sufficient data for the analysis of previous criminal careers were not found. Nevertheless, four of the eleven perpetrators of common economic crimes (that is, one third of this small sample) had been sentenced in the past (two of them even repeatedly). Concerning the perpetrators of financial crimes, data concerning previous criminal careers were not found for eight of the 14 offenders. Of the remaining six offenders three had been sentenced in the past for less serious offences, but these figures are too small for us to be able to formulate any conclusions. In general, the number of people with previous criminal records was surprisingly high (nine of 25 offenders) suggesting that especially among the perpetrators of common economic crimes, criminal experience is widespread.

Five of the offenders were trades people; ten of them were business managers; five were the employees of firms that had been defrauded. Thus the majority of the offenders were entrepreneurs, and were in one way or another associated with businesses that had been the victims of scams. Given the findings concerning prior involvement in criminal activities, it seems that, in the Czech case at least, having a criminal record has not been a serious obstacle to engaging in commercial activities or to obtaining positions of trust that have then allowed the manipulation of huge financial resources.

We also found a broad range of people who come into contact with the perpetrators of economic crime but who are not usually prosecuted themselves. On the one hand there are individuals who know about the criminal activities of the offenders, but who for various reasons (such as friendship, credulity and indifference) remain silent and thereby facilitate the criminal activities in question. On the other hand there are persons who, in exchange for handsome fees, provide the offenders with professional services, many of which lie on or beyond the border of what is legal.

## Characteristics of offenders

It is obvious that our very limited sample of cases hardly allows us to formulate a typology of offenders, also given the state of the art of psychology of law (Lösel, 1993; Maresova, 2001; Van Duyne, 2000). Nevertheless, we can single out some characteristic features of the offenders' conduct as the basis of a tentative classification. This classification should not be considered definitive, but rather as something that embodies the provisional hypothesis that some characteristic features may be found in the behaviour and calculations of the perpetrators of economic and financial crime. The hypothesis naturally requires testing on the basis of new and more extensive observations. On this basis the following patterns of behaviour and calculation may be said to be typical of the perpetrators of economic and financial crime:

### *The naive, easy-going and light-hearted offender*

This type is represented by younger people under the age of 30. Their undertakings are rather small, but their unpaid debts and liabilities can cause considerable damage. Because of their inexperience, they encounter difficulties which they try to solve by postponing meeting their liabilities, or taking on new debts irrespective of their ability to meet them. They believe that luck is on their side or else they simply do not consider the legal consequences. When they are prosecuted they blame their predicament on misfortune. Offenders of this type can easily become the target of more experienced 'providers of services', who exploit their situation and remain in the background, untouched. We may also assume that this type of offender has a fair chance of being engaged as a 'white horse'.

### *The offender as sports person*

These offenders commit crimes repeatedly and intentionally until their offences are discovered. They are aware of their law breaking and once detected they do not cause any trouble but simply plead guilty and co-operate with the authorities in order to minimise their punishment and the damage to themselves. It seems that they accept exposure and punishment as the natural risks associated with the game they are playing. Psychologically they may feel satisfaction in trying to outsmart victims and the authorities.

*The ruthless adventurer*

These offenders usually begin their careers as normal entrepreneurs. Later on they may encounter difficulties and decide to solve their problems by intentional and planned criminal activity. Others may organise scams from the very beginning of their business careers as the quickest way of gaining financial resources and advantages both for their firms and for their personal needs. Their characteristic feature is the ruthlessness or cynicism they show toward victims ('victims are sheep that should be fleeced', remarked one of the offenders in the sample). When their activities are exposed they deny any guilt, twisting the evidence in order to avoid punishment, and blaming their accomplices and victims alike. These offenders often have previous criminal records, but their previous crimes tend not to have been of an economic nature only, but involve, rather, several kinds of activity.

*The manipulator*

Offenders of this type are people who reached their positions in the financial world legally as licit entrepreneurs or as employees. Their positions give them the tools needed to operate in financial markets, and thus enable them to manipulate the assets entrusted to them. Initially, their transgressions are confined to small-scale breaches of administrative rules. They rely on their knowledge of the financial milieu and assume that some tolerance will be shown with regard to their financial operations because of their positions and reputations. As the scale of their activities grows, they finally cross the line between the breach of civil and criminal laws, but they rely on their cunning and good fortune to hide their unlawful activities, for example, by ensuring that the pattern of their dealings is so obscure and complex that it is hardly possible for the law enforcement agencies to detect them or to produce evidence of their offences. In comparison with the previous kind of ruthless adventurer they usually have no previous criminal records or contacts with criminal milieux; rather, they are typical 'white-collar' employees.

*The megalomaniac*

These offenders can appear within both of the above-mentioned groups. Because of early successes or career advances (and probably also because of their personal qualities such as their intelligence, formal qualifications or social

skills) they are convinced of their extraordinary abilities. Occupying managerial control positions they feel themselves authorised to take autonomous decisions irrespective of regulations. As entrepreneurs they try to fulfil quite unrealistic plans and ambitions using criminal methods. They feel themselves not to be criminals, because they consider themselves to be above the rules and regulations that would stand in the way of achievement of their 'big plans'. Often their megalomania, autonomy and ambition give them the appearance of authority, and may significantly influence the behaviour of those around them, at least for some time.

Of course, these types of offender are to be found not only among the perpetrators of economic and financial crimes or in the Czech milieu only. There may be some relation between the types we have described, and the types described as psychotic or sociopathic by Schneider (1940) and Eysenck (1989), or the factors described by Mischel (1973) in cognitive social learning theory. To specify such relations we need to work with larger samples and a broader range of research methods. For the moment the variety of forms of conduct we have described seems to have been typical of the range of offenders that emerged after 1989 among newly established entrepreneurs, managers and trades people in the Czech Republic. In this unstable environment, suitable niches were found by different kinds of offender, ranging from people that did not initially intend to commit crimes but then did so because of their levity, inexperience and irresponsibility, to experienced criminals looking for quick and high returns, and typical white-collar criminals without previous criminal convictions but able to misuse their managerial positions.

## **Conclusions**

Given that they are based on our limited pilot study, the following conclusions must be understood as preliminary. They suggest some of the features that seem to be typical of economic and financial crime in the Czech Republic. Most of the specific features of economic and financial crime that we have discovered probably hold in a more general sense, but in the new and unstable

economic, social and legal environment of the Czech Republic, they appear to have acquired a special relevance.

- Apart from those who are directly affected, economic crime damages the interests of a wide of persons indirectly (from depositors, employees, investors in pension funds and so forth). It is often the state that must provide compensation for unmet insurance claims, lost deposits etc. and given that when it does so, it draws on public funds, the result is to damage citizens generally.
- Economic crime relies, in most cases, on relatively primitive methods involving simple plans of action; nevertheless the damage inflicted is often extensive (frequently running to tens of millions crowns).
- Fraud is often facilitated by victims' credulity: some co-operatives claimed to be able to increase the value of deposits by 17 to 30 per cent per annum. Such claims should be suspicious from the start but nevertheless they have been used successfully to attract large numbers of clients.
- Very often gaps in legislation have been misused and non-penal (economic) legislation violated owing to the inadequacy or the lack of non-penal sanctions.
- Market pressure induce producers to consign their products and services to almost anyone without first assuring themselves of such persons' abilities to pay for the products and services.
- There is a series of semi-criminal ancillary activities (for example the provisions of legal, economic or financial advice; the provision of contacts and credits), that service the needs of the perpetrators of economic crimes and that are parasitic upon them, while usually going unpunished.
- In the early years following the collapse of communism, it was very easy in the Czech Republic for individuals to establish financial institutions (co-operatives, investment funds, pension funds) because their backgrounds tended not to be checked (even if they suggested a questionable personal past). It was also easy to push aside those managers not involved in the scams and to concentrate real authority in the hands of a small number of people, practically undermining all internal controls (while external controls were weak and very rare).
- Internal controls in the majority of companies were almost totally inadequate, especially controls over management activities.

- ❖ Companies were often careless and inconsistent and employed people with previous criminal records even in positions of trust, thus opening the door to financial manipulations.
- ❖ Offenders often make use of the assistance of colleagues who give them access to documents and files while knowing that this breaks internal regulations; who give undue discretion to the offenders, or who validate documents without checking them first.
- ❖ Often there are indications that a suspicious activity is being carried out, but colleagues of the offender fail to react, thus allowing the activity to continue.
- ❖ Banks especially do everything in order to avoid prosecuting their employees, trying instead to solve problems internally.

All of this helps to sustain an environment containing many unsupervised niches for financial and economic wrongdoers.

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# Islamic fundamentalism and Western horror: Fear of the other or of oneself?

*Marinos Diamantides*<sup>1</sup>

## Introduction

Terrorist crimes perpetrated by Islamic fundamentalists, like all culturally or religiously induced crime, has the effect of increasing the alienation between the western liberal/secular and Muslim worlds. The danger is that *Al-Qaeda* type Islamic extremism may win the pyrrhic battle of establishing itself in the western popular imagination as representative of a single, uncomplicated and un-modernised 'Muslim world' and of an essentially intolerant, non-rationalised 'Islamic religion'. This will be at the expense of being understood as a particularly modern movement motivated by specific political ideals that are justified in terms of *Sunna* orthodoxy, which competes for prominence within a socio-economically and theologically complex Islam. The danger of this misunderstanding consists partly in the fact that the western public, and much of western social theory, displays a secular, 'orientalist' bias in its approach to the Islamic world, which it perceives as a 'mystical', thoroughly religious realm, irrespective of the emergence of Islamic extremism. In sum, our modern ignorance of Muslim politics and the history of Islamic religion and law are compounded by the terrorist phenomenon. This bias poses the urgent task of self-defence as opposed to reflection, and re-evokes our cultural arrogance and historical projections regarding the 'need' for the Muslim world to evolve as 'we did'. It also evokes our anxiety regarding our own problematic relation to our religious past and secular present. The intimate relation between

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religion, politics and history that Islamic fundamentalism celebrates is also the aspect of our religion that we have disavowed.

This chapter argues that this mystifying projection is reinforced with the appearance of Islamic terrorist activities, and reinforced for three reasons. First, in its religiously justified brutality Islamic extremism reminds the western public of the horrific religious imperialism that Christianity itself has historically engaged in. Thus, it is easy to believe that we are dealing with an un-modernised, and therefore, inferior civilisation that requires us not so much to understand it as to contain it. In this respect, I examine the literature that shows how Islamic fundamentalism, far from being a response to internal developments, is a *modern* phenomenon in that its function is to express the structural and material pressures that developed as the Muslim world encountered western modernity.

Second, the religious zeal with which Islamic extremists heroically sacrifice everything to the effort of bringing about Divine Sovereignty on earth, further terrifies western humanity because it provokes its *own* pervasive sense of disenchantment with what our social theory calls the ‘crisis of meaning and authority’ in the aftermath of the ‘death of God’. As such, fundamentalism mirrors the emergence of religious fundamentalism in the West as well. In this regard, I look at literature that studies the core beliefs and values of major modern Islamic fundamentalist theorists, before concluding that they, like Christian and Jewish fundamentalists, express a preoccupation with the erosion of values, tradition and meaning that is seen as constitutive of post-Enlightenment modernity. Moreover, I consider arguments that liberalism is ‘exported’ by the western states with what amounts to an emotive, quasi-religious fervour that justifies the fundamentalists’ claim that the rules of ‘globalisation’ constitute a continuation of the West’s crusades. At the same time – and this makes Islamic fundamentalism all the more horrific for secular people – fundamentalists do not reject all the fruits of secular modernity. For example, we know them to be apt at using modern western technology to advance their cause. For good reasons the western media emphasise the fact that *Al Qaeda* ‘ sleeper cells ’ communicate via email and Internet chat-rooms using coded language. More importantly, their theory of the Islamic State can be said to partake of the modern tradition of totalitarianism. Indeed, they are ideologically dedicated to the creation of an ‘Islamic State’ in which all

disputes over meaning are subject to state arbitration 'because' *law* made by formally trained 'experts' sets froth religious truth without the need for contemporary moral re-evaluation even in the light of the general principles contained in Islam's primary sources (the *Qur'an* and the *Sunnah*) and without the need to demonstrate that it serves the public interest.

My third argument in this connection is that this dedication to Islamic law and the Islamic State, independently of religious morality and secular teleology, mirrors the western/liberal situation in which we are asked to live according to positive rules that we accept as legitimate. Interestingly, as the relevant literature shows, the Islamic law that Islamists make a fetish of consists for the most part of jurisprudence produced in the Abbassid period, which scholars call Islam's legal 'modernity'.<sup>2</sup> This is due to the fact that laws in that era acquired most of the characteristics of formal law *per* Weber, and concerned secular matters of interest to the then Islamic State, rather than matters of religious rites etc. All in all, it is a difficult but useful task to reflect on the similarities between the legalisms of the secular West and that of the Muslim East. Both seem dedicated to valorising their version of the 'rule of law' over and above the Christian and Islamic moral traditions from which they respectively emanate.

Finally, the paper goes beyond the comparison of the antagonistic liberal and Islamic legalisms, by arguing that the inhuman moral decay they produce cannot be addressed, respectively, by a simple western return to its religious foundations and the creation inside the Muslim world of a democratic, inclusive religious public space of dialogue in which basic Islamic principles can be interpreted in relation to the facts of modern life. Within both the western and Muslim political traditions the conflict between secularism and religion has been irrevocably surpassed by the 'cult of legalism,' the 'priests' of which are, respectively, the morally 'neutral' western bureaucrats and the morally 'perfect' Muslim mullahs. For this reason, I finally argue, the question of 'God' and the question of 'right', which can be answered either from a

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<sup>2</sup> The Abassid dynasty lasted from 750-1258, when it was destroyed by the Mongols. In the first two centuries Islamic culture, literature and science reached a high level. At this time the *Sunna* form of orthodoxy with its set of rules and obligations, derived from the *Qu'ran* and the *hadieth* (tradition). [Editors' note]

Christian/liberal or a Muslim/fundamentalist point of view, must give way to the universal ethical question of the Good. We need, in other words, a philosophical discourse of ethics that assuages humanity's universal metaphysical cravings *and* is religiously neutral. At the end of the chapter I give a brief summary of one such ethical philosophy – that of Emmanuel Levinas's (1993) Godless metaphysics – from the perspective of which Western and Muslim legalisms can be equally called to account for their inhumanity. From the perspective of such ethics, I conclude, it is as wrong to oppress and kill the non-Muslim as it is to wrong to declare the Muslim an *a priori* 'equal' in the abstract, forcing him or her to join us in the hypocrisy of a 'disinterested' reason. This is rendered more difficult because there is little consideration for the miserable material conditions in which he or she finds himself/herself partly because of nature's blind distribution of energy and partly because of our own domination and exploitation.

### **Understanding Islamic fundamentalism – a short literature review**

Recourse to terrorism, like all violence, not only signals the breakdown, or absence of, relationship, in this case political, between victim and perpetrator but also perpetuates it, taking what psychologists call 'narcissism' to the extreme point where the 'other' is not even considered human. Perhaps more than a classic murderer, persons preparing themselves to commit an act of indiscriminate murder must symbolically 'de-humanise' their victim(s). Victims are no longer considered persons but at once hated symbols of their group and instruments for the attainment of a supposedly higher good. With the act carried out, the possibility is high that the victim's side may reciprocate by equally symbolically de-humanising the actual terrorists, as well as all others that can be associated with them. This is a dangerous tendency, the evidence for which can be found in German 'white cells', Italian courtroom cages, the US Guantanamo Bay extra-territorial detention centre and US and Israeli extra-judicial killings of terrorist suspects. In a tactical sense, this de-humanisation serves the purpose of ensuring that this kind of violence does not get recognised as a successful means of advancing political goals. If Islamic terrorists are seen as 'inhuman' and irrational, then the motivating beliefs and

the ideology which, for them, justifies their crimes is undeserving of closer inspection. At the same time, however, the narcissistic refusal to ‘hear’ what even Muslim terrorists have to say deprives one of the chance to examine their ideology in the wider context of the historical evolution of Islamic political ethics. Thereby, it becomes difficult to assess realistically the extent to which it is ‘representative’ of the various ways in which Islamic scholarship has historically answered the questions of pluralism and tolerance.

Thus, anyone who is tempted to see Islamic fundamentalist terror as the ‘natural outcome’ of the traumatic encounter between ‘inherently’ morally intolerant and culturally introvert Muslim communities on the one hand, and the secular, pluralistic civil societies of the western world, on the other, could rightly be accused of ignorance and of projecting onto Muslim societies the memories of the West’s historical struggle to individualise religion in the Reformation period. As Muhammad Khalid Masud has argued, Islam as a moral tradition actually favours ethical pluralism because it appeals to reason, whilst Islam as a political tradition pragmatically endorses the value of institutionalised popular participation (in the form of consultation) and inter-religious tolerance (Hashmi, 2002: 135–47). Similarly, many other contemporary Muslim thinkers interpret the Islamic moral and political tradition as enjoining a continuous dialogue over meaning, one that explicitly enjoins tolerance among Muslims and other religious traditions.<sup>3</sup> Worryingly, the failure to take into consideration this body of literature, in the aftermath of the ‘war on Islamic terror’, is not a problem confined to individuals lacking sophistication. As Eickelman points out, there prevails in much of social theory a ‘secularist bias’ which can lend legitimacy to the tendency to characterise ‘[T]he Muslim world(...)as especially resistant to ‘modernity’ and intolerant of other religious traditions’ (Hashmi, 2002: 130). Philosophically, the temptation is wrongly to consider the nihilism of Islamic fundamentalist violence – most clearly seen in the phenomenon of the suicide bomber – as evidence of ‘collective’ *ressentiment*, in Nietzschean terms. This projects the religious Muslim civilisation as trapped between nostalgia for the lost

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<sup>3</sup> See: Morocco’s Bin Said, Syria’s Muhammad Shahrur, Turkey’s Fethullah Gullen, Iran’s Muhammad Khatami, and Indonesia’s Nurcholish Madjid, as cited in Inayatullah and Boxwell (2003: 127).

prominence of the Muslim empire and resignation to their technical-economic inferiority vis-à-vis the secular western civilisation. Such a claim goes hand in hand with equation of the 'modern condition' with the 'western condition' and the suggestion that Islamic fundamentalism represents the stubborn, if bound-to-fail persistence of the archaic, the Eastern and the mystical at the so-called 'end of history'. This is the era when economic rationalism, i.e. global capitalism, and the forced exportation of liberal or democratic theories of politics are destined to triumph (Euben, 1999). Far from being a rational and informed assessment, this position has been exposed as 'orientalist' and criticised as being the practice of a 'politics of distress' (Inayatullah and Boxwell, 2003: 169).

Scholarship works against such mystifying views of Islamic fundamentalist intolerance as an a-historical given of the Muslim faith in two ways. One strand of literature concentrates its efforts on 'relativising' the assumed centrality of fundamentalist thought by emphasising that the Muslim religion has never experienced what we can call the doctrinal arteriosclerosis of the Christian churches. The aim is, first, to show that there has never been a prevalent 'official' or 'authoritative' view in Islam, but only a number of competing interpretative traditions within its theology, moral philosophy, political theory and jurisprudence. Exemplary of this literature in relation to Islam's primary and secondary sources of law is the work by Masud (Hashmi, 2002: 135-47). Regarding Muslim political history, such literature reclaims the notion of modernity for Islam. Regarding internal pluralism, attention is paid to the anti-orientalist sociological observation that 'Islam in its seventh century origins was for its time and place 'remarkably modern(...) in the high degree of commitment, involvement, and participation expected from the rank-and-file members of the community' (Eickelman citing Robert Bellah in Hashmi, 2002: 117). Regarding tolerance vis-à-vis other religions, certain verses of the *Qur'an* that are easily interpreted as commanding tolerance are cited as evidence that 'intense awareness of and interaction with other faiths have been present in the Islamic tradition from its inception and are not characteristics

unique to the modern era' (Hashmi, 2002: 118).<sup>4</sup> At the same time this approach optimistically points to the circumstances in which fundamentalism's claim to a monopoly of Islamic wisdom is and can be further challenged by Muslims. For example, Eickelman's thesis is, in short, that the contestation of the rather un-sophisticated interpretations of Islam's primary and secondary sources is perfectly possible and already occurring from within Islamic societies and will further increase, alongside increasing levels of education, greater ease of travel and the rise of new communications media that tend to fragment religious and political authority (*supra* 115, 130). Thus, Eickelman observes that 'civil societies' do exist in the more democratic Islamic countries (Iran's constitutional reference to Allah's 'absolute' sovereignty next to the peoples' right to control their 'destiny' is cited). However, we should understand by 'civil society' not a strictly secular public space, as is the case in the West, but what the Iranian anthropologist Fariba Adelhah calls Iran's 'religious public sphere' (as cited by Eickelman in Hashmi, 2002: *supra*: 128, 129). Eickelman also recognises such freedom in the religious discussions in the more unfettered broadcast media, e.g. the al-Jazeera satellite TV (*ibid.*).

Whilst these public debates are usually local and concern particular issues on which no traditional Islamic view exists (e.g. the implications of biotechnologies for personal status), they are deemed important because 'they proceed not from traditional jurisprudence, the form used by *madrasa*-trained clerics, but by expounding directly from the actual Qur'anic text. In that way arguments could arise that the *Qur'an's* divine message forms the basis of a complex moral language that encompasses all mankind' (*supra* 128). A rather more intriguing aspect of Eickelman's argument is made in non-communication theory terms. In a 'Foucaultian moment', Eickelman accurately reminds us that certain dominant interpretations of what constitutes Islamic behaviour have always been de facto subverted by popular practices such as homosexuality and other forms of sexual expression. To this form of subversion we may contrast the severely repressed efforts publicly to express this autonomy

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<sup>4</sup> There is 'no compulsion in religion. Whoever(...)believes in God has grasped a firm handhold of the truth that will never break' (2:256); 'If it had been your Lord's will, they would all have believed, all who are on earth. Would you [O Muhammad] then compel mankind against their will to believe?' (10:99)

[of sexual preference] by recourse to a western-style ‘queer’ identity politics (as evinced by the recent convictions, in Egypt, of the clients of a gay bar).

A second strand of literature pays more attention to Islamic fundamentalism *per se*. Within this strand two distinct, if interrelated, questions are asked. First, ‘what is fundamentalism’s function?’; second, ‘what are its values?’ In contrast to the assumption made, both by fundamentalists and much of their misguided western target-audience, that fundamentalist political ethics somehow represent the traditional ‘essence’ of Islam, such literature sees Islamic extremism as a particularly *modern* communal phenomenon in the form of movements with *secular* concerns that adopt a religious ideology. It is based less on the interpretation of the religious and moral aspects of Islamic scriptures and more on Islamic jurisprudence dating from the expansionist Muslim State in the first two centuries, which sought to justify violence against non-believers and those seen as ‘bad’ Muslims. As is the case with Christian and Jewish fundamentalist movements, the Muslim variety embraces a number of secular forms and uses religion as a convenient and powerful ‘sign of difference’. The reason for this is that religion is deeply embedded in the sense of ethnic or national identity, while providing a popular basis for moral differentiation along ‘Manichean’ lines (Bruce, 2000: 9).<sup>5</sup> Spatio-temporally, the term ‘Islamic fundamentalism’ is associated with social phenomena and intellectual labour occurring in territories with large Muslim populations starting in the nineteenth century. It is associated with big issues of economic development, geopolitical power and cultural evolution arising out of the modernisation of Muslim polities in the colonial and post-colonial eras (Huorani, 1991).

Concerning the question of its *function*, the second strand of literature presupposes that Islamic fundamentalism is explicable as a ‘mechanical’ response to structural pressures. For example, revolutionary fundamentalism in Iran has been explained as a ‘reaction to the dramatic reduction in the chances of the traditionalist milieu to reproduce itself culturally under conditions of rapid urbanization, industrialisation and secularisation’ (Riesebrodt as quoted by Bruce, 2000: *supra*: 9). Moreover, the same material factors were, it is argued, present in formally colonised Muslim territories, such as pre-partition

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<sup>5</sup> Mani (216–277), a Persian aristocrat, was the founder of a religion in which the antithesis of God and light against matter and darkness was central.

India and pre-revolutionary Egypt. In these territories they underlay the dynamic nationalist-fundamentalist movements of the time and which survive to this day, i.e. the *Muslim Brotherhood* in Egypt and the *Jama'at-i Islami* first in India and today in Pakistan (Brown, 2000: 143-73). For the purposes of this chapter, this 'mechanistic' approach to the question of Islamic resurgence is valuable in that it helps us recognise how misleading it would be to consider Islamic fundamentalism as a purely religious phenomenon. It suffices to remind ourselves that the major modern texts on Islamic political theory that are currently used for the production of fundamentalist ideology were written by Muslims who were either founders or members of movements with secular aims, namely the nationalists Hassan Al-Banna, and Sayyid Qutb of Egypt, Abu al-A'la Mawdudi of India/Pakistan and the revolutionary Ayatollah Khomeini of Iran.

The functionalist approach, taking Islamic extremism to be a response to local material and structural pressures, explains that without change in the material reality and social structure of Muslim populations, the popularity of fundamentalist ideologies could expand. This should serve as a lesson to those who argue that economic and political liberalisation are pre-conditions for development.<sup>6</sup> Yet, local conditions cannot account for Islamic fundamentalist *values*, which have by now become inseparable from a global mood of 'disaffection' with secular modernity and instrumental rationality (Euben, 1999). As Euben argues, Islamic fundamentalist theorists, despite the apparently alien quality of their specifically Islamic debates about reason, interpretation, and revealed law, can be understood as 'participating in a conversation that we, as Western students of politics, not only recognise but in which we participate' (*supra* 155). Posing and answering the question of

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<sup>6</sup> The author of this chapter has served as advisor in the drafting of the new Yemeni electoral law and can vouch that it meets the highest standards of western constitutionalism. The passing of such laws is a condition of bilateral agreements with international financial institutions on which the impoverished country has come to depend. Yet, it means next to nothing in a country where most people's lunch consists of tea and bread and where loyalty is owed not to the state but to the tribal chief and religious charities, namely the only individuals and organisations whose intervention can bring about some relief from the misery of daily life. A female minister for 'human rights' has also been appointed even though most people would not know it in a country where both the enforcement of court decisions and state policing of the provinces are minimal.

fundamentalist *values* requires a shift from fundamentalism understood as a conduit for processes and tensions in the material and structural realm, to the consideration of its 'inherent power as an ethico-political vision of the modern world' (*supra*: 154). Euben spends a good deal of her book engaging with the ideas of Sayyid Qutb, one of the most influential among Islamic fundamentalists. Qutb chastised any political system where sovereignty was not reserved for God alone as slavery, tyranny (*tughyan*) and idolatry (*taghut*). Instead, he equated freedom with '*ubudiyya*', a non-Qur'anic term, which simultaneously means, on the one hand, worship of and subservience to God, and on the other hand, slavery or bondage, in the sense that each believer is equal to all others by virtue of their common submission to God. Instead of natural rights, Qutb proposed equality of submission to God's commands. In lieu of freedom from constraints, Qutb offered the exchange of 'unjust slavery' for righteous servitude. And in place of police coercion and constitutional regulations to constrain social behaviour, Qutb argued that conscience, God's wrath and pleasure and the reward of Paradise, are the only constraints that can adequately control both social behaviour and the condition of the soul. Although not denying the existence of inequalities in natural endowments, Qutb's vision was that 'Once [Divine] sovereignty is established in its proper scope, social justice, equality and freedom will naturally flow' (*supra* 63). In sum, Qutb appears to have turned from being a leading scholar of English literature to being a political theorist fit for mediaeval times. Nevertheless, the value of his work is not lost on Euben who, building on work by Gilles Kepel and Bruce Lawrence, sees in Qutb's political theory the same preoccupation with the post-Enlightenment erosion of values, tradition and meaning (Kepel: 1994, Lawrence: 1998). Specifically Qutb's engagement with post-Enlightenment rationalism 'reveals the extent to which a modernity originally defined in terms of Western experience is no longer a Western experience alone' (Euben: *supra*: 161).

Significantly, Euben refuses to pass judgement on whether, at the end of the day, Qutb's agenda carries within it elements of redemption of the modern crisis of meaning or if it is a pathological nostalgic attempt to 'turn the clock back', which of course is a product of this very crisis. Thus, on the one hand, she emphasises the similarities between Qutb's notion of *jahiliyya* and a series of expressions that several important western critics of the Enlightenment

have used to describe the crisis of authority and meaning in liberal politics, *inter alia*, Hannah Arendt's 'alienation' (*supra* 133), Alistair MacIntyre's 'emotivism' (*supra* 136) and John Nauhaus' secular 'religion of relativity' (*supra* 139, 141). In sum, 'this modern crisis is understood to be an expression of the bankruptcy of the Enlightenment aspiration to ground morality rationally' (*supra* 141).

On the other hand, however, Euben concedes that Qutb's fundamentalism is comparable to contemporary Christian and Jewish fundamentalism both of which are nostalgic rather than forward-looking:

Fundamentalism, in its many varieties, may be the radical conclusion of a more widespread conviction that contemporary life is plagued by a multifaceted alienation requiring redress. Put slightly differently, fundamentalism can be understood as part of the larger attempt among various groups and theories to 're-enchant' a world characterised by the experience of disenchantment, an expression of what Nietzsche describes as the 'metaphysical urge' to construct myths that give meaning to life and its struggles (*supra* 15).<sup>7</sup>

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<sup>7</sup> Empirically, this view may seem far-fetched. It groups together, under 'fundamentalism', phenomena that others have painstakingly differentiated. Thus, for example, Brown singles out for analysis 'Islamic fundamentalism in the Middle East where a particular kind of religion is associated with big issues of economic development, geopolitical power and social evolution and where what is at stake is the relative power of communities' (Bruce, 2000: 10-11). This is clearly different from American fundamentalism [which] is essentially a voluntary association of self-selecting individuals, competing to define the culture of a stable nation state. Yet, on reflection, Euben's analytical viewpoint seems more comprehensive than Bruce's. As Bruce admits, 'far from being solely a response to internal developments, Islamic fundamentalism owes a great deal to the direct influence of the West' (*ibid.*). I have indicated above the material implications of this influence. Moreover, we know that the leading theorists behind Islamic fundamentalism had received a western-style education, all had been raised in western colonies, one had spent the first part of his intellectual life trying to 'rationalise' Islam and one, whose work is discussed in detail below, had lived in the USA. Finally, and crucially, it would be counter-intuitive to assume that Muslims who became aware of the post-reformation history of the West would not begin to ask themselves questions about the effects on their faith.

## Fundamentalism and legalism

Let me look more closely at Euben's comparisons beginning with the Arendt-Qutb one. On the one hand, for Qutb as for Arendt legitimate political authority was and is predicated on the existence of foundational standards that transcend yet refer to human affairs (*supra* 131). Both writers 'converge' around the assumption that the loss of the traditions that sustain such standards 'signals the disappearance of legitimate political authority', even if Arendt sees this loss as a 'demise' and Qutb as a 'repudiation' (*supra* 132). Moreover, both recognise that it is a feature of this crisis that it is increasingly difficult to perceive it by referring to 'alienation' and *jahiliyya* respectively. Qutb implicitly describes the latter concept as a 'disease whose strength lies in part in the way it colours our very tools of perception and thus obscures its own nature' (*ibid*). On the other hand, Euben shows that whilst Arendt traces the demise of transcendentalism through a series of related but uncoordinated historical developments, Qutb takes a normative and anthropomorphic approach to history 'accusing' modern man of 'repudiating' these foundations. In sum, while Arendt's sociology concedes that modern man's capacity to believe is irrevocably lost, Qutb's theology still evokes the power of faith. In consequence, Euben thinks, whilst Arendt does not call for a search for new foundations but for the reconstitution of a public sphere in which meaning can be woven through political action (public speech and deeds among equals), Qutb 'exemplifies the literal meaning of the word fundamentalism: a return to and excavation of indisputable foundations that are taken to exist in a realm beyond human power and interpretation' (*ibid*).

In this connection, it can be argued that, ironically, the fundamentalist evocation of the return to a golden past rests not on historical 'excavation' but on the *active interpretation* that qualifies as Arendt's 'political action'. The point is that radical Islamists do not offer simply a 'return of Islam,' in the sense of getting back to some history-defying Islamic essence. Rather, they advance 'new ideas served up in familiar old terms(...)Although [they] claim to be restoring the golden age of the early Islamic period, they are, in many important aspects, revolutionaries' (Brown: *supra*: 176). Brown illustrates the point by reference to Khomeini's notion of *velayat-e faqih* and Mawududi and Qutb's notion of *jahiliyya*. The former requires radical clerical control of

political life. This concept is ‘outside the mainstream of classical Muslim political thought’ (*ibid.*) that had hitherto ‘tilted towards quietism and acceptance of political authority provided it did not impede individual believers in carrying out their religious duties’ (*supra* 157). Turning to *jahiliyya*, this classical term, too, has been radically reinterpreted from the original meaning of the state of ‘human ignorance’ in the historical period before God’s revelations to Muhammad, to a transcendent normative standard, whereby one Muslim can declare another, including the ruler, to be an infidel and, therefore, a legitimate object of physical *jihad* (religiously sanctioned war). Again, this idea is simply ‘out of line with the classic Muslim disposition to leave such matters to God’s judgement, not man’s’ (*supra* 176–177).

To say, however, that something constitutes a ‘radical interpretation’ is not to say that it is a simple ‘invention’. If we take *jahiliyya* for example, on the one hand, the meaning given by Qutb ‘departs from the main current of Islamic political thought throughout the centuries’. On the other hand, in typical *legalistic* spirit, this hard-line interpretation consciously evokes a precedent. Qutb’s explicitly claims authority by reference to Ibn Taimiyya (1268–1328), who had helped justify the war of the Mamluks against the nominally Muslim Mongols by asserting a legal principle whereby even ‘Muslim rulers not living up to the high standards of Muslim orthodoxy should be resisted’ (*supra* 157). Implicitly, he evokes the memory of the seventh century and historically suppressed *Kharijite* movement, with their all-or-nothing approach to politics (*la hukma ila lillah*, ‘judgement only to God’) (*ibid.*). Thus, politically, modern fundamentalists effectively re-claim the legacy of historic movements with secular aims. In their time these movements were seen as revolutionary and even vilified (in fact the term ‘*kharijite*,’ or seceder, was used as a term of abuse).

Euben also finds an epistemological connection between Qutb and MacIntyre. MacIntyre’s ‘culture of emotivism’ signifies the secular-liberal doctrine that all evaluative judgements are nothing but expressions of preference, attitude or feeling. This, in turn, is predicated on the epistemological assumption that there exists a strict separation between facts and values. This follows the ‘rejection’ of metaphysics in the two forms in which it had historically appeared in the West, i.e. Aristotelian moral-political teleology and Christian theology. In such circumstances, morality would either

be grounded rationally, a project doomed from the start despite the best efforts of Kant and the neo-Kantians; or, as actually happened, it would be substituted for individual conscience. Hence, McIntyre's thesis that the modern vision of the world is primarily Weberian, meaning that as we resign ourselves to the fact that we cannot publicly agree on the meaning of what is 'good,' e.g. in debates about justice and rights, we confine these to the private realm and adopt the liberal/bureaucratic political ethos of dedication to the rule of formal and morally 'neutral' laws and procedures which are constructed efficiently to adjudicate between morally isolated individuals.<sup>8</sup> In this connection, Euben loosely claims a connection between Qutb's language regarding the epistemological 'myopia of modern *jahiliyya*', and McIntyre's argument that the belief in the efficiency of formal rules and procedures, guaranteed by technical-bureaucratic expertise, is a self-perpetuating myth.

In this connection, I argue, contra Euben, that fundamentalist political theory and practice is characterised by acute statism, legalism and moral confusion that make it much more of an object of critique than an ally of McIntyre's. Moreover, far from evincing a theological approach to the contemporary crises of political authority and meaning, statist and legalistic fundamentalist ideology *secularises* Islamic religion and morality. Wherever successfully imposed, it comes to produce a moral decay not dissimilar to the one that McIntyre diagnosed in the liberal bureaucratic states. Thus, it has been argued that Islamic fundamentalist theories partake of a wider history of totalitarian state ideologies (Inayatullah and Boxwell, 2003). This ideology aims at the establishment of an 'Islamic State (...) supposed to provide solutions to all the problems of Muslim societies (...) where every human-situation is

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<sup>8</sup> In addition, as is well known, the predominant view concerning the legitimacy of law, as taught in western law schools, is Weberian. It argues that law derives its legitimacy not from morality or the effective pursuit of the public interest but from its formal properties, on account of Weber's concept of formal rationality. Thus, in England, a rule has formal validity (rule of recognition) and is valid even if the legal procedures for making and applying the law did not provide opportunities for moral argumentation of the 'rightness' of normative validity claims (the reverse point is made by Jurgen Habermas's theory of communicative ethics). It cannot be defended in relation to moral principles that have historically been integral to the law (a criterion argued for by Ronald Dworkin) or frustrate the terms of the social contract, such as greater social justice (as per John Rawls' theory of justice).

open to state-arbitration' (Inayatullah and Boxwell: *supra* 170-171). Importantly, from a theological point of view and contrary to the perception of Islamic fundamentalists as religious purists, '[t]he reduction of the worldview of Islam into an [totalitarian] ideology is a form of *secularism*' (*ibid.*). Indeed, far from relying on faith, Qutb and other fundamentalists make human flourishing dependent on the establishment of an Islamic State in which priority is given to legal coercion, a far cry from Islamic scriptural principles that relate public interests to religious freedom. Empirically, the point is made by reference to those countries that claim to have an Islamic government. The hallmark of these states is their 'paranoid preoccupation with the *huddud*<sup>9</sup> aspects of Shari'ah law(...) without due regard for their prerequisites: institutionalisation of distributive, social, economic and political justice and implementation of the rights of individuals and groups in society' (*ibid.*). We can even, I believe, talk of 'fetishisation' of law at the expense of the religious and moral values that are supposed to underpin it. In fact, the very rigidity of the distinction between inflexible and flexible Islamic law is problematic. Although historically *huddud* crimes came to coincide with those for which the *Qur'an* provides fixed punishments and are usually categorised in opposition to *ta'zir* crimes for which penalties are discretionary, the distinction is not absolute. This is the case if considered in the moral-religious sense of good Islamic governance according to which the ruler's obligation to introduce and administer *Shari'ah* law came under his 'all encompassing and supreme obligation' to protect the public interest' (Khare, 1999: 28).<sup>10</sup> That

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<sup>9</sup> The reference is to what are known as *Huddud* crimes, or transgressions of the 'boundaries' or 'outer limits' set by the law, for which specific sanctions are provided in the *Qur'an*. These are usually contrasted with crimes carrying penalties of 'chastisement' (*ta'zir*), which vary.

<sup>10</sup> Sardar showcases the 'un-islamic' inhumanity of this substitution of pursuit of the public interest by legal formalism with the upheaval created by the immediate re-introduction of *Shari'a* laws in newly created Islamic states, *inter alia*, in relation to alcohol. In the first example, he notes that the *Qur'an*'s approach was humanely gradual, occurring in three revelations: 'The first revelation warned that the evils of alcohol outweigh its good effects; the second asked the believers not to pray while under the influence of alcohol. The complete ban on drinking was finally made in the third revelation [by which time] the Muslim community was well prepared: wine flowed in the streets of Medina as every member of the community threw out his/her reserves' (Inayatullah and Bozwell, *supra*: 72).

fundamentalists expect political transformation to happen by means of law alone is also shown by the fact that its theorists pay little attention to Islam's primary sources (*Qur'an*, *Sunnah*) by comparison to jurisprudence (*fiqh*) (Inyatullah and Boxwell: *supra*: 172).

Historically, those of Islam's primary sources that are less important to the fundamentalists date to the pre-Abbasid period (before 749) and are widely seen as comprehensive narratives on private morality, religious practice, and the notion of public interest, but otherwise as non-comprehensive legal codes. By contrast, the secondary jurisprudential sources, or *fiqh* (known in the literature as the five predominant schools: *Hanafi*, *Maliki*, *Haanbali* and *Jafari*), which arose in the Abbasid and post-Abbasid periods (after 1258) contain systematic legal principles. *Fiqh*, crucially, is seen as reflecting the political necessities of that time. First, '[a]t that juncture, Muslim community was in its expansionist phase, and *fiqh* incorporated the logic of the Muslim expansionism. The *fiqh* rulings on apostasy, for example, derive not from the *Qur'an* but from this logic' (*ibid.*) This arrogant logic is also evident in the *fiqh* principles regarding the status of Jews and Muslims. Generally, the *Qur'an* and the *Sunnah* mandate the protection of these groups, described as the 'people of the book'. The jurist Ibn Taimiyyah, however, added to this 'his own view (...)and advised Muslims to 'humiliate them (Christians), but do no injustice to them' (Inyatullah and Boxwell: *supra*: 173). Subsequently, all of the five law schools that defined the legal status of Jews and Christians did just that - by stipulating, for example, that non-Muslims can be tried by but cannot testify in a Muslim court of law (*ibid.*). Second, this body of jurisprudence reflects the simple Manichean division of the world into the Muslim 'house of God' (*dar al-Islam*) and the rest of the world, full of ignorance and violence (*dar al-harb*), which undermines the *universal* nature of the Islamic faith (*ibid.*). Finally, 'as the framers of the law were not by this stage managers of society, the law became merely theory which could not be modified - the framers of the law were unable to see where the faults lay and what aspect of the law needed fresh thinking and reformulation' (*ibid.*).

Compare and contrast this with the function of law as a substitute for religion and morality in the post-Enlightenment West. In *After Virtue*, MacIntyre talks of 'moral confusion,' and argues that in the aftermath of the demise of God and of Aristotelian teleology the 'deontological character of

moral judgement is the ghost of conceptions of divine law which are quite alien to the metaphysics of modernity and (...) the teleological character is similarly the ghost of conceptions of human nature and activity which are equally not at home in the modern world' (McIntyre, 1984: 111). Let me offer an example from English law. This law's principle of 'sanctity of life' barely reflects the Christian belief in the sanctity of every form of life as the creation of God. That this is the case has been made clear in a series of legal judgements – such as those declining to recognise the 'right to life' of the unborn, or those which counter-balance the right to life of individuals with severe disabilities with the scientific/utilitarian principle of 'quality of life.' That these non-Christian legal decisions express what MacIntyre calls 'moral decay' is further shown by the fact that the utilitarian calculus behind them, as I have argued elsewhere, does not even correspond to the Aristotelian logic of human happiness as humans are (*eudaimonia*) but rather invokes elusive future benefits for humanity. The fact that judges feel free to disregard Christian, for the sake of a secular morality does not mean that they are free from metaphysical beliefs. A prerequisite for taking utilitarianism seriously is the – unacknowledged – *belief* in a leading conscience of the universe and operator of universal finalism. Today, this usually takes the form of a belief in the power of economics and science to increase happiness and manage suffering efficiently and comprehensively, before finally eradicating it. Without this secularly dressed metaphysical belief in universal ends in nature, the world or history, utilitarianism cannot perform its calculus whereby the happiness and suffering of persons across the globe can be measured and compared. More generally, if the secular individual of practical reason acts as both a source of value and legislator, what value is there in legally entrenched human rights provisions that are open to deviations imposed by the practicalities of the state? Such laws advertise the idea that the individual has 'intrinsic value,' irrespective of any power that is supposedly the original share of each human being in the blind distribution of nature's energy and society's influence, but also independent of the merits the human individual may have acquired by his or her efforts and even virtues. At the same time we allow their scope of application to be restricted by our political assessments of power and merits. Hence, we can allow the unborn to be aborted because their mothers possess an autonomy that they lack; we deprive terrorists of some basic rights in the

name of justice. Most importantly we disassociate human rights from the political struggles that are necessary to bring about the circumstances of social and economic justice in which these can be meaningful. And we shamelessly open our borders to those suffering political persecution whilst closing them to those in search of food. In other words, we legally entrench an *absolute* sense of human dignity just as we reserve the right to judge it as *finite*, subject to political necessities, which, be they true or false, constitute a determinism as rigorous as that of nature's indifference from which human rights were supposed to deliver us! In other words, positive human rights laws appear meaningless and devoid of value. Or rather, they become a misnomer for a rule of law that constitutes its own value.

That modern fundamentalist thought proceeds by interpretatively giving a modern significance to a body of legal principles that were developed at a particular time of Muslim state imperialism, has significant consequences both for the Muslim culture considered in isolation and its relation to the West. Since their inception in the Muslim Abbasid 'modernity,' and certainly after their 're-discovery' in contemporary modernity, the legal principles that allow resistance to any Muslim political ruler who is deemed 'un-Islamic', the inhuman treatment of non-Muslims and justification of the rigorous application of legal rules irrespective of the ends they serve, have brought a situation of moral incoherence to the Muslim world. They have done this by undermining the Islamic religion's universality and, importantly, the values that Muslims, Christians and Jews shared and which had allowed their peaceful co-existence and co-operation in the early Islamic states. In compensation, *fiqh* jurists and today's fundamentalists fetishise law to the extent that their world view seems almost Weberian (or, conversely, the Weberian view is *fiqh*-like, our modernity acquiring some of the characteristics of the Muslim modernity of Abbasid times). The point is that Weber's criteria for law's legitimacy are met by *fiqh*: it's norms were developed by professional jurists, they are generally applicable and abstract and bind the judiciary and state to apply them without need for discussion of their morality in relation to faith and/or the secular *telos* of public interest.

If the above is correct then Islamic fundamentalist legalism at once historically 'anticipates' the post-Enlightenment western legal positivism and the obsession with legal means rather than with values or aims and, ironically,

in its contemporary re-appearance inverts it. The fundamentalist desire to regulate every aspect of social life, for example, points to a mistrust of the shared moral values within local Muslim communities, as if Islamic law is all that can keep them together. This, I think, strangely correlates with Liberalism in which 'social interaction is mediated by rules and procedures constructed to adjudicate between the demands of strangers' (Euben: *supra*: 135). If MacIntyre is correct that western legal positivism owes its existence to moral decay, which in turn is due to the incoherence of the Enlightenment's intellectual project of secularising Christianity, an equivalent consequence may have resulted from the Abbasid era's attempt by the state to legalise social life – putatively in the name of religion – in the service of its own secular aims. This project could not have been an intellectually and morally coherent project, as shown by the examples offered above from the work of the 'authoritative' jurist Ibn Taimiyyah, which destroys the universality of Islam. If we can say that there has been a situation of moral decay similar to that of western modernity's in those parts of the Muslim world that have been subject to domination by a *fiqh*-indoctrinated clergy, then the Muslim encounter with western modernity would seem to have compounded such decay. It is not only ironic that contemporary fundamentalist theorists now seek to reinvigorate the Muslim civilisation, in opposition to western 'decadence', by recourse to a legalism that has produced such decadence in both civilisations. More than ironic it is tragic. The current manifestation of fundamentalism as *jihad* against all things western historically incorporates the cultural arrogance and imperialistic drive of the aggressively expanding Muslim state of the time when *fiqh* was developed; but it has absolutely no pragmatic basis in terms of the contemporary international power balance. By contrast, the West is *today* capable of pursuing an expansionist and culturally arrogant agenda and exporting its own version of moral confusion. In other words, morally confused westerners impose their version of the rule of law on the world, whilst Muslim fundamentalists fight back by committing suicide, literally and metaphorically.

My final consideration is Euben's comparison between the thought of Qutb and that of Richard John Neuhaus. As Euben points out, Neuhaus' analysis of religion and American politics, shows, first, that 'the banishment of religion from the public sphere results not only in moral chaos and meaninglessness

[to the extent that religion has historically given the west much of its ‘foundational’ principles – the rest having come from Greek philosophy], but in a vacuum that invites the invasion of the state as religion and the hegemony of secular humanism’ (Euben: *supra*: 138). Despite its pretensions to neutrality, secular humanism generates a ‘religion of relativity’ that is camouflaged in the discourse of interests and pluralism (Euben: *supra*: 139). Secondly, Neuhaus explains the resurgence of Christian fundamentalism in the USA as a reaction to the fact that by stripping the American public sphere of the Christian content that is part and parcel of Americans’ democratic heritage, liberalism purchases tolerance and equality at the expense of rendering democracy meaningless. Thus he argues that the cult of secular humanism in the American constitution ‘has in fact become a collaborator in the resurgence of anti-democratic fundamentalist movements intent on forcibly clothing the [morally] naked public sphere with their own meanings’ (*ibid.*). All in all, secularism ‘far from expressing a principle of neutrality, has served as a Trojan horse of ersatz religion, corruption and totalitarianism’ (Euben: *supra*: 141).

Neuhaus’ first insight serves, in the context of Euben’s thesis, to support her broad argument that Islamic fundamentalism ‘mirrors’ the secular West’s crisis of meaning and the resulting disenchantment. Here, I want to add that even if liberals fail to realise the extent to which their attachment to secularism has become a quasi-religious cult, the point is not lost on Muslims. Muslims perceive that since the reformation Christianity has not *actually* been abandoned but ‘has become a handmaiden of secularism’, and has ‘abrogated the claim that religious experience offers a unique insight into moral behaviour’ to the point that ‘there is hardly any difference between the attitudes and morals of most Christians and those of the liberal secularists’ (Inayatullah and Boxwell: *supra*: 162, 164, 165). Sardar’s crucial thesis is that ‘contrary to popular belief, secularism did not actually produce a decline in religiosity – it simply transferred religious devotion from the concerns of the Church to the rational concerns of the world. Since the Enlightenment, this Western religiosity has been expressed in nationalism, communism, fascism, scientism, modernism and has now built its nest in postmodernism’ (Inayatullah and Boxwell: *supra*: 163), all of which had significant effects on the Muslim world. In other words, he argues, western ‘religiosity’ has not dissipated under the impact of instrumental rationality but, on the contrary, has been the cause of what we

empirically know to have been an *excessively passionate* attachment to a series of modern western ideologies in the last few centuries of western expansion. Thus, we understand why the ‘grand narrative of secularism’, functioned as the cornerstone of a European imperialism that was not content simply to dominate physically non-European peoples, but aimed to subjugate their minds. This excessive desire to ‘illuminate’ the dominated and the corresponding sense of superiority can, therefore, be explained as a form of *religious* zeal, minus the morality and humanity of the revealed faith. The implication of this view is to render rational the view held by Islamic fundamentalists that when the ‘secular’ West passionately promotes liberal values in Muslim countries it is effectively continuing its religious crusades.<sup>11</sup>

Neuhaus’ second insight is that in America the formal expulsion of religion from politics is ultimately responsible for the resurgence of anti-democratic Christian fundamentalism. Euben mentions this point in order to claim that both Neuhaus and Qutb’s theories go to show that the rationalist rejection of the transcendent diminishes the public relevance and purchase of moral truths ‘only to dominate the moral as well as the political realm; the decay of meaning both presages and facilitates the hegemony of rationalist cosmology that endows efficiency and technique with supreme value’ (Euben: *supra*: 141). I want to expand this argument. First, Neuhaus’ argument can be generalised to include those Muslim countries in which Western-secular values have been institutionalised and legally entrenched and in which Islamic fundamentalist movements both are undemocratically excluded and forcibly try to infuse the public sphere with their own version of Islamic meaning. Second, whilst Islamic fundamentalist thought like Qutb’s may well be used to expose the western secular ‘parasitic’ hold on the moral realm’s religious heritage (*ibid.*), it is itself subject to the same accusation. If, as I argued above, Islamic fundamentalism ‘secularises’ Islam by tacitly taking its core to be not its

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<sup>11</sup> In an illuminating analogy Sardar argues that in the eyes of Muslims the ‘secular’ West’s desire to ‘drag’ non western cultures into secularism willy-nilly, is not much different to the *inhuman* ‘religious imperialism’ of the sort that Germaine Greer famously attributed to the saintly Mother Teresa who is ‘ministering to the poor and destitute of Calcutta not for the sake of humanity, not because they are victims of a colossal system of injustice, not because their dehumanising poverty is a product of global system of domination but for the sake of her variety of Christianity’ (Inayatullah and Boxwell: *supra*: 167).

scriptures but its historically contingent jurisprudence, which was created to serve secular aims, then its claim to represent *authoritatively* the ‘essence’ of Islam is another form of parasitism.

### **An ethical perspective**

‘Philosophy (...) derives from religion. It is called into being by a religion adrift, and probably religion is always adrift’: Emmanuel Levinas in *Nine Talmudic Readings*.

Euben’s thesis that Islamic fundamentalist political theory ‘must be understood as a ‘dialectical response’ to rationalism and westernisation’ (*supra*: 155) is only partly right. It is right in so far as it looks at Islamic fundamentalist theory as ‘a dynamic critique rather than a scriptural reflex’ (*ibid.*). As I showed, however, it must also be understood as a form of political praxis that actually secularises the Islamic faith by reducing it to an ideological instrument for the establishment of a totalitarian state based on the rule of extant Islamic law without possibility for the moral evaluation of such law in the light of general Islamic principles. I now want to argue, with a view to concluding, that in this double understanding Islamic fundamentalist theory not only acts critically vis-à-vis secular liberalism but, inadvertently, shows the limits of that critique. In Hannah Arendt’s critique, redemption for the loss of meaning and the crisis of authority that come with secularisation cannot be based, as fundamentalists have it, on the recognition of modern man’s ability to believe in transcendence. At least with regard to Christianity both the atheist Nietzsche and the believer Kierkegaard have argued that secularism is the product of Christian faith. Thus, Arendt pins her hopes not on the search for new foundations but on the fact that individuals are political animals capable of political speech, who do not merely express interests, or life processes, and are not instrumental to some goal beyond themselves. Provided that there is a minimum of freedom and an attitude of worldliness, therefore, meaningful political action is possible. But we have seen that secular speech did not satiate the metaphysical urge but turned secularism into a cult in itself. It was free speaking people who theorised and instituted the cult of state law irrespective of values and ends; they are the free accomplices of processes that make

democracy appear devoid of meaning and which invited the backlash of anti-democratic fundamentalist movements, which take it upon themselves forcibly to infuse the public arena with their re-interpretation of religious truth. In the West, the cult of supposedly 'neutral' positive law and abstract human rights belies a religious zeal that is counterbalanced by fundamentalism. The same applies with regard to those Muslim states where western-style liberal constitutionalism remained a formal legacy of colonialism, as in Egypt, or in Yemen where it provided the only feasible institutional arrangement for the unification of the secular South with the Islamist-tribal North.

In Egypt the *Muslim Brotherhood* is officially banned but its most prominent members are actively supported as independent candidates by the secular parties which cannot hope to get enough votes for their own liberal-minded candidates. In Yemen, the trend since independence has been the incessant amendment of the constitution by free-thinking liberals and nationalists in 'tactical' acts of deference to Islamist forces, the most notable of which has been the re-wording of the fundamental clause that used to state that Islamic law was the 'main' source of legislation and now states that it is the 'only' source.

If, for Neuhaus America needs to rediscover how the biblical tradition is part of its democracy, one could suggest that in Muslim societies too, what is needed is not the separation of faith from politics but their mutual accommodation, in the form of an Islamic democracy. In this regard, it is worth mentioning that in those Muslim countries that constitute themselves either as Islamic Democracies (Iran) or democracies where Islam is the official state religion (e.g. Egypt, Yemen) we see much less the emergence of an open 'religious public space' of competing meanings of Islamic scriptures and Islamic conceptions of the good, and much more a polarisation between the madrassa-trained clergy and fundamentalist activists who seek to dominate the political and moral realms through the strict application of Islamic law, and their pluralist opponents or appeasers who defensively rely on the (receding) letter of constitutional law.

The problem to which I am alluding here is the pervasive legalism that characterises both the secular constitutional orders *and* theocracies. Instead of seeing law as a mere expression of *morally defensible* means of application of religious principles and an instrument for rationally conceived political aims

the application and testing of which require the institutionalisation of processes of meaning-contestation and interpretation, liberals and fundamentalist Muslims consider the implementation of the rules of their choice as having an absolute value be it as a matter of historical necessity or as a matter of pleasing God. Arguably the problem arises in connection with a common aspect in the doctrinal nature and historical evolution of both Islam and Christianity. To make the point we must consider that all three monotheistic religions aspire to be realised in collective conscience and not only in individual conviction. As such

They (...)frame for themselves public policy through laws that define what is to be done or not done and will enforce these laws in God's name. The history of Islamic, Christian and Judaic religious systems alike sets ample evidence that characteristic of monotheism from scripture forward is the aspiration to *legislate* theology and morality. (Neusner and Sonn: 1999: at vii, my emphasis).

The problem with legislation of all kinds is that it remains in force long *after* its underlying values and aims are forgotten. It becomes, in other words, dry knowledge of the 'right' and 'expedient' without reference to what is 'good.' In the West, Christianity's inherent aspiration to legislate has not been extinguished by the Enlightenment. Rather it has been inverted by secularism in the form of the emotive cult of positive state laws and human rights that, as we saw, are the bastard progeny of their Judeo-Christian heritage, simultaneously proclaimed universal and *a priori* and deprived of their substantive meaning according to principles of political necessity. Whilst religion both seeks to legislate comprehensively *and* asks us to believe in a larger order that can make claims on us, its secular progeny refuses to justify the rules by reference to any transcendent order. Similarly, in the Muslim 'modernity' era Islamic laws became specific, systematised and codified, and the hermeneutically open-ended general principles of the *Qur'an* and the *Sunna* were subordinated, as the 'doors of interpretation' were declared closed by the clerical officialdom. As we have seen, it is the cult of this body of rules that sustains the totalitarian state ideology called 'Islamic fundamentalism' even as it calls itself a 'religious' movement. In sum, when religion becomes codified

law, it ceases to operate as the point where transcendence affects politics and becomes a hermeneutically closed system of meaning.

In these circumstances a return to *ethics* may offer the ground for the critique of the inhuman legalisms of both the liberal and the fundamentalist states/political movements. What is needed is a universal ethical philosophy that is neither secular nor religious but which, nevertheless, would redress the metaphysical urge of humanity. In this regard, the work of the Jewish-French philosopher Emmanuel Levinas (1993) is instructive. From the perspective of Levinas' epistemology the modern attempt to conceive purely secular foundations for moral and political authority is due to the erroneous assumption of the Enlightenment that true knowledge of the world and society needs to be 'objective' and disinterested in the sense of 'impersonal.' For Levinas the categorical distinction between 'objective' and 'subjective' knowledge is mistaken since all knowledge is interested, value laden, expresses cultural prejudices etc. In the place of this false distinction Levinas puts an ethical distinction between knowledge that is enunciated for the sake of affirming the identity of the knower, whereby the object of knowledge is assimilated into its representation, and knowledge that is enunciated for the sake of the 'higher good' of maintaining the difference between knower and other, a great part of which is meeting the needs of the other to continue to exist *as* other. This ethical relation to the world – benevolent engagement through distance and love of alterity – qualify both rationalist philosophy and religion.

'Philosophy', Levinas tells us, 'derives from religion [but] religion is always adrift'. The first part of this sentence could be unpacked in a separate paper because here it has already been shown historically. Rationalist philosophy becomes unethical – and therefore unable to produce true knowledge – when it assimilates the religious realm from which it derived. The second part, however, needs explanation. What does it mean to say that religion is always 'adrift'? For Levinas, the ethical perils of religion are no less than those of rationalist philosophy. Religion is no exception to the claim that we are never disinterested. For this reason, we must be prepared to link the intelligibility and rationality of religious orthodoxy and orthopraxy with their relation to the 'good.' In turn, this 'good,' which is the ultimate test for philosophical and religious ethical intelligibility, is not to be determined theologically or

philosophically but ethically. Levinas' *ethics as first philosophy* does just that by insisting that this good is not to be seen as abstract or deferred but as something that concerns the real conditions in which the 'other man' can or cannot enjoy his life. In short, any system of knowledge or religious doctrine must be submitted to the question: 'is it good for the widow, the orphan, and the stranger?' (Peperzak, 1995: 154).

This ethical question can be equally put to both Islamic fundamentalism and secular liberalism. Is Islamic fundamentalism good 'for the widow, the orphan, and the stranger'? For the 'stranger' to orthodox *Sunna* Islam it clearly is not. As for the 'widow and the orphan', it is the case that a great deal of seemingly charitable work is undertaken by Islamic movements in impoverished Muslim countries. But this is not charity for the sake of the religiously uneducated poor. Rather it comes in exchange for accepting the pre-eminence of *fiqh* and for accepting as divine truth the humanly created doctrines of *jahiliyya*, *jihad* etc. Charity is not the word to describe this indoctrination and instrumentalisation of person by person for the sake of ideology. As for secular liberalism which recognises the formal equality of all individuals just as it tolerates massive and systematic inequalities and legitimates a relative indifference to the plight of the world's poor and exploited, it makes a 'mockery' of the idea of universal and a priori human rights that it nominally embraces (Levinas, 1993: 123). 'Is it so certain that the entire will is practical reason in the Kantian sense?', Levinas asks rhetorically (Levinas: *supra*: 122). The question arises because of the fact that in the plurality of free wills united by reason, called the 'kingdom of ends', the idea of human rights is thought to be 'limited by justice' and, therefore, 'remains repressed', inaugurating only an 'uncertain and ever precarious(...) bad peace' among humans.<sup>12</sup> The universal ethical value of human rights

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<sup>12</sup> This peace is 'bad' because it acquires a determinism of its own that can only lead to conservatism. It is '[a]n abstract peace, seeking stability in the powers of the state, in politics, which ensures obedience to the law by force. Hence recourse of justice to politics, to its strategies and clever dealings: the rational order being attained at the price of necessities peculiar to the state, caught up in it. Necessities constituting a determinism as rigorous as that of nature indifferent to man, even though justice – the right of man's free will and its agreement with the free will of the other – may have, at the start, served as an end or pretext for the political necessities. An end [that goes] soon unrecognised in the deviations imposed by the practicalities of the state, soon lost in the deployment of means

discourse, however, derives from the ethical aspiration of individuals to value each other *beyond any necessity*, false or real. Thus, a truly universal idea of human rights is ‘based on an original sense of the right, or the sense of an original right (...) [signifying] an ineluctable authority, older and higher than the one already split into will and reason (...) . that authority that is perhaps – but before all theology – in the respect for the rights of man itself, God’s original coming to the mind of man’ (Levinas: *supra*: 116-117). On the basis of this strange authority beyond philosophy and theology, Levinas explicitly lists many of the rights that remain unrecognised and without which the established human rights principles, enshrined in law, become ‘concretely impossible’: among them the right to health, happiness, work, rest, a place to live, freedom of movement; and, beyond all that, ‘the right to oppose exploitation by capital (the right to unionise) and even the right to social advancement’ (Levinas, 1993; *supra*: 120). And, beyond all that, ‘the right (utopian or Messianic) to the refinement of the human condition, the right to ideology as well as the right to fight for the full rights of man, and the right to ensure the necessary political conditions for that struggle’ (*ibid.*).

Levinas is not a theologian and in fact his metaphysics is God-less. To put it simply, in his philosophy the ethical sense of the right, which gives value to law, derives not from the revelation of truth to finite individuals from an infinite God that ‘must exist,’ but from the empirical description of human beings as at once finite and immanent (consisting of nothing more than what nature and culture make them) yet affectively incapable of resigning themselves to this finitude. The human being, in other words, becomes ethical to the extent that he or she emotionally rebels against things as they are and is, therefore, internally compelled to transcend them by undertaking to defend the ‘rights of man’, anarchically, beyond the constraints of practical reason *and* theology. This is what Levinas calls a ‘vocation outside the state, disposing in a political society, of a kind of extra-territoriality, like that of prophecy in the face of the political powers of the Old Testament’ (Levinas, *supra*: 123). This vocation is realised in what he terms the ‘substitution’ or ‘servitude’ of one being for/to another, which is in turn a function of a being’s ethical ability

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brought to bear’ (Levinas, 1993: 123).

– over and beyond real and transcendental constraints – to care for another being’s lack of material enjoyment or suffering, that is, to show compassion.

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# **In Defence of (Liberal) Democracy: The Machiavellianism of the 'War on Terrorism'**

*Nina Peršak*<sup>1</sup>

One of the major problems with democracy, as some see it, is its apparent incompatibility with the values of security and of political stability.<sup>2</sup> The latter may require strong leadership, which does not usually leave much room (if any) for pluralism, tolerance of different opinions and the other hallmarks of democracy.

To maintain both, democracy and stability, democratic states sometimes define circumstances in which, in order to protect the state as such, that is, to 'defend democracy', certain democratic liberties and freedoms may be suspended. However, in such circumstances the state is required to take into account a number of limitations, which act as safeguards against oppression and autocracy. The circumstances are, of course, thought of as 'exceptions', and hence defined and interpreted narrowly; while they, and the corresponding suspensions of liberties, are usually defined only in legal acts having the status of constitutional law, rather than in ordinary legislation. It is commonly accepted that the level of the reduction of rights has to be proportionate to the level of the actual danger, and that the suspended rights and liberties have to be re-activated as soon as the imminent danger is over. On the other hand, there are also several fundamental human rights and freedoms, such as the

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<sup>2</sup> See Held (1989: 39): 'Above all this the demands for freedom and political equality are not compatible with the preservation of authority, order and stability'.

Rule of Law or the right not to be tortured,<sup>3</sup> that are thought of as ‘absolute’ in the sense that they may never be derogated or suspended.

This chapter has an explicitly normative purpose. In what follows, I shall seek to identify the weaknesses and limitations of attempts to pursue security without giving due consideration to what happens to individual liberties along the way. I shall show that the recent so-called ‘war on terrorism’ has infringed a number of basic human rights and liberties (even ones that may never be suspended) and that it prevents people from freely participating in the democratic process. It does this through the limitation on the freedom of expression that takes place when the mass media are made to act as a kind of public relations service for governments supporting the war.

First, I shall look at the state as such and argue that violence is intrinsic to what we understand the state to be. Then, I shall compare ‘state violence’ with the notion of ‘state terrorism’ and try to make a distinction between the two. I shall claim, later on, that the ‘war on terrorism’ is in fact an example of ‘state terrorism’ and that, despite using a patriotic and democracy-friendly rhetoric, the outcomes, statements, and actions of its proponents are very far from being ‘in defence of democracy’. In fact, the ‘war on terrorism’, it will be argued, is a political strategy whose purpose is to expand the powers of the states and politicians who are perpetrating it. I shall conclude with a discussion of the (appropriate) balance between the values of security, on one hand, and liberty, on the other, or, more abstractly, a discussion of the relationship between ends and means, stressing that, in a liberal democratic society the emphasis should mainly be on means – something that has been missing from many of the debates, academic and non-academic, that have taken place since 11 September 2001. Before proceeding with this agenda, a note on the term ‘democracy’ is in order.

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<sup>3</sup> Article sixteen of the Slovenian constitution, for example, lists this as one of the rights that may never be suspended.

## The concept of democracy

In this chapter the term 'democracy' is not used (solely) in its original Greek sense. Thus, it is not used merely to mean 'the rule of the people' or 'the rule of the majority' (as opposed to the rule of the minority (oligarchy)<sup>4</sup> or of a single individual). Rather, it denotes 'liberal democracy' of the kind that is found, for example, in the United States as well as in Europe (though I do not, by any means, wish to imply that there are no more specific varieties of democracy within the category of 'liberal democracy'). The concept suggests that liberalism forms an important part of democracy – that it is, indeed, an intrinsic part of it. In this respect, the present chapter to some extent adopts the standpoint of two important liberal political theorists of our time, Habermas<sup>5</sup> and Rawls,<sup>6</sup> who have argued that the two concepts are in fact equivalent.<sup>7</sup> That *empirically* they go hand-in-hand in contemporary discourse on democracy can be inferred from everyday (political) language, which often employs the terms interchangeably. Thus, using today's terminology, we find it difficult to conceive of a 'democracy' that does not also adhere to basic human rights and liberties – which are normally enshrined in a constitution.<sup>8</sup>

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<sup>4</sup> Or, in Aristotle's terms, 'aristocracy'. 'Oligarchy' is, according to Aristotle, a degeneration of aristocracy, which happens when the government of the few is conducted solely in the interest of the rich. (See Pitamic, 1927: 67).

<sup>5</sup> Habermas in his book, *Between Facts and Norms*, developed the so-called 'co-originality thesis', according to which liberalism and democracy are internally related and mutually supporting.

<sup>6</sup> Rawls regards democracy as primarily an instrumental good, i.e. as a means to promote liberal political values rather than as something valuable for its own sake. He endorses Habermas' co-originality thesis in his 'Reply to Habermas' in *Political Liberalism*.

<sup>7</sup> Although we may not go as far as Habermas in saying that democracy and liberalism are conceptually the same and that the term 'liberal democracy' is, therefore, a redundancy (one could imagine a state that was democratic but not liberal or vice versa), we maintain that the two concepts are 'intimately related' (something even the critics of Habermas and Rawls do not deny). Moreover, within liberal democracies, it is understood that the one does not (and should not) travel alone. See more in Taylor

Also on the Internet: <http://www.theihs.org/libertyguide/hsr/hsr.php/35.html>

<sup>8</sup> A US government website, which dedicates several pages to defining what democracy is, lists the following values as 'pillars of democracy': sovereignty of the people; government based upon consent of the governed; majority rule; minority rights; guarantee of basic human rights; free and fair elections; equality before the law; due process of law; constitutional limits on government; social, economic, and political pluralism; values of

We therefore understand ‘democracy’ to be a state of affairs encompassing (at least):

- rule of the majority, which logically presupposes institutions providing for popular participation in processes of political decision making; and
- a system that places the utmost value on individuals’ autonomy, i.e. on their right to choose for themselves, on their human rights and liberties (liberalism).

From this point of view, therefore, democracy represents not merely a specific form, but has a specific (libertarian) content as well. Kušej, Pav nik and Pereni (1992: 50) make this point when they assert that

[t]he notion of a democratic state itself [therefore] has two components: a substantive (internal) component and a formal (external) one(...) The substantive component is mirrored in the individual’s freedom and in the will of the people that is exercised through the state. Fundamental rights (that is, human rights and fundamental freedoms) and the mechanisms that create (facilitate) the relationship between citizens and the institutions of the state are, on the other hand, ‘merely’ a form or a formal component of democracy. It is obvious that this form is highly important and that it is precisely upon this form that the content of democracy, the scope and the mode of how the citizens’ will can be exercised, depends.<sup>9</sup>

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tolerance, pragmatism, cooperation, and compromise. See: <http://usinfo.state.gov/products/pubs/whatsdem/whatdm3.htm>

<sup>9</sup> There may at first sight appear to be a discrepancy between our and their view of ‘human rights and liberties’. We referred to them as the content (the substance) of democracy, while they talk of them as being the form (‘formal component’) of democracy. Yet, in the next sentence they emphasise that this ‘formal’ element *de facto* constitutes part of the ‘content’ of democracy. See in the main text.

## **Violence as a built-in characteristic of the State**

Even in peacetime and within societies where the state is commonly conceived as being in the service of the individual, there is a violent element built into the state. One need only look at the most distinctive element of the state, the element that separates it from any other organisation within the territory of its jurisdiction – namely that of having a monopoly on the legitimate use of force against the individual – to see the element of violence lurking just beneath the surface. It is because of this element that, in addition to constitutions setting out citizens' rights, liberal-democratic societies typically also have codes of criminal procedure. For the latter provide an additional safety net, an additional 'constitution' especially written for individuals who may find themselves in face-to-face confrontations with the state. The fact that there is a special 'constitution for the accused', specifying in detail what the authorities may and may not do, *ipso facto* acknowledges the state's tendency to resort to violence and therefore the risk that it will abuse its superior position vis-à-vis the individual.

Even in peacetime, therefore, there exists the implicit threat of the use of violence on the part of government against anyone who would attempt to overthrow it or challenge it other than in tightly circumscribed ways. Governments find it expedient to divert attention from this potential for violence by ruling in ways other than through the exercise of naked coercion. Thus it is that they attempt to defend their positions on fundamental issues by giving in on other, less important ones, or else by attempting to manipulate popular attitudes. Thereby, the public does not even realise what is actually going on. It is not sufficiently informed to be able to grasp the meaning of the information it has got, and consequently it is unable to articulate its standpoints and demands – which in turn, reduces levels of effective popular accountability.

## **From state violence to state terrorism**

There is to date no generally accepted definition of terrorism. The most important reason for this probably lies in the fact that one state's 'terrorist'

in another state's 'freedom-fighter'. However, the reason may also be that an ill-defined concept allows much latitude to the authorities. For example, the absence of a commonly accepted definition without doubt adds to the mystery (or mystification) of it. It is as if we were fighting dark forces, some mysterious dragon, which shows up from nowhere, wreaks havoc and then disappears into the mist again. This 'mythological' quality of terrorism works in the authorities' favour by providing them with an explanation and justification for their equally vaguely circumscribed counter measures. Since terrorists are 'everywhere and nowhere', we can 'hear them breathing', but we cannot see them, and thus the Rule of Law's demands regarding the when, how and for-how-long governments may suspend individual liberties and freedoms in the name of safety, are more flexibly interpreted. Governments need not worry about the proportionality of their counter-terrorism measures since, in the absence of a clear-cut definition, there is no case or act that cannot be construed as terrorist. Moreover, defining as terrorist specific criminal acts, rather than criminalising terrorism as such, offers many advantages. As Chadwick puts it: '[T]he many efforts to define and control world terrorism [thus] depend to a certain extent on the context in which it appears desirable to criminalise a proscribed act'. If, for example, 'the inherent political nature of terrorism is ignored, terrorist acts can be identified more easily for purposes of prosecution'. Also, '[a] definition which requires evidence of an intent to spread fear (for whatever purpose) by means of acts of violence is completely different, and much more problematic, than a requirement of proof of an intent to throw a bomb, for instance'. (Chadwick, 1997: 336). Nevertheless, there is – in human nature perhaps – an inherent need to define 'the enemy', which is why a plethora of definitions have been offered. As a last resort, if everything else fails, there is the all-encompassing trump card borrowed from American Supreme Court Justice Potter Stewart who, on the issue of pornography, famously said: *'I can't define it but I know it when I see it!'*

In searching for definitions and the meanings of phenomena, one necessarily finds oneself examining the past with the aim of discovering their initial, original meanings. Historically, the word 'terrorism' was used to describe what is today usually referred to as 'state terrorism'. It derives from the era of the French Revolution and the Jacobin Dictatorship, during which a state-directed policy of inflicting terror was practised for the purposes of maintaining political

and social control. (Chadwick, 1997: 330) Terrorism thus originally meant a *state-directed* policy of inflicting *terror* for *political* purposes.<sup>10</sup> Terror (from the Latin *terror, terroris* meaning 'a strong fear') on the other hand is, as Dimitrijevi puts it, 'a tool of a minority who believes some general interest to be in danger and in its fear wishes to instil fear into its enemy and thus paralyse it'.

Terrorism *qua* state terrorism acquired unbelievable proportions in the era of fascism. 'The Fascist state is based on pure, overt terror. It does not acknowledge any legality, any individual freedoms, any freedom of belief or of expression etc.' In Hitler's Germany and like countries people disappear without trace; they die without trial; they fill jails and concentration camps. Meanwhile, those who are on the outside, who are 'free', live in a state of constant fear, under the constant surveillance of the authorities and their informants, not trusting friends or members of their families, not even themselves. And there is no place to hide from the fear.

A special kind of systematic state terrorism has for many years been practised in Latin America where torture as an administrative tool or as an important way of ruling has a long tradition. Here the terrorism is rooted in endemic political instability, which in turn has its roots in the social structure and in the economic dependency of the region on the USA and other foreign interests. The immediate post-war period saw the import of Nazi influences, the Cold War imported new ideological explanations and modern technology perfected the means of terror. People killed by the authorities are frequently classified in official records as 'terrorists'. That is not surprising if one recalls the words of former Argentine president, Jorge Rafael Videla, who said: 'A terrorist is not just someone with a gun and a bomb, he is also the one who disseminates ideas that contradict Western and Christian civilisation' (Dimitrijevi, 1999: 21, citing Chomsky).

Terror has always been accompanied by the cult of security. Therefore, as many writers have observed, even in societies that fought (and fight) against

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<sup>10</sup> Attempts at a definition of terrorism on the international plane include those of the League of Nations Convention (1937) and of numerous UN Resolutions. Within the UN system there are around 150 instruments and documents on the subject of terrorism, 16 of which are international conventions.

fascism and authoritarianism the name of ideals such as democracy and humanitarian principles, liberal-democratic governments in moments of deep crisis often abandon these principles and adopt similarly authoritarian modes of thinking.

### **The ‘war on terrorism’ as state terrorism**

The ‘war on terrorism’, which erupted in reaction to the events of 11 September 2001, has some very interesting characteristics that distinguish it from other previously declared wars. First and foremost, this particular war is being run ‘in the name of democracy’. ‘The defence of democracy’ is frequently offered as an explanation and justification for both domestic measures and acts of foreign intervention that in fact appear to contradict principles of democracy. By keeping vital information from the public on one hand, while relying on patriotic, black-and-white rhetoric and the dissemination of propaganda on the other, the ‘war on terrorism’ undermines the effectiveness of popular accountability and popular participation in the decision-making process. As will be seen below, it has resulted in massive violations of the basic human rights and liberties that are thought of as part of the essence of modern notions of democracy, of so-called ‘liberal democracy’.

Second, the ‘war on terrorism’, unlike most other ‘wars on(...)’, is not a metaphorical but an actual war. In expressions such as ‘the war on drugs’ or ‘the war on crime’ and so forth, the term ‘war’ is used to describe an intense commitment to stopping, preventing or reducing the phenomena – drugs, crime etc – in question. On the other hand, people are actually being killed as a direct result of the ‘war on terrorism’. They are of course also killed as the consequence of the war on drugs and on crime and so forth. But in these cases the killings are a kind of side effect, a kind of ‘collateral damage’, rather than being directly intended.

Third, the ‘war on terrorism’ is heavily supported by the mass media which act as a kind of public relations service for (or a mouthpiece of) governments. Of course the media have always been interested in crime and tragedies – this is what sells newspapers and boosts ratings. Yet the blood-thirsty attitude

of the tabloids had always been reduced to a minimum when it came to 'serious newspapers'<sup>11</sup> or large, national, and supposedly 'objective' TV stations' such as CNN, for example. Some observers, however, have noticed that this difference between networks has been drastically reduced in respect of the issue of terrorism. As Chomsky (2002) observes, 'even the most serious, 'objective' channels sell White House press releases and spin as facts', while on the other hand, 'even simple facts [that might put the US Government in a bad light] are not reported'.<sup>12</sup> Directors of the Terrorism Research Center go as far as to call the role the media plays in the 'war on terrorism' a 'second-hand terrorism'.<sup>13</sup> Preying upon the public's paranoia concerning terrorism, the media have generated fear among the American and international population. It is the mass media that are primarily responsible for the current climate of fear.<sup>14</sup> And climates of fear are what terrorists create. Much criminological research has established the importance of the media in exaggerating the risks of crime and 'cultivating an image of the world that is 'scary' and 'mean' (Reiner, 2002: 383) The fear of crime such images generate is deemed disproportionate to the actual risks. Moreover, media

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<sup>11</sup> Cf. Reiner (2002: 382): 'The proportion of space devoted to crime was greater the more 'downmarket' the newspaper'.

<sup>12</sup> 'For example, as soon as the current fighting began last September 30, Israel immediately, the next day, began using U.S. helicopters (they cannot produce helicopters) to attack civilian targets. In the next couple of days they killed several dozen people in apartment complexes and elsewhere. The fighting was all in the occupied territories, and there was no Palestinian fire. The Palestinians were using stones (...) On October 3, Clinton made the biggest deal in a decade to send new military helicopters to Israel. That continued the next couple of months. That was not even reported, still isn't reported, as far as I'm aware.' (Chomsky 2002)

<sup>13</sup> See Houghton, Brian K. and Pollard, Neal A., 'Second-Hand Terrorism' on the website of The Terrorism Research Center:  
<http://terrorism.com/terrorism/Media.shtml>

<sup>14</sup> This fear-generating role of the media is an especially interesting phenomenon in the case of terrorism. Usually, fear of crime only leads to changes in legislation *post delictum*; it does not influence the criminal acts themselves. However, one of the important elements of terrorism is the intention to incite fear in people, which implies: no fear, no terrorism (or no terrorist act). The media, however, in 'reporting' on acts, generates the fear that many wrongly attribute to the perpetrators rendering their act an 'act of terrorism'. It is therefore the media that changes perspectives and does the final labelling – that turns an act into an 'act of terrorism'.

misrepresentation of crime risks is said to ‘increase political support for authoritarian solutions to the supposed ‘crisis’ of law and order’ (Reiner, *ibid.*). Forth, the ‘war on terrorism’ uses a specific language. Its rhetoric is:

- ‘*gothic*’ (Valier, 2002), retributive (‘zero tolerance’) and moralistic, approaching things and people through ‘binary division and branding’ (Chadwick, 1997; 339) as good/evil, right/wrong (e.g. ‘axis of evil’; ‘rogue states’; ‘either you are with us or you are with the terrorists’ (Vidal, 2002: 75));
- heavily reliant upon appeals to patriotism (e.g. there is ample usage of the words ‘we’, ‘the Americans’, ‘American values’, expressions like ‘this is what makes America great’, ‘I will not stand idly by watching fellow Americans die’, and so forth);
- apparently ‘democracy friendly’ (sentences abound with words such as ‘freedom’, ‘democracy’, ‘liberties’, equality, in the name of which the war is supposedly being fought).

Fifth, the messages of the war on terrorism are concise but, perhaps precisely for this reason, powerful. Their contents can be broken down into five essential themes:

- *democratic values* and *you* are in *great danger*;
- only *we* (the US) can help you;
- we can help you only *in the way we are proposing* (i.e. with arms and zero tolerance<sup>15</sup>);
- we have to protect you *right now*;
- the ‘war on terrorism’ is a matter of *self-defence* and of *responsibility* to the nation and to the *world*

Sixth, basic human rights and liberties, which are protected by national constitutions as well as internationally are being violated or drastically reduced. In the USA, according to Amnesty International’s *Annual Report* for the year 2002,

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<sup>15</sup> As UK Prime Minister, Blair, said: ‘There is no compromise possible with such people, no meeting of minds, no point of understanding with such terror. Just a choice: defeat it or be defeated by it. And defeat it we must.’ (reported in the *Guardian*, 2 October 2001).

from early January, people detained in Afghanistan, Pakistan and as far away from the military conflict zone as Bosnia-Herzegovina, were transferred to Camp X-Ray at the US Navy Base in Guantanamo Bay, Cuba. There, they were kept in a 'legal limbo' in which they were denied 'prisoner of war' status under the Geneva Conventions and did not enjoy the internationally recognised rights of criminal suspects (Amnesty International, 2002).

Representatives of Amnesty International attempted to visit some of the detainees but were denied access. Fundamental rights are not, however, being infringed only in practice. They are being denied to certain groups of people through consciously decided upon legislative acts. In the United Kingdom, section four of the Anti-Terrorism Crime and Security Act (ATCSA), passed in November 2001, empowers the Home Secretary to detain foreign nationals indefinitely, without charge or trial, if they are deemed to pose a risk to national security. According to Amnesty International's report, ATCSA also violates the right to be brought promptly before a judge, the right to trial within reasonable time, and the presumption of innocence. These rights are guaranteed in, among others, articles five and six of the European Convention on Human Rights (ECHR), as well as in article fourteen of the International Covenant on Civil and Political Rights. Furthermore, secret evidence can be entirely withheld from those against whom it has been adduced. Detainees are held in high-security prisons, they have no way of knowing for how long they will be held, which, according to Amnesty International (2002), amounts to a violation of the right not to be subjected to torture or other ill-treatment, enshrined in article three of the ECHR. At approximately the same time, the USA Patriot Act, which was signed into force on 26 October 2001, gives extensive powers to the attorney general, expands all existent tools of surveillance and removes many of the checks and balances on the activities of the security forces. It also permits indefinite detention of immigrants and other non-nationals (Sammonds, 2002: 10).

One of the most important, if not the most important, civil liberty to have been undermined as part of the 'war on terrorism', is freedom of expression in all its forms: the right of the citizen to dissent, tolerance of others' opinions, polite debate etc. Such liberties have taken second place and to question their displacement, or 'second-placement', is often deemed 'unpatriotic' (Knightley, 2002: 147), carrying the risk that one is labelled as a 'terrorist sympathiser',

or even a traitor. When the writer Susan Sontag, for example, made some mild criticism of her country for its reaction to 11 September, she received a large number of letters calling her a traitor. ‘There’s a serious attempt to stifle debate’, she says. ‘The media have been very intimidated (...)’ She says the US media see their role as that of shoring up the president’s image, and that debate equals dissent and dissent equals lack of patriotism. She worries that another terrorist attack would lead to martial law (Knightley, 2002: 150). Many feel that they should participate, but feel inhibited about participating, in a debate about where the balance between freedom and security is to be struck. In this way is the climate of fear maintained, and freedom of expression – that ‘one essential freedom that should never be curtailed’ (Knightley, 2002: 155) – in fact curtailed.

In short, the ‘war on terrorism’ is *itself a series of acts of state terrorism*: it is a state-directed politics of violence involving physical and psychological torture, which in turn generates fear and xenophobia among ordinary citizens. Through the spread of fear, western governments are able not only to maintain, but more importantly, to expand their powers while better ensuring themselves of the safe supply of important resources such as oil. With so much at stake, the war has been assisted by a huge propaganda machine whose job it has been to use the vocabulary and the rhetoric of ‘democracy’ to legitimise the highly questionable means it employs.

## **Means and ends**

The ‘war on terrorism’ displays a number of the characteristic features of what Michael Whine (2000/1) and others have called ‘new terrorism’. That is, it (1) employs indiscriminate violence for the purposes of (2) lowering the morale of the targeted population, where (3) a key role is played by the mass media in transmitting the message of the terrorists to the target population. From this point of view, the ‘war on terrorism’ is not even an act of ‘defence’, let alone a defence of democracy. Initiated by the United States, it then subsequently drew in other countries by virtue of US military and economic superiority. It has thus led to a ‘spill-over’ effect whose consequences are likely to be the export of an ‘anti-terrorist ideology’ that results in mutual

cooperation on matters of internal security and legislation – which in turn undermines still further the fundamental human rights universally acknowledged within the international community.

Since, therefore, the 'war on terrorism' is itself an act of terrorism, and since acts of terror violate principles of democracy, we must conclude that the war is incompatible with democracy. This is not to suggest that the security concerns of citizens are not genuine or that they have no basis in fact. Nor is it to deny that democracy requires security in order to flourish. Rather it is to suggest that in seeking to achieve this security, the democratic state must be careful how it does it if it is not to place in jeopardy the very democratic principles it claims to defend. Ultimately, therefore, it is a question of ends and means and of the degree to which the latter can be reconciled with the former. From a normative point of view it would seem to be a matter of striking a proper balance between security and those democratic virtues that allow people freely to participate in the process of finding that balance. From this perspective, the ideal 'war on terrorism' is one that focuses on the underlying political, economic and social causes of terrorism, rather than on its symptoms. And it is one that limits itself to the use of democratic – that is, legal and legitimate – means that respect the Rule of Law and that ensure that all the usual guarantees of criminal procedure are respected and fully adhered to with respect to 'terrorists'. A war fulfilling these criteria is one that would, in stepping back, thereby be successful in stepping forward.

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# Institutional reform and attempts to fight corruption: The Italian case<sup>1</sup>

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## **Introduction**

Under what conditions can we expect anti-corruption efforts in liberal democracies to be more or less intense? What are the circumstances that give rise to government-sponsored attempts to curb corruption? Although corruption, like poverty, has always been with us (Williams, 2000: xii) and, indeed, may always be, these are important questions to ask for at least two reasons. First, corruption has potentially grave and pernicious consequences. It involves the suspension of normatively defined criteria for the allocation of resources in favour of market exchanges whose distributive consequences in turn depend on the arbitrary and unequal distribution of money and other resources. By undermining principles of equality and transparency, corruption is subversive of liberal democracy. It inflates the costs of public services and perpetuates administrative inefficiency besides being self-generating (Newell and Bull, 2003a). Second, how, and, one might add, under what conditions, do actions against corruption take place, and how can one determine the success or failure of those actions themselves?

Recognising in recent years that political corruption has always been a powerful enemy of good governance around the world (Eigen, 1996: 158), a growing number of researchers have explored the impact of anti-corruption

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<sup>1</sup> A revised version of this chapter is forthcoming in the journal, *Modern Italy*, under the title, 'Corruption mitigating policies: the case of Italy'

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strategies in an effort to draw conclusions on how best to tackle the phenomenon.<sup>3</sup> Rather less has been done on the circumstances likely to favour the adoption of these strategies, and what work has been done has tended to concentrate on the less developed countries. This may have been due to the perception that corruption was largely confined to these countries, together with the perception that developed countries had experienced corruption in earlier phases of their development and then got it under control through a variety of reforms. Under these circumstances, the conditions giving rise to anti-corruption efforts were probably thought of as already known, and thought of as being factors associated with economic development, namely, political democracy, the spread of 'due-process' norms, the pressure of public opinion. Since the explosion of corruption scandals in developed countries from the early 1990s, the confidence with which these beliefs were held has been shaken. The investigation of anti-corruption strategies in advanced industrial nations is, therefore, extremely timely.

This chapter focuses on the Italian case and begins by considering the conditions likely to be associated with greater and lesser efforts to curb corruption. Arguing that there are theoretical and empirical reasons for expecting institutional change to affect authorities' responses to corrupt activity, the paper then goes on to describe the ways in which institutional arrangements tended to diminish the commitment to anti-corruption efforts prior to the mid-1990s, as well as the new institutional arrangements that have been put in place since then. Noting that these new arrangements, in particular, the 1993 change to the electoral law and the now largely bipolar party system, do not appear to have had the effects expected of them, the final section of paper explores the reasons for this.

### **Anti-corruption efforts**

A useful starting point is to define 'anti-corruption efforts' and to consider what, *a priori*, appear to be their most proximate causes. In the abstract, anti-

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<sup>3</sup> Some of the most authoritative contributions to date have been gathered together in the volume edited by Williams and Doig (2000).

corruption efforts would seem to belong to one or the other of two categories: (a) the efforts of the police and judicial investigators to bring those suspected of corruption to justice, and (b) the efforts of legislators to frame laws designed to prevent corruption taking place to begin with.

Across democratic countries at any one time, and within a single country over time, one would expect the intensity of investigative efforts to vary with at least seven interrelated factors:

- political culture/levels of social capital;
- levels of corruption (its relationship with anti-corruption efforts probably taking the form of an inverted 'U');
- resources made available to investigate it;
- public/political pressure to investigate it;
- investigators' perceptions of the consequences of corruption;
- investigators' perceptions of the consequences of the exposure of corruption;
- the power of those who would lose from, and therefore resist, anti-corruption efforts.

Across democratic countries at any one time, and within a single country over time, one would expect the intensity of legislative efforts to prevent corruption to vary with a similar set of factors:

- political culture/levels of social capital;
- levels of corruption;
- public pressure to enact laws to prevent corruption;
- legislators' perceptions of the consequences of corruption;
- the power of losers from anti-corruption legislation.

All of these variables are in their turn obviously influenced by short-term, macro-political changes. For example, it is often said that a significant factor in explaining the timing of the outbreak of the *Tangentopoli* ('Bribe City') corruption scandal in Italy in 1992 was the collapse of the Berlin Wall. Investigating magistrates were thus aware that for the first time in forty-five years they could attack the misdeeds of a governing class among which corruption was widespread without thereby enhancing the risk of the large Italian Communist Party coming to power (Newell, 2000: 60; Pasquino, 2001). Public and political pressures to combat corruption, and therefore the resources made available to investigate it, would also seem to be affected by

political changes. For example, in Britain, the change of government in 1997 put the Labour Party under immense pressure to address corruption in local councils, for it was aware of the importance of concerns about public standards in the downfall of the outgoing Conservatives and thus that some well-publicised instances of corruption in Labour-controlled councils made it highly vulnerable to partisan attack (Doig, 2003).

There are a number of reasons, therefore, for thinking that the intensity of investigative and legislative efforts to combat corruption will be significantly effected by macro-political changes. From the current literature on anti-corruption strategies, it would seem that such changes can be regarded as belonging to a number of distinct categories.

First, there are altered pressures and incentives deriving from the international environment. The above-mentioned end of communism was an example. Another example is the initiative of the Organisation for Economic Co-operation and Development (OECD) in adopting, probably as a result of US diplomatic pressure (Delare, 2000), an anti-corruption programme from 1989 on. This, it has been suggested, 'has had a catalytic effect and promoted dramatic policy change over the last ten years' (Pieth, 200: 52). By persuading a number of countries to agree to its *1997 Convention on Combating Bribery of Foreign Public Officials*, for example, the OECD also managed to persuade several of the signatories, as a logical corollary of the *Convention*, to alter their domestic legislation to deny the tax deductibility of bribes in international business transactions (Millet-Einbinder, 2000).

Second, there are the catalysts provided by 'one-off' political events taking place in the domestic environment. These include election outcomes and most obviously, political scandals. The examples are legion and include Watergate, the Foreign and Corrupt Practices Act in the United States, and the oil scandal leading to the 1974 party finance law in Italy. The occurrence of these kinds of dramatic domestic political events is often unpredictable, while the nature of their impact is usually straightforward and obvious. Typically, they create sudden and intense public pressure for action, to which the authorities are obliged to respond as the price of retaining power and authority. For these reasons, as causes of anti-corruption activity they not particularly interesting.

Far more interesting is a third type of change, namely, institutional change. It is frequently argued that some institutional arrangements are more conducive to high levels of corruption than are others. Likewise, on the face of it, it seems reasonable to assume that some institutional arrangements will be more conducive to a fight *against* corruption than are others, if for no other reason than that the impact of at least one of the variables listed above (i.e. public pressure) will vary with the institutional arrangements through which it is channelled. Consequently, it seems reasonable to think that when institutional arrangements change, so will the nature and intensity of anti-corruption efforts.

The kinds of institutional change we may expect, given earlier investigations, to have an impact, include reform of electoral systems, party-system changes, changes in the distribution of power between central and sub-national units of government. All other things being equal, democracies where voting takes place by closed-list systems of proportional representation are more likely to witness attempts to fight corruption than are democracies that have open lists. The reason is that in the former case those who would lose from, and therefore resist, anti-corruption reforms are likely to be less numerous and/or powerful. For, with closed-list systems, candidates' chances of being elected depend on the party hierarchy who determines the order of candidates' list placements. With the open-list system, by contrast, voters have the opportunity not just to select a party, but also to express preferences among their chosen party's candidates. Therefore the candidate's chances of being elected depend on his or her success in competing with fellow candidates from the same party and this encourages the provision, to voters, of patronage benefits, which can easily degenerate into out-and-out corruption.<sup>4</sup> Geddes (1991; 1994) who investigated civil service reform in Latin America argues that in Colombia and Uruguay voting by closed-list proportional representation facilitated the reform effort – while Brazil and Chile both had open-list systems and failed to reform (cited by Rose-Ackerman, 1999: 201).

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<sup>4</sup> Although, as Rose-Ackerman (1999: 202) points out, the contrast between closed- and open-list systems, is about necessary, not sufficient conditions. 'If the party leadership is corrupt, it will want a closed-list system as a means of controlling members through control of positions on the list'.

That the characteristics of party systems appear to have an impact on anti-corruption efforts is suggested by the examples of nineteenth-century civil-service reform in Britain and the United States. Both had two evenly matched parties able to provide single-party government and to alternate in power. The reason this facilitated reform has to do with the fact that, if reforming parties can gain voting support by advocating change, this has to be set against the loss of votes deriving from the reduction in opportunities for corrupt exchanges. Any given party advocating reform may therefore suffer a loss of votes to rival parties that outweighs any gain deriving from the advocacy of a cleaner system. This is more likely to be the case where its access to corrupt exchanges is greater than that of rival parties. Moreover, there is a 'first-mover disadvantage' in the sense that the party that advocates reform is likely to have to bear higher costs than those that simply go along with the change (Rose-Ackerman, 1999: 201). Therefore, in multi-party systems with disproportionate access to corrupt exchanges, reforming efforts are likely to be relatively few. On the other hand, in two-party systems with regular alternation in power, parties will be evenly matched in terms of their access to corrupt exchanges and if they can collaborate to legislate change neither party will lose votes, and both will share in any benefits of reform. For these reasons reform is more likely in party systems with these characteristics than in party systems of the former type.

Finally, that the distribution of power between central and decentralised units of government appears to be a relevant consideration in terms of the likelihood of the occurrence of anti-corruption efforts is suggested by the example of nineteenth-century America. On the one hand, as the efficiency of government services began to loom large in voters' minds, Federal politicians found that the dispensing of patronage – which also consumed much time and energy – eventually became a political cost rather than a benefit. On the other hand, patronage was increasingly controlled by state and local party bosses whose interests were not necessarily congruent with those of Federal politicians. Federal politicians thus supported reform because it was a way for them to reduce the power of rivals at lower levels of government (Rose-Ackerman, 1999: 206).

The institutional profiles of democratic countries are therefore clearly significant in terms of the efforts these countries make to combat corruption. In the following section we describe those features of the institutional set-up in Italy that acted as a break on anti-corruption efforts and the grounds there were for expecting the institutional changes of the 1990s to bring improvement.

### **Anti-corruption efforts in Italy**

Until the 1990s in Italy, legislative efforts to combat corruption were depressed by the nature of the country's party and electoral systems, investigative efforts by low levels of autonomy of the judiciary from other political institutions.

Between the end of the Second World War and the end of the Cold War, the fundamental determinant of coalition formation, underpinned by the widespread popular acceptance of anti-Communist attitudes, was the so-called *conventio ad excludendum*. This was the agreement between the remaining parties in the legislature that the second largest party and party furthest to the left, the Italian Communist Party (PCI), was unacceptable as a coalition partner and should never be admitted to government. Likewise, the parliamentary party furthest to the right, the neo-fascist Italian Social Movement, was also excluded, and this led to the permanence in office of the centre-placed Christian Democrats (DC) as the mainstay of all feasible governing coalitions.

This had several significant consequences. First, the DC and its allies knew that their agreement to exclude left and right extremes virtually guaranteed them a place in government regardless of election outcomes, and thus that the collapse of any government (there were over fifty between 1945 and 1992) would be more or less quickly followed by the installation of a new government composed of some more or less altered combination of the same parties. This meant that they were under little or no pressure to enact coherent legislative programmes and therefore that they were under little pressure to construct governments with any real power vis-à-vis the legislature. Consequently, senior party leaders with the power to impose discipline on their followers tended not themselves to be cabinet ministers but rather to delegate these positions to secondary figures. The fact that it was not they,

but the powerful party secretaries who chose their cabinet colleagues, quite naturally meant that prime ministers had little authority.

Second, the weakness of prime ministers and executives meant that not only were governments, and the parties staffing them, under little pressure to enact coherent legislative programmes, but that they had little power to do so either. Consequently, small-scale distributive measures, allowing them to establish clientele relationships with their followers, became the parties' preferred means of mobilising and retaining electoral support. Thus the substance of negotiations leading to the formation of governments essentially concerned how the various ministries and under-secretarial positions were to be distributed among parties anxious to control them for patronage purposes. Thus did the parties penetrate vast areas of the state and society, a state of affairs that came to be dubbed *partitocrazia* or 'partyocracy'.

Third, knowing that they would always be the mainstay of any feasible governing coalition, the Christian Democrats were highly factionalised, and given *partitocrazia*, the main basis for factional conflict tended to be the distribution of patronage resources rather than ideology or policy. This was reinforced by the electoral system, which was of the open-list variety described above and which allowed the voter to express up to four preferences among his or her chosen party's list of candidates.

Fourth, the Communists' exclusion meant, paradoxically, that their legislative behaviour tended to be 'responsible', where 'responsible' here means an only partly visible tendency to collaborate in the functioning of *partitocrazia* and in the passage of patronage-based measures. On the one hand, the depth of the ideological divide separating the Communists from other parties meant that the PCI was engaged in a perpetual search for its own legitimacy as the only means of extending its electoral support beyond its heartlands. On the other hand, the precariousness of coalition solidarity often meant that the passage of legislation would come to depend on the support or abstention of one or more of the non-governing parties. Moreover, article 72 of the Constitution enables Parliament with few exceptions to give law-making authority to its committees, except that the 'committee only' route can be overridden at the request of one tenth of the members of the house in question, in which case the bill concerned must be referred back to the plenary session. Both of these features gave the Communist opposition considerable

power to block the patronage-based legislation of which it rhetorically disapproved. Declining to do so gave it a valuable means of providing proof of its 'responsible' intentions.

In this situation, there were at least two reasons why the Italian parties were unable to carry on any really committed legislative offensive against corruption. For one thing, the governing parties' reliance on patronage and small-scale distributive measures as the main basis on which they sought support had the consequence of entrenching a large number of vested interests, each of which had a power of veto whenever policy change was considered. Clientelism and patronage therefore reinforced still further the inability of the system to respond to popular demands through coherent policy making.

For another thing, given the emergence of a number of factors stimulating both the demand for, and the supply of corrupt exchanges from round about the mid-1970s (Newell and Bull, 2003b) clientelism itself facilitated the spread of political corruption to the point where it eventually became systemic. Since clientelism represents a denial of the value of universalism, namely, 'the principle that all persons should be evaluated in the same way, regardless of who they might be' (Sharrock, 1977: 507), those whose power depends on it face lower moral costs in resorting to illegality to defend their positions whenever these are threatened. If they do decide to resort to illegality, then the corrupt exchange presents itself as a possibility that has much in common with the patron-client relationship. The positions that allow their incumbents to patronise clients frequently provide access to the resources that can provide the basis for corrupt exchanges. The acceptance of bribes, in its turn, offered the means of acquiring even larger clientele followings so that clientelism and corruption tended to be mutually reinforcing.<sup>5</sup> As is often remarked, once networks of corruption have become established, they then tend to spread in a self-generating way. Consequently, by the early 1990s, the parties that had ruled Italy since the War had essentially been transformed into organisations for the carrying on of mutually profitable exchanges and the construction of alliances between economic and political potentates willing to stop at

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<sup>5</sup> Inasmuch as clientelism is not *itself* a form of corruption. See Van Duyne (2001), who considers the transition from favouritism to clientelism as the 'crossing of the Rubicon' to corruption.

nothing to achieve their objectives. Corrupt parties are not generally known to be the most zealous when it comes to trying to tackle corruption. In such circumstances, anti-corruption laws are a deterrent, not to corruption itself but to attempts to break the silence and the networks of connivance that allow corrupt exchanges to be carried on undisturbed. In such circumstances, the possession of compromising information about one's colleagues tends to be used as a sword of Damocles, whereby 'blackmail becomes an invisible source of cement for a political class condemned to a lengthy and forced cohabitation' (della Porta and Vannucci, 1997; quoted by Rose-Ackerman, 1999: 209).

The possibility of any very strenuous investigative efforts being made to combat corruption was compromised by very similar factors. In Italy, when suspicions arise that a criminal act has been committed, the matter is reported to a public prosecutor, who is responsible for gathering and analysing evidence with the object of ascertaining whether there are sufficient grounds to warrant proceeding to a trial. From one perspective, public prosecutors have considerable power and of course there are plenty of examples of attempts by them to use their power to combat corruption a long time before the famous '*Mani pulite*' ('Clean hands') investigations that led to the *Tangentopoli* scandal of the early 1990s. Their power derives from two things: first, the considerable independence they have, both from other prosecutors' offices and other branches of the state, to decide what to investigate and what charges, if any, to press.<sup>6</sup> Second, public prosecutors belong to the same profession as trial judges and trials often represent little more than the formal confirmation of prosecutors' investigations.<sup>7</sup> However, precisely *because* of this power, public prosecutors tended to become the target of individual politicians and political parties keen to 'have friends' in the judiciary in order to avoid themselves becoming the targets of judicial initiatives (Alberti, 1996: 286). Thus it was that politicians were able to establish informal relations of connivance with

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<sup>6</sup> Article 112 of the Constitution obliges them to prosecute all cases that come to their attention, but the volume of work makes this impossible while the article makes it possible for them to initiate investigations, not only on request from external bodies, but also on their own initiative in relation to crimes they think *may* have been committed.

<sup>7</sup> This is because the main body of evidence on which the court bases its decision is the prosecutors' evidence and it may not know what weight to give to the interpretative and filtering processes of the author of that evidence (Newell, 2000: 57).

individual members of the judiciary whereby judicial favours (such as damaging a political opponent) could be traded for political favours (for example, help in getting a seat in Parliament).

Collusion between politicians and judicial investigators was encouraged by two further features of the judiciary: first, the lack of prolonged training prior to entry and the lack of any separation in the careers of trial judges and prosecutors. These factors prevented the development of 'a coherent set of values concerning (...) professional integrity and ethos', leading, instead, to 'a corporatist logic according to which the judiciary (...) tried to oppose any measure which could reduce (...) [its] 'privileges' and status (...)' (Alberti, 1996: 285). These circumstances in turn made it difficult for the judiciary to remain free of the political dynamics of other institutions, notably the political parties whose support they sought in opposing undesired measures. Second, the fact that twenty of the thirty-three members of the judiciary's governing body, the Higher Council of the Judiciary, were elected by members of the judiciary as a whole *whatever* their rank, gave rise to a tendency for it to take decisions according to political, rather than hierarchical, criteria. Thus most members of the judiciary belonged to one of four organised factions each of which had a clearly identifiable location on the left-right spectrum. Consequently, though the factions were not formally linked to the parties, matters such as the distribution of resources, disciplinary sanctions, transfers from one judicial office to another became highly political issues on which individual members of the judiciary had an incentive to ally themselves with one party or the other.

Given all of this, political parties were often able to influence, through the judicial factions closest to them ideologically, 'the assignment of magistrates to various posts and in particular the choice of the heads of judicial offices' (di Federico 1989: 35; quoted by Alberti, 1996: 287). The judiciary, for its part, was so highly politicised, that its members were often willing to turn a blind eye to acts of corruption in order to maintain their privileges. Many prosecutors 'tried to break such a system but [were] always blocked during their investigations either by indirect political pressures on high level judges or by the non-co-operation of other colleagues. Thus(...)not all members of the judiciary [were] inactive, but(...)it was sufficient to have the key positions 'covered' to neutralize most efforts' (Alberti, 1996: 287).

This is not the place to discuss in detail the causes of the 1990s institutional changes that transformed the situation we have described hitherto. What is important to note is that the end of the Cold War; growing popular discontent with the incapacity of the governing parties to engage in coherent policy making, and the emergence of the ‘Maastricht constraint’ (meaning that the cost of bribes could no longer be financed through increases in public indebtedness), all meant that public prosecutors felt free to break their informal ties with the political parties ‘and undertake investigations in areas not covered before’ (Alberti, 1996: 289). The resulting *Tangentopoli* scandal eventually led to the complete organisational disintegration of all the traditional parties of government. Meanwhile, the early 1990s also saw the emergence of a cross-party movement for reform that sought –successfully – to engineer a change in the electoral law for the two chambers of Parliament by exploiting the constitutional provision that allows the holding of referenda on laws and parts of laws when requested by means of a petition of at least half a million electors. By forcing a change from a proportional, to a largely single-member, simple plurality system, reformers hoped that the new system would mean voters being presented with a straightforward choice between Left and Right. The system, which provides for three quarters of the members of each chamber to be elected according to the majority system, only one quarter proportionally, would oblige parties to form electoral coalitions whose leaders would be natural candidates for the premiership. This would allow voters directly to determine both the composition of the Government and the identity of the Prime Minister who, in virtue of the receipt of a popular mandate and competition from the Opposition, would enjoy sufficient authority to be able to impose discipline on the governing coalition. Consequently, it was hoped that in place of the old system of governance, based, as it had been, on unstable coalitions whose composition owed more to ‘behind-the-scenes’ negotiations after the votes had been counted than to the voting choices of citizens, the changed electoral law might bring with it a new system providing greater stability, responsiveness and popular accountability.

In terms of the most salient characteristics of the party system, the hopes of reformers have been broadly fulfilled. No longer is the centre of the political spectrum occupied by a single party able to exclude left and right extremes. And the party system as a whole has shed its old tri-polar format and been

replaced by a bipolar configuration based on two broad electoral coalitions – one of the centre-left, the other of the centre-right – both competing to win absolute majorities of parliamentary seats (Pasquino, 2004). While the new electoral law has provided the framework of rules for three general elections (those of 1994, 1996 and 2001), the most recent election has seen the further consolidation of a predominantly majoritarian and bipolar dynamic to party competition. For the first time since the War it resulted in the defeat of an incumbent government seeking re-election, by a pre-constituted opposition coalition that was successful in winning absolute majorities of seats in both chambers of Parliament.

Typically in such circumstances, and for as long as alternation in office remains a realistic possibility, the fortunes of the governing majority are dependent on their success in implementing a coherent programme of policies. Meanwhile, the presence of a single opposition coalition seeking to take the government's place ensures that the prospects of any one of the governing parties individually are closely bound to the success or failure of the government as a whole. Given this situation, and given the divorce of the judicial and party systems mentioned above, it was reasonable to expect to find much more strenuous efforts being made to combat corruption than was possible prior to the early 1990s. We discuss the extent to which this has been the case, in the next section.

### **Anti-corruption efforts**

In considering legislative measures to tackle corruption, it will be most relevant to examine what happened from the date of the 1996 election onwards. The legislature inaugurated by this election lasted for the full parliamentary term of five years. The legislature inaugurated by the election prior to that had seen two governments whose time in office and, in the second case, mandate had been too limited for any significant reform to be possible. It is also necessary to bear in mind what is to count as an 'anti-corruption measure'. Some measures are passed with the specific *purpose* of dealing with corruption; others may have the effect of reducing corruption as an incidental side effect of other intentions.

Della Porta and Vannucci (1999: 40) argue that the thirteenth legislature, elected in 1996, was the first parliament to attempt to tackle the corruption emergency in any incisive way. However, given that the authors later remark that the measures adopted were ‘few’ and ‘ambiguous’ (della Porta and Vannucci, 1999: 45), this must be taken more as a comment on the poor performances of earlier parliaments than an expression of appreciation of the activities of this one.

The first measure, taken by the Chamber of Deputies, was the setting up, in September 1996, of a special Commission with the remit of preparing, for the consideration of the Chamber, new legislative proposals for the prevention and repression of acts of corruption. This considered a number of proposals but was given a limited amount of time within which to fulfil its remit (and the Commission was not revived by the legislature elected in 2001). Consequently, two months after its mandate expired at the end of March 1998, only two new proposals had been approved by the Chamber. One proposal, concerning the relationship between criminal and disciplinary proceedings against public employees’, was modified by the Senate (the two chambers of Parliament have co-equal legislative powers) and only given final parliamentary approval on 8 March 2001 – the very day that the legislature came to the end of its life through the dissolution of Parliament and the calling of fresh elections!<sup>8</sup> The other proposal, ‘Measures for the prevention of corruption’, never became law, falling instead victim to lengthy processes of amendment in the two chambers and then finally, it seems, to the decisions

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<sup>8</sup> Briefly, what the law did was to remove the anomaly whereby public officials, despite having been convicted of gross acts of corruption, were nevertheless able to remain in their posts. The point is that in Italy, everything governing the public employee’s relationship with his or her employer has the status of law, meaning that nothing can be done on either side unless there is a specific law sanctioning it. Therefore, it was not possible to take account, in disciplinary proceedings against the corrupt employee, of evidence arising in criminal proceedings for the offence of which they stood accused. Nor was it possible to transfer or dismiss employees on the basis of the outcome of criminal proceedings. The new law rectifies this.

of the parliamentary group leaders whose responsibility it is to allot space to proposals within the parliamentary timetable.<sup>9</sup>

Both proposals attempted to reduce the probability of acts of corruption occurring by containing provisions designed to raise the probability of being caught and once caught, of being punished. Two further proposals (initiated not by the anti-corruption Commission but by the Government) took the opposite approach of reducing the opportunities for corrupt exchanges to begin with by seeking to simplify administrative procedures. These proposals became law in 1997.<sup>10</sup> Clearly, one would assume that the elimination of bureaucratic complexity would necessarily reduce the scope for officials to enter into corrupt exchanges through the sale of special, 'fast-track', modes of access to the processes of public decision-making. However, whatever effects the laws may in fact have had, such effects have to be regarded as the unintended consequences of other aims. For in passing the laws, the objectives of legislators (moved by an awareness of the handicap imposed on Italian

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<sup>9</sup> The proposal provided for:

- the appointment of an independent 'Authority for the legality and transparency of the activities of the public administration', with powers to inspect the activities of public bodies and to investigate the financial circumstances of a range of public officials in the event of suspicions arising concerning the violation of principles of legality and transparency;
- the setting up of a register of the financial interests of a range of elected and non-elected public officials from prime ministers to university professors;
- the setting up of a register of the lobbying activities of individuals, companies and associations;
- the publication of an official Bulletin making public the details of all sales, acquisitions and tendering activities carried out by public bodies.

<sup>10</sup> The first of them, law 59/97, sought to give effect to a range of administrative reforms including delegation, to the regions and local authorities, of a number of administrative functions via a process of legislative decree. It empowered the government, within nine months, to pass legislative decrees conferring upon the regions and local authorities administrative responsibilities in all areas 'related to the protection of the interests and the promotion of the development of their respective communities' except those areas listed in the law itself (Newell, 1998: 159-60). In doing this, it sought to initiate a process of bureaucratic rationalisation that would eliminate all duplication of functions between different levels of government and administration (for details see Gilbert, 1999). The second, law 127/97, sought to continue the attempt to simplify administration in a number of areas of public life initiated by law 59/97, by improving the efficiency of decision-making and reducing the extent of bureaucratic control procedures (Newell, 1998; Gilbert, 1999).

competitiveness in the European single market by a bureaucratic public sector) were to streamline the public administration rather than to deal with corruption as such.

If the legislative activity described hitherto is not, then, evocative of an idea that parliamentarians were particularly enthusiastic about fighting corruption, it is possible, in addition, to cite initiatives that if anything evoke the opposite impression. Among these, della Porta and Vannucci (1999: 39) mention:

- proposals discussed in the anti-corruption Commission to decriminalise financial contributions made by individuals to political parties but not declared in the parties' accounts;
- proposals discussed in the anti-corruption Commission to circumscribe the law on false accounting rendering punishable only acts of 'gross' falsification;
- the reduction, in July 1997, in the penalties attaching to cases of abuse of office for financial gain and the contemporaneous abolition of the offence altogether where the purpose is other than financial gain;
- the reform, in August 1997, of article 513 of the penal code in such a way as to render inadmissible as evidence, defendants' statements incriminating others in the course of criminal investigations, where the defendants subsequently refuse to confirm the statements in court.

Of the above four initiatives, a variant of the second actually became law a few months after the election of 2001. This election brought to office a prime minister widely regarded as embodying a conflict of interests between his position as the country's chief executive on the one hand, and on the other, his position as beneficial owner of twenty-two holding companies that control about ninety-six per cent of Fininvest, the company whose largest asset is a controlling stake in Italy's three largest private television stations. Most significantly, since assuming office, the Prime Minister has apparently been prepared to use his position to pursue a relentless flow of measures which, far from attempting to stem corruption, seemed likely to feed it by virtue of their attack on principles of universalism and even-handedness in the service of the Prime Minister's own personal interests. The measures include:

- ❶ the passage of a law, on 3 October 2001, authorising the government to introduce secondary legislation substantially decriminalising a range of types of false accounting of which the Prime Minister himself stood accused;
- ❷ the passage, on 5 October 2001, of retroactive legislation whereby the conditions that would have to be met for evidence gathered abroad to be admissible in Italian criminal proceedings, were considerably tightened. It was widely predicted that this would assist a number of high-profile defendants in corruption trials, including the Prime Minister's lawyer, Cesare Previti, by so lengthening trials that cases would eventually have to be dropped under the statute of limitations;
- ❸ at the end of February 2002 the Chamber of Deputies agreed to proposed legislation supposedly to deal with Berlusconi's conflict of interests but widely seen as bogus;
- ❹ on 1 August 2002, the Senate agreed to the so-called 'Cirami Bill' (after its original sponsor Melchiorre Cirami) allowing a defendant to ask the Court of Cassation to transfer proceedings against them to another court on grounds of 'legitimate suspicion' concerning the impartiality of the judges involved in trying the case. It was widely suspected that the legislation was being pursued in order to allow Berlusconi's lawyers to delay proceedings against him in the Sme-Ariosto corruption trial whose judges were expected to give a verdict in the autumn;
- ❺ 12 August 2002 saw the publication of a Bill, sponsored by *Forza Italia* (FI) Deputy Giancarlo Pittelli. This envisaged, among other things, obliging investigating magistrates to inform a suspect that they were under investigation as soon as a file was opened on them, a provision which, prominent members of the judiciary argued, would allow suspects to destroy evidence because it removed the secrecy from investigations.

It may be safely suggested that if passed, the latter proposal would more difficult the efforts of judicial investigators seeking to tackle corruption. And it is a reasonable supposition that in so doing, such proposals not only undermine the effectiveness of judicial action but also the enthusiasm for it in the first place precisely because the achievement of a 'successful outcome' (meaning the conviction of suspects in this case) is so difficult. Therefore, the large number of initiatives, taken since *Tangentopoli*, whose effects, perceived or real, intended or unintended, act in the direction of making the work of

judicial investigators more difficult, suggests that the strenuousness, not only of legislative efforts, but also of judicial/investigative efforts, may have failed to increase in the wake of the institutional changes of the mid-1990s.<sup>11</sup>

A further piece of evidence pointing in this direction concerns the growing campaign of denigration of the activities of the judiciary, in certain political quarters, since the outbreak of *Tangentopoli*. As we have seen, a concatenation of events in the early 1990s led judicial investigators to break free of the political constraints that had until then frequently conditioned their work. One of the reasons why they were successful in initiating investigations into so many (highly placed) individuals at the time of *Tangentopoli* was because they were able to use preventative custody laws to create for suspects a kind of ‘prisoner’s dilemma’ – leading to a veritable rush on the part of politicians, administrators and entrepreneurs, to confess the part they had played in networks of corrupt exchange.<sup>12</sup> In these circumstances the judiciary’s new-found independence must have seemed, to not a few politicians, a particularly threatening development. It is undoubtedly this that explains the increasingly shrill reactions of politicians whenever, in the period since *Tangentopoli*, the news of some new investigation, or progress in an existing investigation, has broken into the public domain. Politicians’ reactions have centred around the idea that judicial investigators are politically motivated, using their powers to damage politicians with whom they disagree. The Prime Minister himself

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<sup>11</sup> These initiatives have been linked to the hostility towards the judiciary on the part of numbers of politicians, discussed in the following paragraph. They include the attempt, in 1994, to restrict by government decree, the preventive custody powers of prosecutors; the attempt, in 1998, to establish a parliamentary commission of enquiry into the activities of the *Mani pulite* investigators; periodic ministerial inspections of the important Milan public prosecutor’s office, and most recently, proposals to replace the constitutional obligation on prosecutors to pursue all cases of suspected wrongdoing of which they are aware, with a degree of political influence over the cases to be pursued.

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has been especially shrill in his denunciation of investigations into allegations against him, as the work of communist sympathisers who have been

‘using the judicial system to eliminate political adversaries, riding rough-shod over the law, due process and reality itself, by means of contrived investigations, witnesses invented ad hoc, contradictory accusations, farcical trials and monstrous sentences’ (*la Repubblica*, 5 September 1998, p.13; quoted by della Porta and Vannucci, 1999: 56, my translation).

The constant repetition of these sorts of claims has had a significant effect on public opinion, at the time of *Tangentopoli* almost unanimous in its support for what the judiciary was doing, now much more divided, and in a significant proportion of cases definitely hostile, in its attitudes towards the institution. Thus has the judiciary been deprived of an important ally, something whose effects on morale can only be guessed at but which we may assume to be more than insignificant.

Finally, a third piece of evidence relevant to the strenuousness of judicial anti-corruption efforts concerns the numbers of judicial investigators who are themselves caught up in allegations of corruption. The judiciary may be thought of as the ‘natural adversary’ of those involved in corrupt exchanges, but of course it itself is rather exposed to the danger of corruption as its power to apply sanctions gives it a resource that is one of the kinds most frequently sold for bribes. The involvement of its members in corrupt exchanges will have a negative impact on its ability to prosecute suspects. Therefore figures showing the numbers of magistrates who are themselves under investigation for acts of corruption and related crimes can stand as an additional indicator of the strenuousness of judicial anti-corruption efforts. We have no evidence that these numbers have significantly decreased in recent years.<sup>13</sup>

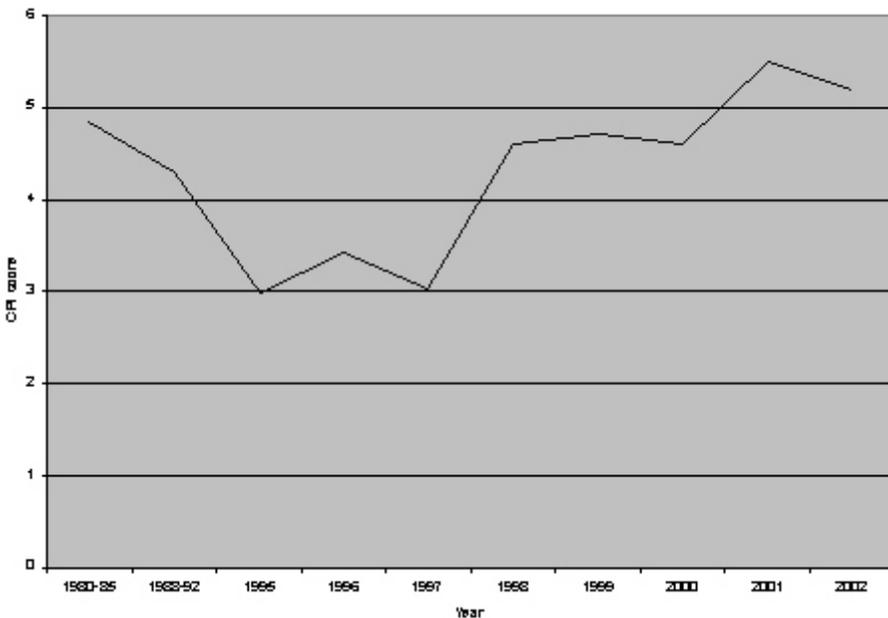
In short, the institutional changes of the mid-1990s have not been reflected in any noticeable change in the amount of effort the authorities are able or willing to make to curb the extent of corruption in Italy. True, the evidence

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<sup>13</sup> della Porta and Vannucci (1999: 54) cite Ministry of Justice figures showing that on 31 May 1998, 203 magistrates were under investigation for crimes ranging from extortion and corruption to abuse of office, slander, ideological falsity and collusion with the Mafia. Unfortunately, we do not, for the time being, have figures for earlier years.

for this conclusion is largely impressionistic and we lack robust indicators with which to quantify it. Nevertheless, indicators of a sort do exist. Transparency International’s Corruption Perceptions Index is compiled by combining the results of multiple surveys of business people, academics and financial analysts who are asked to rank countries according to how corrupt they perceive them to be. The resulting index ranges from zero to ten where the closer to ten a country’s score is, the ‘cleaner’ it is presumed to be.<sup>14</sup>

Figure 1 Corruption Perceptions Index score : Italy;



Since this is a corruption *perceptions* index, had a determined effort to fight corruption been made following the institutional changes of the mid-1990s, we might reasonably have expected to find a significant improvement in Italy’s score by virtue of this fact alone. Since they run from 4.86 in 1980–85 to 5.2 in 2002 – an increase of just 0.34 – the scores shown in Figure 1 provide

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<sup>14</sup> For further details concerning Transparency International and the Corruption Perceptions Index see Lancaster and Montinola (1997) and Transparency International’s Web site: [www.transparency.org](http://www.transparency.org)

precious little evidence of this. In the final section we consider what might explain the failure of the mid-1990s institutional and party-system changes to have the effects expected of them.

## **Explaining the failure**

We expect party systems of the kind Italy had prior to the 1990s to result in efforts to tackle the problem of corruption less strenuous than those that are made in bipolar systems of the kind Italy now has. The reason is that in systems of the earlier kind, with bilateral oppositions, the oppositions may gain by advocating anti-corruption measures, but in order for one or other of them to succeed in displacing the governing parties by so doing, the shift of votes will have to be large *and predominantly in one direction*. In bipolar systems, on the other hand, a governing majority's failure to tackle corruption directly increases the probability of its being displaced by the opposition while its commitment to doing so reduces such probability. However, this is only true if the numbers of corrupt individuals and those who in some way benefit from corrupt exchanges (whose votes may be lost by anti-corruption measures) are outweighed by the votes to be gained by advocating such measures. Moreover, even if this is the case, the advocacy of anti-corruption measures may still have electoral costs. For the time and resources they require necessarily detract from the time and resources the authorities are able to devote to *other* activities whose impact on votes may be even greater. This suggests that the reason why there have been few significant improvements in the seriousness with which corruption is dealt with despite Italy's party-system change is that the net impact on votes of attempts to deal with it is either negative or at least not very largely positive. Several pieces of evidence point in the direction of the latter possibility.

First, in aggregate, the Italian electorate has a rather low propensity to shift the distribution of its vote between the two coalitions of centre left and centre right from one election to the next. Both the 1996 victory of the centre left and the 2001 victory of the centre right were essentially a consequence of the effectiveness of the party-alliance strategies pursued by the two coalitions

rather than of any significant changes in the proportion of votes won by each.<sup>15</sup> This aggregate stability is underpinned by stability at the individual level.<sup>16</sup> A question therefore remains about whether there is a sufficiently large number of voters able and willing to move to make alternation between coalitions of the centre left and centre right a realistic possibility in most ordinary circumstances. If this is not the case, then the fundamental assumption underlying expectations of a beneficial effect of bipolar systems, namely, that governments are obliged to behave in certain ways by the dynamics of party competition, thereby loses its validity.

Second, even if voters are able and willing to move, a bipolar system may not have the beneficial effects expected of it if voters' choices are not an exogenous variable. That is, the assumption that public opinion places governments under pressure to attack corruption is not a valid one if, instead of *responding* to public demands, parties have the power to *change* or 'manipulate' public opinion in such a way that a response is unnecessary. As we have seen, there is evidence of this having been the case in Italy, the change in opinion having been the consequence, it would seem, of the aforementioned attacks on the judiciary on the part of politicians. For example, della Porta and Vannucci (1999: 57) cite the results of a survey, carried out in 1998. While 34,1 % of respondents expressed the belief that the conflict between magistrates and politicians was due to politicians' desire to escape punishment for acts of wrong-doing, 29,1 % thought it had to do with a desire on the part of the judiciary to interfere with the sphere of politics. Moreover, 42,5 % thought that the judiciary treated with undue favour those belonging to particular social groups, while 43,5 % felt that the administration of justice depended on the professionalism and the personality of individual judges – who were, however, often dishonest or incompetent. Politicians' attempts to change public opinion might have been less successful had their attacks on the judges all come from just one of the two main coalitions, with representatives of the other coalition offering a strenuous defence of the

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<sup>15</sup> These can be found in Newell (2002).

<sup>16</sup> For example, Italian National Election Study data show that between 1994 and 1996, only 5,5 % of those voting at both elections switched allegiance between the two main coalitions, and between 1996 and 2001, only 7,6 % did so (ITANES, 2001: 93).

judiciary's attempts to tackle corruption. This is, however, far from having been the case. While criticisms of the judiciary have come principally from the current Prime Minister and his governing party, FI, some of the opposition parties have been distinctly ambiguous in their attitudes (principally, it would seem, because they are the 'heirs' of parties whose leading spokespersons were high-profile defendants at the time of *Tangentopoli*).

Third, at the time of the 2001 election, there were significant numbers of voters for whom corruption and allegations of corruption apparently cut little or no ice. Though there is evidence that the opposition parties gained votes by 'demonising' him (Ricolfi, 2001), impressionistically, Silvio Berlusconi's quest to become Prime Minister was hardly damaged at all by the allegations of tax fraud, false accounting and links with the Mafia that were frequently levelled against him. This may have something to do with a significant feature of Italian political culture, namely, a more or less deeply rooted feeling of diffidence and mistrust towards the institutions of the state – something that is underpinned by low levels of interpersonal trust in general. The results of the 2001 Italian National Election Study confirmed the findings of surveys carried out over a period of thirty years when they revealed that 74,1 % of respondents believed that 'One can never be too cautious in one's dealings with other people' – as compared to only 24,2 % prepared to endorse the view, 'One can trust most people' (ITANES, 2001: 72). Italy therefore enjoys relatively low levels of social capital and in such circumstances it is reasonable to assume that individuals will be less scandalised by revelations of corruption than will be the case where levels of social capital are higher. And where the sense of moral outrage provoked by given acts is relatively weak, so there may we expect levels of public pressure to do something about them to be correspondingly weak.

## Conclusion

We are left to conclude, therefore, that while institutional change is not a necessary condition for the initiation of vigorous anti-corruption efforts in liberal democracies, it may not be a sufficient condition either. If our findings from the Italian case have any relevance for liberal democracies generally, then they suggest that electoral- and party-system changes can only have the effects expected of them given the simultaneous presence of other factors, which make up a sufficient condition *together with* the changes. These other factors include a number of those we identified in the second section of this paper, especially public pressure (in the form of a degree of electoral ‘mobility’) and an ‘appropriate’ political culture. In relation to the Italian case itself, however, while our findings may incline us towards a pessimistic view of the future of anti-corruption efforts in that country, we should be wary of accepting such a view too easily. After less than ten years and only three elections, the new bipolar party system is hardly consolidated and competing coalitions with stable party memberships and regular alternation in office have not yet had a chance to emerge as enduring features of Italy’s political system. If, with time, such features do emerge, then it may be that they will favour anti-corruption efforts in the longer run. This suggests that it will be worth keeping the Italian case under observation, and that the future may at some stage oblige us to revise our conclusions about the impact of institutional change.

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# In the quest for essence: The principal-agent-client model of corruption

Matjaž Jager<sup>1</sup>

*‘Stuart: What did I tell you? Trust leads to betrayal.*

*Trust invites betrayal.’*

(J. Barnes, *Love, etc.*, 2002: 192)

## **A fervent bazaar of ideas on ‘corruption’ – is there a problem?**

Since the beginning of the 1990s there has been an almost exponential growth in the volume of the scholarly literature on corruption. Recent empirical ‘meta-research’ produced by Transparency International illustrates this. The study provides a rough overview of what one could call the ‘fervent bazaar’ of ideas on corruption produced from 1990 to 1999 (TI Global Corruption report 2001: 229–231). In a nutshell the situation is this: of the over 4000 books and journals with corruption as a main or leading theme produced during the period, the great majority, i.e. 74%, were (broadly) classified as ‘descriptive analysis of corruption in politics and public administration’. The remaining significant subject areas were ‘history’ (10%), ‘law and judiciary’ (9%) and ‘economics’ (4%). The study covers the 1990s but it is my intuition that these trends have not altered significantly since.

Such rapid growth in the quantity of texts and the corresponding interplay of different conceptual paradigms has led some authors to criticise the pace of

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methodological and conceptual development. These critics believe that it ought to have taken place least simultaneously with, if not to have preceded, the production of 'substantive policy papers'.<sup>2</sup> By definition descriptive studies provide a lot of material on the diverse forms of corruption and related phenomena, on diverse evaluations of them, on policy responses and so forth. Evidently legal and empirical analysis of corruption and related phenomena is indispensable and may provide the lion's share of the scholarly output. On the other hand, patient, thoughtful and step by step attempts to enhance definitional and conceptual clarity ought to be regarded as being of fundamental importance. How can one produce adequate descriptive or empirical studies of a phenomenon if its definition is unclear or, indeed, is non-existent?

As Williams pointed out: 'The study of corruption is like a jungle, and if we are unable to bring it to a state of orderly cultivation, we at least require a guide to the flora and fauna' (Williams, 1976: 41). In addition to classification, what is also required is greater conceptual agreement as this would provide a common denominator and enable more adequate and more sensible (comparative) research. Thus far, the frustration has been considerable. The whole debate may be said to resemble the clash between theory and practice that is typical in the field of crime policy. There are similar problems involved in conceptualising, for example, 'organised crime', 'money laundering', 'pornography', 'terrorism' etc. (Cf., von Lampe, this volume; van Duyne, 2001; 2002: 67-71; Peršak, this volume). Thus what one typically finds is broad consensus on the dangerousness of the nebulous 'thing' which should, without delay, be struggled against, fought and eradicated. This kind of 'get to work' attitude is impatient with calls to spend time on additional discussion or time consuming theorising and research.<sup>3</sup>

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<sup>2</sup> See, among others, Lancaster and Mantinola (1997), Williams (1976, 1999), Gambetta (2002).

<sup>3</sup> Williams again aptly describes it: 'There is, it seems, a desire, even impatience, to get on with the tasks of detecting its causes, assessing its consequences and evaluating means to bring it under control. It is unusual for authors to take time to examine the concept but, when they do, they find it vague, elusive and unsatisfactory. Yet it is a curious state of affairs when the academic mini-industry and the policy agendas of development professionals are dominated by a concept which most participants in the debate are reluctant or unable to define' (Williams, 1999: 503). Similarly, Bull and Newell point to a '(...)paradox of the co-existence of an inconclusive dispute about definitions and a consensus on the severity of the phenomenon' (Bull and Newell, 1997: 182).

To my mind, the remedy is clear: not less but more (high quality) theory is needed in order to resolve this (perpetual) conflict. The well-developed theory founded on adequate concepts is a great departing point for any genuine policy agenda. Or, to echo Kant, there is nothing more practical than a good theory.<sup>4</sup> The state of affairs in which research is conducted and strong policy recommendations are made regarding a phenomenon that ‘most participants in the debate are reluctant or unable to define’ (Williams, 1999: 503) ought to be avoided to say the least.

I therefore start from the proposition that patient and meticulous extraction of the core conceptual framework of corruption is necessary and valuable. It may be that the development of an adequate definition of corruption embraced by the great majority of the scientific community is a state of affairs that will not be achieved easily, even if it is thought of as theoretically possible.<sup>5</sup> Some believe that it is in principle impossible and that any efforts in this direction must be futile (Cf., Sajó, 2002: 2).<sup>6</sup> I am inclined to share the opposite view (Cf. also Gambetta 2002: 33–35). But even if we take the pessimistic stance, the concept building process may in itself bring new insights.

This paper will address the principal-agent model (PACM) as a candidate for a conceptual foundation of corruption. I begin by describing its epistemological platform: primarily rational choice theory (broadly conceived) and the strategic behaviour assumption. I then sketch its essential structure. Finally, I evaluate the overall strengths and weaknesses of the principal-agent-client model of corruption and suggest directions for improvement.

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<sup>4</sup> In Kant’s memorable words: ‘...it is not the theory’s fault that its concepts are believed to be unsatisfactory in practice: the problem is that there has not been enough of theory to begin with’ (1977:127).

<sup>5</sup> At least in theory this may be easier to achieve in the area of law (i.e., predominantly in the area of criminal but also civil law – see, e.g., the definition of corruption in Ch. 2 of the 1999 Council of Europe Criminal Law Convention on Corruption).

<sup>6</sup> Cf., Jager (2000). It may be true that our (post) post-modern times with its emphasis on the particular, the parochial and the unique in combination with the distrust of the ‘big narratives’, ‘essentialist aspirations’ and ‘grand theories’ do not offer sufficient incentives for the laborious, analytical explorations aimed at producing well-structured analytical conceptualisations. But, on the other hand, the conceptualisations and the organisation of accumulated knowledge remains a standard prerequisite of any sensible, rational analysis.

### **Basic assumptions: rational actors in a strategic situation**

As we shall see, the principal-agent-client model of corruption serves various useful functions. On the one hand it can serve as a simple, easy-to-grasp heuristic tool-kit and metaphor for talking about corruption. On the other hand it serves as a delineating device which marks the analytical boundaries of the phenomenon. Finally, it offers many of the elements of a theory, for example, in as much as it enables predictions to be made.

This model is an important part of the (neo-institutional) economic approach to analysing corruption, an approach that emerged round about the mid 1970s.<sup>7</sup> The principal-agent-client models of corruption produced so far are more or less comprehensive and more or less formal – the concept may be presented on different levels. It may be used as an easy-to-grasp scheme or metaphor for talking about corruption. On the other hand it may be developed as a highly formal mathematical model. Be that as it may, typically this model is implicitly or explicitly based on a common methodological paradigm. This paradigm is the mainstream rational choice theory. In fact these models embody a particular application of this theory in a situation characterised by a (non)cooperation game of at least – as we shall see – three actors.

The first actor plays the role of a principal (P) and the second the role of his or her agent (A), who in turn deals with a client (C), the third actor. Individuals as well as collective bodies can play any of the three roles. The second actor, the agent, accepts the obligation ‘to act on behalf of his principal in some range of matters and, in doing so, to serve the principal’s interest as if it were his own’ (Banfield, 1975: 591). The principal more or less carefully selects his agent and gives him power ‘over (some) resources that interest the client’ (Gambetta, 2002: 37). In addition the principal typically prescribes the rules that ought to regulate the agent’s work in order to ensure the observance of his interests in providing services to clients, i.e. in allocating the resources entrusted to him.

The third party – the client – is not indifferent to the way these resources are allocated. Corruption represents one particular way in which the client can try to influence agent’s decision making. In a typical case the client (the *corruptor*)

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<sup>7</sup> On the various contributions of economic thinking to the literature on corruption, see, e.g., Jager (2003).

tries – by offering a bribe to an agent – to induce the agent (the *corruptee*) to deviate from the prescribed rules of conduct in the client's favour. By taking a bribe the agent breaches the rules, breaches the principal's trust, sacrifices his principal's interests to his own and in fact trades away resources entrusted to him by the principal. The principal is a victim of the agent's disloyalty; the resources entrusted to the agent are abused, and the principal is harmed. The agent perceives his corrupt decision to be one which, in the given circumstances, maximises his utility.

In general the principal's problem is how to induce the agent to carry out his/her tasks the way they would be carried out if they were performed directly by the principal, assuming s/he had the time, the necessary skills, the knowledge and so forth. (Cf. e.g., Stiglitz, 2002: 966; Pratt and Zeckhauser 1985; Rose-Ackerman 1978: 6).

From the perspective of rational choice assumptions about decision making, all actors are viewed as trying constantly to optimise their welfare (utility) by maximising various benefits and minimising costs of all kinds.<sup>8</sup> All actors in the model try to get the most out of the situation according to their subjective preferences and their subjective perceptions of the burdens and rewards connected with the alternative choices they (subjectively believe they) face.

In this way corruption is modelled in the light of the strategic behaviour of actors pursuing their own interests. It is depicted as a set of strategic relations where the participants are '(...) trying to influence, to outguess, or to adapt to the decisions or lines of behaviour that others have just adopted or are expected to adopt' (Schelling, 1965: 198). In this kind of (non)cooperative game, actors, in trying to maximise their utility, do not just act, they also take into account how other agents in a (non)cooperative situation act and are likely to act. In other words, they try to predict what other players will do in response to their actions since their welfare will be influenced by the acts of the others involved.

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<sup>8</sup> What do various actors try to maximise? In the world of mainstream economics the public (as a principal) is usually viewed as if trying to maximise 'social welfare', individuals their 'individual utility', and firms their profits (Cf., Ales and di Tella, 1997: 86).

## **The agency problem: information asymmetry, incentives and moral hazard**

Having briefly presented the basic methodological assumptions underlying the principal-agent-client model of corruption we can now turn to an examination of how it is applied and why it is also called the ‘agency problem’?<sup>9</sup>

In principle, at least according to the rational choice theory, trusting other people to do things for you means potentially to be looking for trouble.<sup>10</sup> The relations between principals and agents are problematic because the inner logic of a trusting relation – as illustrated by this paper’s motto taken from a love triangle story – potentially leads to betrayal. In other words agency is a problem because it is based on ‘a permanent and built-in possibility of failure’ (Dunn 1988: 81).

Of course, a straightforward remedy to this problem is at hand: Do not trust anyone and consequently do not delegate anything to others.<sup>11</sup> Even though analytically very thorough, this simple solution appears not to be very practical.

What usually happens is schematically this: the one in the role of the principal (more or less reluctantly) hands over to the other in the role of the agent a part of his/her affairs and gives him/her power over certain resources. Upon reaching agreement with the principal, the agent accepts the assignment and has to be rewarded, in one way or another, for the execution of it.<sup>12</sup>

From this point on the solution to the principal-agent problem lies in the effective incentive structure: how do I make my agent do the things the way I want him to do? It is interesting that the textbook answer to this question has undergone considerable change over time. The standard approach was simplified; the issue was not even viewed as a problem. As Stiglitz explains:

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<sup>9</sup> The principal-agent-client model goes under various names: ‘principal-agent theory’; ‘principal-agent problem’; ‘principal-agent paradigm’; ‘incentive theory’; ‘agency problem’, and ‘agency cost theory’.

<sup>10</sup> On the other hand, a certain level of trust appears to be among the central prerequisites for the preservation of any community or society (Cf., Fukuyama, 1995). On the empirically proven, outstanding success of the tit-for-tat strategy in situations of reciprocity in long-term cooperative relations, see the classic work of Axelrod (1984, 1997).

<sup>11</sup> Or as perfectionists like to say: ‘If you want a thing done well, do it yourself’.

<sup>12</sup> With some imagination all human cooperation can be viewed as a universe of agency relations.

In the standard theory, individuals were paid for performing a particular task. If they performed the task, they received their compensation; if they failed to perform the task, they did not. Individuals thus always had an incentive to perform the contracted-for service. Only if the employer were so foolish as to pay the worker whether he performed the task or not, would an incentive problem arise (Stiglitz, 2002: 967).

The assumption behind the standard approach was that the flow of information between P and A, and back again, was perfect. It was also assumed that A's actions and its consequences could be observed perfectly and free of costs. In other words the agency relation was observed in an ideal world of no transaction costs. In a world of no transaction costs no principal-agent problem would exist since the flow of information would be perfect, instant and costless and the behaviour and output of any agent could be observed perfectly and without costs (a state of affairs that may remind us of the most effective functioning of Bentham's panopticum).

Due to their obvious disregard of reality, these simplified assumptions were later on relaxed by assuming various transaction costs. Now, in order to minimise transaction costs the parties design the contract that will shape their cooperative relationship. At an early stage both try to anticipate and address the potential problems that might arise.<sup>13</sup> These differ depending on whether the relationship is (perceived to be) an isolated, one-off event with the parties never seeing each other again, or, whether they anticipate a longer term relationship involving repeated interactions (i.e. the so-called 'repeated game' situation).

The contract defines mutual obligations, in particular the tasks of the agent and the reward that s/he will receive. The terms of the contract can be implicit or explicit. Clearly, at a minimum, the content of the agreement must satisfy the expectations of both parties as otherwise the agent would choose not to work for that particular principal and the principal would not hire that particular agent. From the principal's point of view a good contract ought to induce the agent

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<sup>13</sup> In presenting these basic aspects of the agency problem I follow the more 'social-scientist friendly' presentation given in the recent textbook, *Economics of strategy*, by Besanko et al. (1999: 509-543). For another textbook treatment see, e.g. Baron and Kreps (1999: 247-283, 566-576).

to act to further the principal's interests and to take actions that embody an optimal trade off between benefits and costs.

However, after the contract has been agreed and the agent is given instructions on how to act, the principal cannot rest in peace. Though the inducements in the contract are supposed to influence agent's behaviour, the principal has to monitor his/her performance (actions and/or outcomes). At a minimum the principal ought to make A believe s/he is being monitored. If, in the ideal case, the principal could perfectly and without costs observe the actions of the agent and (easily) compare them with the detailed enforceable contract, s/he would have come very close to solve the agency problem all together (not without cost, but almost). In reality monitoring of the agent's effort or the outcome of his/her actions is often not trouble-free.<sup>14</sup> In most cases the principal-agent problem will exist because even though our rational principal will employ some level of monitoring, there will be informational asymmetry to the benefit of the agent. Hence the agent will be partially out of control and will inevitably face what is called 'moral hazard situations': sooner or later s/he will realise that s/he is able to shirk without being caught. By shirking s/he will maximize his/her own interests instead of those of the principal and get away with it.

### **Corruption PAC-rayed**

The principal-agent-client model is an analogy of great use for the study of corruption. It is an attempt to extract the 'invariant, behavioural and relational properties' of this phenomenon (Gambetta 2002; for a similar behavioural approach to corruption see, Van Duyne, 1999, 2001). Indeed, more or less formal versions of this model have so far achieved a significant track record in their

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<sup>14</sup> The principal may use a proxy, another action or outcome, as a measure. We have a good proxy when it and the desired action or outcome are highly positively correlated. But the agent can shirk by concentrating on the proxy measure while not in fact improving his/her real effort. For example, law enforcement, health care and education are areas where desired measures have to be substituted by more or less good proxy measures for performance, effort and results. In addition, the agent's performance can influence various dimensions of the principal's agenda, which further complicates the issue (Besanko et al. 2002: 514, 530).

application to corruption (Cf., Rose-Ackerman 1975, 1978; Banfield, 1975; Klitgaard, 1988, 1991; Schleifer and Vishny, 1993; Groenendijk, 1997; Hopkin, 1997; Gambetta, 2002). The model posits that in order to grasp corruption correctly, we should see it as something that involves three parties and not just two – the corrupter and the corruptee – as most of us would at first think. The three parties are the principal (P), the agent (A) and the client (C). The parties are involved in a situation/relationship that can be roughly depicted as follows:



**Figure I:** The basic scheme (unit) of the principal (P) – agent (A) – client (C) relationship

Life abounds with relations that can be easily subsumed under this scheme. For example, we can typically include all kinds of employer–employee relationships; classic fiduciary relationships, such as the relationship between a trustee and a beneficiary, or an attorney and a client (where the ‘client’ is not a client in the PACM sense but is, in fact, a principal) – and so forth.

Using the basic scheme we can construct ‘composite’ cases that further expand the basic triadic form. In composite cases, elementary forms of the principal–agent–client relationship are combined in various ways. A single principal may employ more than one agent simultaneously. In that case we are talking about ‘multiple agency’. The prime example is a work group. In a group the main agency problem is the following: how do I reward/stimulate an individual agent in a group where one can only observe the performance of the group as a whole. When all agents in a group are rewarded equally no matter how they perform individually, the moral hazard to shirk may appear (i.e., some agents may free ride).

Second, there are cases where one agent serves multiple principals at the same time. This situation is called ‘common agency’. Here again many variations are possible and moral hazard/monitoring/agency costs can be analysed from the point of view of each participant.<sup>15</sup>

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<sup>15</sup> Groenendijk (1997) in general argues that corruption is but a subset of common agency situations.

In addition, actors may be – at the same time or consecutively – involved in a number of hierarchical or non-hierarchical interactions, many of which may be strategic principal–agent relationships – trust games. The principal in one trust relationship may be an agent in another and *vice versa*. Characteristically we could map out a more analytically challenging chain or a net of principal–agent–client relationships. To make things even more complex, all corrupt relationships may be – and are in fact most of the time – interwoven with other forms of misconduct together with which they form highly complex phenomena. Figure II below illustrates such composite cases:

$$\dots P \leftrightarrow P(A) \leftrightarrow A(C) \leftrightarrow C(P) \leftrightarrow A \dots$$

**Figure II:** Composite cases: chains or webs of principal-agent –client relationships

These composite cases are supposed to model the more or less complex reality. Even though chains or webs of trust games may become analytically complex, the elementary principal–agent–client triad remains as the point of departure and the basic unit of the analysis. In my discussion I shall focus primarily on this elementary unit.

## Discussion

Evaluation of the principal–agent model of corruption may proceed along various lines and focus on many of its aspects and levels. For obvious reasons I will necessarily address only a limited number of them. I start by pointing out features that I consider to be this model’s strengths. After that I draw attention to potential problems with its methodological assumptions. Finally, I address what I believe may be serious challenges to the model’s claim to conceptual generality.

## Strengths

The principal–agent–client model of corruption appears to have a number of epistemic merits. First of all it is simple. Yet its simplicity does not preclude highly formal modelling or mathematical elaborations. In addition, it appears to be reasonably general: it enables a wide range of applications and covers both private and public corruption, individuals as well as groups and collective bodies, benefits and costs of all kinds.<sup>16</sup>

The model starts with a basic unit of analysis which is a building block for modelling more complex cases. This facilitates the move from the simple to the more complex. The elementary cases are a point of reference, comparison and (eventual) measurement.

In the case of corruption it may also be an advantage that the defining elements are ‘technically’ limited to behavioural-relational aspects without explicit recourse to legal, ethical or moral determinants, which so regularly hinder the achievement of conceptual common ground.<sup>17</sup> Moreover, the strategic analysis reflected in this model is in principle ‘technically impartial’ regarding the positions of actors. The analysis of strategic situations in general is said to be ‘neutral, even cold-blooded’ (Schelling 1984:198) and without a moralistic spin. Although typically in the case of corruption the principal’s interests and the principal’s point of view are at the forefront this need not be so. In order to grasp the strategic totality

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<sup>16</sup> In Europe the agency analogy was used as a conceptual starting point in defining corruption offences in the criminal law of Sweden (from 1977 on) and recently became the framework of the proposals for the change in the UK’s criminal legislation on corruption (Cf., for Sweden: Cornils 1997; for the UK: the Law Commission Consultation Paper No. 145 of 1997; the Law Commission Report No. 248 of 1998). In the UK, for example, the reliance on the general principal-agent-client paradigm came about since the drafters recognised – rightly I believe – that the traditional distinction between corruption in the public and in the private sphere had become blurred. By discarding this distinction, the problem of defining the public sector and its actors became obsolete. The new conceptual focus became ‘breach of duty’ (or ‘breach of trust’) irrespective of whether the relationship existed in a public or private area or somewhere in between (Cf., Law Commission Report No. 248 of 1998, para. 5.4, 5.5). On the problems with this alternative concept see my discussion below.

<sup>17</sup> On the surface at least this appears to be so. For the feasible contrary view that no model of corruption can ignore the underlying moral evaluations, see, e.g., Williams (1999); for a similar argument in the case of political corruption, see Philp (1997: 27–30).

of the situation one is forced to take into account the point of view of each actor. Besides focusing on the principal's interest one must analyse the maximisation problem also from the point of view of the agent and the client: each maximisation effort affects the maximisation efforts of the other players in the game.

Finally, the model is not only a delineating conceptual tool. It generates predictions that can be empirically tested (see, e.g., Gambetta 2002: 54–56). The underlying rational choice theory predicts the behavioural responses of actors to changes of variables. For example, the model predicts that all other things being equal, the agent is less likely to engage in corruption the greater the punishment threatened by the principal and the greater the possibility of detection. Another general prediction may be that the more people trust each other, the greater is the potential for (successful) corruption as this phenomenon is 'parasitic on the existence of trusting relations' (ibid.). Furthermore, the model implies the following: the harder it is, *ceteris paribus*, for the principal to screen (in advance and during the relationship) the potential agents for untrustworthiness, the more prevalent corruption will be (ibid.). And one could go on inferring further predictions of this kind. The ability to falsify the model's predictions may further facilitate the development of a well defined empirical research agenda with the potential for policy relevance (ibid.; Groenendijk 1997).<sup>18</sup>

### **Weaknesses in assumptions (but with room for further improvement)**

On the level of methodological assumptions there are weaknesses that some might take as serious challenges for further development and that others might treat as insurmountable.

From a modest point of view the principal-agent-client model of corruption could be regarded as merely a conceptual, heuristic tool – a *chapeau* for conveniently differentiating the 'thing' from other related phenomena. More commonly and more ambitiously however, the model is rooted in mainstream economic thinking and is thus based on the mainstream version of rational choice

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<sup>18</sup> See, e.g., the extensive overview of non-punitive policy recommendations – implications of the principal-agent-client model of corruption – produced by Klitgaard (1988: 94–95).

theory. This being so, the model is vulnerable to all the usual objections to this theory of decision making.<sup>19</sup>

In a nutshell, many critics challenge the whole idea as unrealistic. To them people simply don't behave like that. For example, the fundamental postulate of perpetual utility maximisation has been criticised for quite some time as being too demanding for the average human and thus inadequate. The more down-to-earth alternative concepts like 'satisficing' (Simon 1957) or 'prospect theory' (Kahneman and Tversky 1979) may describe/explain/predict human decision making more accurately. The body of empirical evidence gathered so far in the field of so-called behavioural economics shows systematic aggregate deviations (i.e., discovered 'anomalies' from the theory's point of view) from the standard predictions of rational choice theory (for a general overview see, e.g., Korobkin and Ulen 2000; in relation to trust in interpersonal relations see e.g. Good, 1988: 31-48). The systematic anomalies in human decision making (known by such terms as 'endowment effect', 'status quo bias', 'framing', 'failures of invariance', 'preference reversal', 'myopia and inconsistency in inter-temporal choice' – to name only some of them) are inconsistent with several precise predictions of rational choice theory. This in consequence affects the evaluation of every model based on this theory.

In our case this line of criticism does not in fact challenge the principal-agent-client model's utility for the purposes of outlining a concept of corruption. Instead it questions the model's symbiotic relationship with a mainstream rational choice theory. The systematic 'anomalies' that I mentioned, undermine to a certain extent the model's predictions about how actors in a strategic situation will act and react. But let me stop there: due to the limited scope of this chapter I cannot address this criticism in greater depth. I may provisionally conclude that the principal-agent-client models of corruption that we have seen so far do not try to incorporate all these empirical findings. It does not follow, however, that we will not see the development of 'bounded rationality' principal-agent-client models of corruption in the near future.

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<sup>19</sup> For an overview of the criticisms, see, e.g., Ward (2002), Abell (1992).

### **Some problems with the model's claim to generality**

Is the principal-agent-client model of corruption general enough adequately to reflect all the necessary and invariant features of this phenomenon? As I have briefly argued elsewhere (Jager 2003; see also van Duyn 2003:12-13) there appear to be cases where this particular concept of corruption offers too narrow a framework.

The first potentially problematic feature is the insistence on a clear distinction between principals and agents as an analytical prerequisite. As we saw, the pre-existing relationship between P and A based on a certain level of trust must be taken as a given conceptual element. But is corruption necessarily connected with this distinction? For example, Alldridge has thought of a simple example of corruption where the principal-agent relationship does not exist (Alldridge, 2000: 180; discussed also in Jager, 2003: 164-8). This is the case of private sector corruption and involves a sole-trader who, as his own master and servant, 'owes no duty to any superior'. He or she decides (for whatever reason) to announce a public tender. After the tender is announced one of the competing bidders bribes the sole-trader so that s/he awards the contract to him/her. The principal-agent concept does not apply as no pre-existing relation between a principal and agent exists. The clients in this case deal directly with the principal. The notion of a breach of trust is inapplicable as it cannot be conceived of, but still our entrepreneur was bribed in most common understandings of the word. Also, corrupt motives were clearly present on both sides. Can this example be overlooked as an exceptional case that proves the rule?

One could argue, however, that this is not an example of corruption at all. Is it not simply a case of the sole-trader freely deciding to award the contract to the bidder who offers an additional payment or advantage? Is it not the same every time plumber A – say – offers you a discount for fixing your pipes and you give the work to him/her rather than to plumber B, who doesn't offer you a discount?<sup>20</sup> To counter this objection we need to highlight the elements that distinguish the two examples. First, to announce a public tender is not the same thing as accepting the cheapest offer on the market. The public tender specifies in advance a set of criteria that will guide the decision making process of the

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<sup>20</sup> My thanks to Jim Newell for this argument.

sole-trader. These *ex ante*, transparent criteria usually include the price, but they may also include other, non-pecuniary criteria and even specify that these will be given most weight. The counter-argument also seems to imply that the principal can never publicly and unilaterally bind himself by any rule and thus that any criteria proclaimed publicly and in advance, may be disregarded at any time for any reason. In law, for example this is not the case. The legal doctrine of valid and enforceable ‘unilateral obligations’ already present in Roman law, testifies to the contrary. All this implies that even though in the present case the clients deal directly with the principal, the briber can corruptly influence the determinants of the decision-making process that the sole-trader has bound him-/herself to follow. The sole-trader first promises to follow the procedure and criteria s/he announces in the public tender. But induced by the bribe s/he then deliberately breaks these allocation rules set out in advance.<sup>21</sup>

Different problems of role identification may occur in the field of so-called political corruption.<sup>22</sup> The issue deserves a separate and much more thorough analysis but let us mention here only one aspect. In modelling political corruption in a representative democracy the model designates the voters (or the electorate, the People (...)) as the principal and the elected politicians as their agents. The role-identification problem here is that in real-world politics the model’s descriptions of the principal’s and the agent’s roles are blurred. The interests/directives of the constituency or group that the politicians as agents are supposed to represent are to a considerable extent shaped by the decisions and behaviour of the agents themselves (Philp cited in Gambetta, 2002: 50-1).

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<sup>21</sup> The role identification problem may be closely connected with the question of who defines the rules that the agent is bound to follow (I am indebted to Klaus von Lampe for this suggestion). If setting the rules is an exclusive prerequisite of the principal, then the society at large (or the ‘prevailing legal and moral order’) may always conceptually play the role of the ‘final’ principal. In that much wider sense the sole-trader too has a principal above him/her. One could try to save the model and say that the sole-trader is in fact an agent who has agreed to act on behalf of a principal denoted for example as ‘society’. But to me this would be to over-stretch the concept of a principal beyond any practical purposes. If we insist on identifying a principal in this case, then the sole trader’s *super ego* might be a better candidate.

<sup>22</sup> Some argue that this model is *a priori* not suitable for modelling political corruption (Johnston 1996: 325-326). For the contrary view see Groenendijk (1997).

This at least dilutes the clearly specified distinctions between the principal's and agent's roles. Similar problems may arise with other forms of agency as well.

Both of these examples, each in its own way, indicate that there may be more to corruption than just a 'breach of duty/trust' in a particular isolated principal-agent-client relationship. As we shall see, the insistence on the centrality of the notions 'breach of duty by the agent' and/or 'furthering the principal's interest', may turn out to be misleading or at least too narrow. There are cases of corruption – in the most commonly understood sense of the word – where we cannot point to a breach of duty and where the agent's corrupt decision is not against the principal's interest.

Let me first briefly address the component, 'agent's breaching of rules set out in advance'. As we know, rules that bind the agent may be explicit, implicit, legally binding or 'just' moral; they can be substantive, procedural and so on. Rules of all kinds may be very clear, but they can also be unclear, contradictory or inconsistent. If the latter is the case then even finely tuned rules of interpretation and (legal) erudition may not help (as, to take an extreme example, divided opinions in some constitutional court decisions well illustrate). Analytically, the agent may face the infinite regress problem known as the 'paradox of rule following'. The problem with rule following is that in order to follow a rule we need to interpret its meaning. In order to interpret its meaning we need to follow a rule of interpretation. And in order to interpret this rule of interpretation we need another rule and so on *ad infinitum*. It may well be that besides dwelling on the 'Who in fact is my principal?' difficulty, the agent may also spend quite a lot of his precious time asking himself a Freudian question: 'What does the principal want from me; what in fact is my duty?'

To summarise: the insistence on identifying a breach of duty would leave many cases of corruption outside the conceptual framework (similarly, Law Commission, 1998: 52-3; Alldridge 2000: 179-80). The agent can clearly be bribed but the exact duty that was breached will be hard, if not impossible to identify.

Still other examples point to problems with the component, 'furthering the principal's interest'. Let us imagine a case where the agent faces two or more alternative offers that are all equally beneficial to the principal. In this situation the agent receives a bribe from one of the clients in order to decide in his favour (Law Commission, 1998: 53). In other words, the agent is bribed to select one

of the options that are equally in the interest of the principal; the corrupt decision is not better than the others, but at the same time it is not contrary to principal's interests or harmful to the principal.

Also, we can imagine an agency relationship where the agent is not bound to act in the best interests of the principal. For example, a charity donor may decide to employ an agent in order to distribute gifts to various charities. It happens that the principal relies entirely on the agent's discretion as to how he will carry out the distribution. Then somebody bribes the agent to channel the funds to a particular charity. The corrupt decision may be against the principal's interests but not necessarily so. If we insist that the corrupt act necessarily has to be against the principal's interests then this particular example cannot qualify as corruption (Law Commission, 1998: 58). We can argue whether the agent's behaviour deserves to be made criminal or not (and I believe it does in this case); nonetheless, we can hardly argue that this is not a case of corruption.

Another, perhaps the clearest, example of instances where corruption does not involve a breach of duty towards the principal, comes from German criminal law doctrine (and case law). Here we ought to be on the safe side as criminal law definitions are in principle narrower since they ought to cover only the most harmful acts of corruption. The leading case comes from private-sector corruption and is known as the '*Korkengeld-Fall*' (cork-money case). In this real life case a wine producer bribed a waiter in a restaurant with the intention of inducing the waiter to offer and recommend his wine(s) to the restaurant's clients. The waiter's principal – the restaurant owner – knew about this secret agreement, but did nothing about it. German criminal law is very clear: under article 299 of the Penal Code (*Strafgesetzbuch, StGB*) the corrupt employee can be held criminally liable even though his/her employer knows about, or knows about and approves of, his/her corrupt behaviour (RGSt. 48, 291; for the doctrine cf., Tiedemann, 1992: §299 Rn. 5-7; also Walter, 2001).<sup>23</sup>

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<sup>23</sup> Article 299 of StGB: '(1) Who, as an employee or agent of a business enterprise, in business relationships solicits, let himself promise or accepts an advantage for himself or a third person in return for favouring somebody else unfairly in the competition when ordering goods or commercial services, will be punished with up to three years imprisonment or with a fine. (2) Likewise will be punished who, in business relationship and for purposes of competition, offers, promises or grants an advantage to an employee or an agent of a business enterprise, for the employee or a third person, in return for favouring himself

A similar case received a great deal of public attention recently in Slovenia. According to the press, a pharmaceutical multinational, MSD, offered individual doctors €70 for each new patient for whom the doctors prescribed a particular drug manufactured by MSD.<sup>24</sup> The contract between MSD and the individual doctor was formally denoted as a research study. When the arrangement became public, it was revealed that these kinds of 'study' were not uncommon in Slovenia and in fact representatives of MSD explained that this was a normal practice in Slovenia and in the EU as well. The Slovenian Office for the prevention of corruption started an investigation. Press reports have suggested that these 'research study contracts' were in fact a particular reward scheme for prescribing that particular medicine to patients. Again in this case, similar to the cork-money case, the directors of hospitals (doctors' principals) knew about the practice but remained passive.

What these hypothetical and real life cases show is that the 'breach of duty' approach may be too narrow for conceptualising corruption adequately. One could argue that there are not many cases like these and that the harm is negligible. But in my opinion, even though the number of cases may be small, these instances point to conceptual problems. It appears that corruption ought to be conceptualised more broadly.

Bearing in mind these objections, the UK Law Commission in its 1998 final report decided to go beyond 'breach of duty'. The alternative wider conceptualisation focuses simply on 'an intention to influence the agent's conduct as agent' (Law Commission, 1998: 54). 'Agent's conduct as agent' is understood as wider than 'agent's duties to the principal'. In addition, the Commission stopped insisting on identifying a breach of duty towards the principal as a necessary conceptual element; nor did it insist on identifying an intention on the side of the briber to induce a breach of duty. In this way corrupt behaviour beyond the breach of duty is covered as well as the breach of duty itself.

This wider approach comes close (but is not identical) to van Duyne's conceptualisation of corruption in the broad framework of PACM (van Duyne, 1999, 2001). The delineating notion is this: was there an attempt secretly to

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or a third person unfairly when ordering goods or commercial services' (translation by Walter 2001: 5).

<sup>24</sup> 'Vsak bolnik je vreden 70 evrov' ['Each patient is worth €70'], *Dnevnik*, 24.10. 2003.

influence the agent's decision-making process and (consequently) conduct, by a pecuniary or some other kind of reward, or not? If yes, we have a case of corruption. It is not necessary that the corrupt decision breaches a principal's trust or is against a principal's interests. This broader concept shifts the attention from the relation between the principal and his/her agent and focuses instead on what is going on between the agent and the client. Again the central focus is on the agent's decision-making process. Has the agent in fact (secretly) reached his decision in the briber's favour (primarily) because of some advantage conferred for that reason, or not?

The above examples also show that perceiving corruption as simply a matter of the relationship between principals and agents, i.e., as 'a direct relationship between two individual legal personalities', is too narrow (Alldridge 2000: 179). Consequently, to conceptualise the harm involved in corruption as the harm done to the principal and his interests is too narrow (ibid: 184). There are other, wider interests at stake.

In the cork-money case, for example, German legal doctrine defines the interest (social values) protected by article 299 of the Penal Code as 1) mainly competition (as such) and 2) the interest of fellow competitors, the interest of the principal (if *bona fide*), and the interest of public that is affected by the rise of prizes caused by corruption (Cf., Tiedemann, 1992: § 299).

This wider view is also known as 'distortion of the market' or the concept of 'fair competition' and is not a novelty (see e.g. Alldridge, 2000: 179-185). In Germany this broader concept stems from that country's unfair competition law (see *Gesetz gegen den unlauteren Wettbewerb – UWG* of 1909, para. 12, which in turn, we are told, was modelled on Britain's Prevention of Corruption Act of 1906 – cf. Walter, 2001:1). In this respect the present article 299 of the German Penal Code (modelled on article 12 of UWG) does not require a breach of duty on behalf of an employee. The primary focus is on the general interest the society has in ensuring fair competition and equal treatment and on the interests of the other competitors (Cf., Walter, 2001: 1-2). In other words, this conception does not limit the harm caused by corruption to the harm done to the particular principal as a result of corrupt acts by the agent. Instead the harm produced in these cases is more wide ranging: it is done to the society at large, which favours fair and transparent competition, and to all other non-bribing clients who are falsely convinced that no corrupt discrimination is taking place.

But there is also an enforcement policy dimension. Since in these cases it is the wider social interest that is primarily at stake, relying on a particular principal's oversight would be short-sighted. Fellow competitors, who ought also to be interested in enforcement, face a kind of a 'collective action problem'. They would all profit from the effective reduction of this kind of corruption, but each of them – being rationally self interested – is reluctant to do anything about it. Owing to the costs that each one individually would incur, they have an incentive to leave these activities to somebody else, in the final instance to the state. The state intervenes with anti-corruption measures, trying to provide a low-corruption environment, which then serves all as a kind of a public good.

## **Conclusion**

I have argued in favour of careful extraction of the elementary behavioural components of corruption. In this respect the principal-agent-client model of corruption, in reflecting the typical strategic interrelatedness of three actors in a '(non)cooperation game' situation, appears to be the most promising point of departure, at least for the time being. I have pointed out what I believe to be the strengths of this approach, in particular its simplicity, flexibility, usefulness for empirical research and, to a certain extent, its generality.

On the other hand, the present principal-agent-client model of corruption may be vulnerable to criticism in respect of its methodological ties with rational choice theory. In addition, in some cases clear identification of the roles of the model's actors is problematic. Perhaps most importantly, the model's exclusive focus on the agent's 'breach of duty/trust' as a definitional criterion creates problems in cases of unclear, contradictory, inconsistent or nonexistent rules and in corruption cases where no breach of duty or trust occurs, or where there occurs no harm to the principal's interests. This 'distortion-of-the-market' aspect needs to be taken into account in any conceptualisation that has the ambition to be adequate and thus general.

There are obviously important cases of corruption where the principal even though well aware of his agent's corruption, chooses to remain passive and does not intervene. The harm is then done to society at large as illustrated by the cork-money-case. If the principal-agent-client model of corruption can be so modified

as to deal successfully with these problematic aspects, criticism of its adequacy will be much more difficult. The open question that remains is whether the ‘distortion-of-the-market’ aspect of corruption can be successfully accommodated within the basic principal-agent-client framework and, if the answer is positive, whether the consequent ‘enlargement’ of the model will allow it to sustain the strengths of the original, narrower account.

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# **A critical analysis, - from a Slovenian perspective - of Corpus Juris and the Green Paper**

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## **Introduction**

Following an initiative by the European Commission, a group of criminal law experts from all of the Member States of the European Union have recently published the results of the Corpus Juris project.<sup>2</sup> The aim of the project has been to establish guiding principles in relation to the criminal law protection of the financial interests of the EU.<sup>3</sup> Although the authors of Corpus Juris (hereinafter referred to as CJ) specifically emphasise that the aim of the project is not to ‘elaborate a model criminal code or a model code of criminal procedure’ (Delmas-Marty and Vervaele, 2000), the result has in fact been a kind of model criminal and procedural code protecting EU financial interests. It was first

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<sup>2</sup> The group, consisting of a number of distinguished researchers and professors in criminal law started the work in 1995 under the direction of prof. Mireille Delmas-Marty. The full name of the project was ‘Corpus Juris of criminal provisions for the protection of the financial interests of the European Union’ (Gonzales, 2000).

<sup>3</sup> Of course, this was not the only reaction of the EU to the phenomenon of transnational crime. The first formal plan to combat crime was adopted in April 1997 (EU Justice and Home Affairs Council) and later on in June 1997 (Amsterdam European Council). In March 2000 the so-called ‘EU Millennium Strategy on Organised Crime’ was adopted by the EU Justice and Home Affairs Council. See also Kerchove (2000) and Vermeulen (2000) for an overview of the EU activities after Amsterdam and Tampere and mutual assistance in criminal matters.

published in 1997 and after wide-ranging discussion and the expression of numerous criticisms, a new version appeared in 2000.<sup>4</sup>

CJ consists of two parts: the first describes eight offences and associated penalties, along with basic principles of criminal law. The second part establishes a framework of procedures to enable the detection and efficient prosecution of offences against the financial interests of the EU. The eight offences are: fraud affecting the financial interests of the European Communities and related offences; market-rigging; money laundering and receiving; conspiracy; corruption; misappropriation of funds; abuse of office; disclosure of secrets pertaining to one's office.<sup>5</sup> In a further ten articles, CJ establishes a number of basic principles of criminal liability and sanctions.<sup>6</sup>

CJ also introduces the framework of criminal procedures applicable to the above-mentioned offences. The proposed procedures consist of a preparatory stage and a trial stage involving two central figures: a European Public Prosecutor (EPP) as the competent prosecutor for criminal offences breaching the financial interests of the EU, and the Judge of Freedoms – a member of judiciary who will issue warrants and decide on pre-trial detention during the preparatory stage. The document also introduced the European arrest warrant and established the principle of the mutual admissibility of evidence.

The EPP is conceived of as a supranational institution, the establishment of which would, according to the authors of CJ, be the only guarantee of the efficient prosecution of criminal offences affecting EU financial interests. The EPP is thus the most manifest expression of the leading idea that for the purposes of prosecution of the criminal offences provided for by CJ, the territory of the Member States of the Union constitutes a *single legal area* in the field of criminal law.

The idea of an EPP reached its culmination in the 'Green paper on protection of the financial interests of the Community and the establishment of a European

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<sup>4</sup> See <http://www.euroscop.dircon.co.uk/corpus.htm> and <http://www.era.int/domains/corpus-juris/public/index.htm> (10.9.2003).

<sup>5</sup> The first four can be committed by anybody and last four can be committed only by officials (*delicta propria*).

<sup>6</sup> *Mens rea*, error, criminal attempts, individual criminal liability and liability of organisations, extent of penalties.

Prosecutor<sup>7</sup> The Green paper (hereinafter referred to as the GP),<sup>8</sup> issued by the Commission in December 2001 is therefore the most detailed document establishing the idea of a European Prosecutor.<sup>9</sup> Unlike CJ, the GP has not been written in the form of a legal act, but as a text presenting the idea of an EPP in descriptive terms, and posing 18 questions for discussion.

As proposed in the GP, the EPP would be responsible for detecting, prosecuting, and bringing to trial the perpetrators of offences prejudicial to the Community's financial interests.<sup>10</sup> Holders of the office would be able to exercise their powers only within the limits of a strictly defined jurisdiction, according to the principles of subsidiarity and proportionality. The powers of the EPP would be to direct and co-ordinate the investigation and prosecution of offences; to gather all the evidence for and against the accused (the inquisitorial maxim); to commence proceedings where the grounds for so doing subsist; to send defendants for trial. One of the consequences of the introduction of the EPP would be the establishment of a common investigation and prosecution area in which the acts of the EPP would have the same value.

It was precisely the notion of an EPP that received most criticism, probably because each state perceives its national public prosecutor's office as lying at the heart of its sovereignty. It is true that by accepting the idea of an EPP, Member States would lose a part of their autonomy with regard to criminal law, and perhaps for this reason, public opinion too was opposed to it (Delmas-Marty and Vervaele, 2000: 311).

Both CJ and the GP are extremely ambitious projects that attempt to overcome the differences among very different systems of criminal justice. These range from the traditionally accusatorial system of English law on the one hand,

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<sup>7</sup> The Commission has proposed the new Draft Article 280a to the EC Treaty to provide for the legal framework of the EPP.

<sup>8</sup> [http://europa.eu.int/eur-lex/en/com/gpr/2001/com2001\\_0715en01.pdf](http://europa.eu.int/eur-lex/en/com/gpr/2001/com2001_0715en01.pdf) (10.9.2003)

<sup>9</sup> It is not the purpose of this chapter to inquire into the legal conditions necessary to establish such an institution, but let me just mention that neither the EC Treaty nor the Euratom Treaty currently provide the necessary legal basis for the European Prosecutor to be established. Therefore the Community Treaties would have to be amended in order to introduce such a judicial authority. The Commission has proposed a new Article 280a of the EC Treaty and a new Article 183a of the Euratom Treaty.

<sup>10</sup> It would not extend to other offences, e.g. offences committed by Community staff or euro counterfeiting.

to the traditionally inquisitorial systems of French and German law on the other. CJ in particular attempts to outline, for criminal procedure, a certain ‘common denominator’. It is true that its applicability is limited to the relatively narrow area of the financial interests of the EU, and that it allows for the subsidiary use of national laws; nevertheless, it represents a new model code of European criminal procedure. It is, perhaps, less noteworthy for the brilliance of its solutions than it is for the powerful political interests that lie behind it. And it is no wonder that, though it is not a formal or legally binding act, it has received a lot of attention and has been severely criticised from the start.

The purpose of this paper is to offer a critical analysis of the evolving framework of EU criminal procedure. My discussion will be undertaken on three levels: on the first, more limited one, I will describe the differences between the proposed solutions and Slovenian legislation; examine the possibilities of achieving harmonisation, and analyse the consequences of harmonisation on the structure and judicial practice of Slovenian criminal proceedings. The second level involves a critical assessment of the ‘European’ model of criminal procedure and the institution of the EPP proposed by the CJ and the GP. The third level concerns the most complex, important and difficult (and for that reason perhaps unanswerable) questions – those concerning underlying values and their impact on the nature of criminal procedures in general.

## **The main problems of harmonisation**

### *Organisation and basic ideas of the EPP*

As far as the organisational aspect is concerned, there should be no problems in harmonising Slovenian law with the ideas presented by the CJ project and the GP. The Slovenian State prosecutor’s office is organised according to principles similar to those proposed by the GP: it is independent, hierarchically organised and indivisible. National law is also compatible with the GP concerning obligations to inform the prosecutor of criminal offences presumed to have been committed. The Slovenian State prosecutor is also bound by the principle of legality, at least when more difficult cases are being examined. Like the EPP, the State prosecutor too has a duty to discover the truth and obtain evidence of innocence as well as guilt (Article 17 (1) CCP).

### *The structure of the proceedings*

The differences among the Members States' procedural laws are much greater in the preparatory stage than later on in the proceedings, a fact of which the authors of both CJ and the GP are perfectly aware (Hatchard et al., 1996). In attempting to overcome this difficulty, CJ and the GP offer, first, a much more detailed picture of the preparatory stage as compared to the other stages, and second, express the ambition to unify the preparatory stage. The authors leave the regulation of procedure in the later stages to national law.

The differences in preliminary proceedings are also relevant as far as Slovenian criminal procedure is concerned, since the framework of the criminal procedure outlined in CJ is basically different from that of the Slovenian Code of Criminal Procedure (hereinafter referred to as CCP). In contrast to Slovenian preliminary proceedings, which are based on the so-called separation thesis – that is, the separation of preliminary proceedings from the phase of judicial investigation – the proposed European procedure starts with a single preparatory stage. While in Slovenia the police are *dominus litis* of the preliminary proceedings and the investigating judge of the investigation stage, the European preparatory stage is overseen by the authority especially established for the protection of the financial interests of the European Union: the independent EPP.<sup>11</sup>

While the EPP is the central figure in the preparatory stage and is indeed, a leading authority at all stages of the European criminal procedure, in Slovenia State prosecutors are only slowly obtaining a significant role in pre-trial proceedings.<sup>12</sup> They are not in charge of investigations.<sup>13</sup> They have the (vaguely

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<sup>11</sup> Although State prosecutors are gradually gaining powers in preliminary proceedings they are nevertheless not the *dominus litis* of that phase. In this respect the Slovenian CCP differs from the western continental tradition. (Mathias, 2002: 459-461).

<sup>12</sup> In the last five to ten years, more accusatorial elements have been introduced into pre-trial proceedings. For example, pre-trial detention and the so-called special methods and measures (e.g. surveillance, telephone taping), can only be ordered by the investigating judge on receipt of an application of the State prosecutor (Articles 202 and 152 CCP). Such changes also reflect a different understanding of the role of State prosecutors and investigating judges: the former are becoming more 'active' in investigations and the latter are gaining more of the qualities of the Judge of Freedoms (judicial review function), losing their strictly *ex offio* investigative function.

<sup>13</sup> In December 2001 the Director General of the police force and the Attorney General of the Republic of Slovenia signed the 'Directive on co-operation between the police and the State prosecutor's office for the detection and prosecution of offenders'. The

defined) right to direct preliminary criminal proceedings,<sup>14</sup> but in practice the police act with almost complete autonomy.<sup>15</sup> The investigating judge is the leading authority in the investigation phase, which leaves the State prosecutor with a limited range of functions. Thus, in contrast to the ‘European model’, where most of the investigative powers are entrusted to the EPP, in Slovenia they are conducted either by the police or by the investigating judge. On the other hand, at present the Slovenian State Prosecutor’s office is organised in accordance with the principles similar to those proposed by the GP: it is independent, hierarchically organised and indivisible (Fišer et al., 2002). The national law is also in accordance with the GP concerning the obligation to inform the prosecutor of criminal offences which come to the attention of the police.

### **Investigative authorisations**

In the preliminary stage the EPP is provided with the full range of investigative powers. S/he needs prior authorisation only for those investigative acts that involve the greater restrictions on the rights and liberties of citizens, such as house searches or telephone tapping. The EPP also has complete discretion to decide when to conclude the preliminary stage.

CJ and the GP provide for the numerous investigative powers to be entrusted to the EPP. These include:

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Directive certainly tightened the connections between the signatories, but it nevertheless does not and cannot change the structure of proceedings or the roles of the main protagonists.

<sup>14</sup> Some articles (e.g. Article 45 CCP) vaguely suggest that there should be constant co-operation between the police and the State prosecutor during preliminary proceedings. In practice the police usually conduct investigations on their own initiative without any ‘direction’ from the State prosecutor for about one month before submitting the charges or the results of their investigations. In the more complex cases co-operation between the State prosecutor and the police is more common.

<sup>15</sup> However, the police are not allowed to use certain investigative measures – for example the questioning of suspects can be conducted only by the judicial branch – or they can act only with the prior approval of the investigating judge.

- so-called Community investigation measures – such as collecting information, copying and seizing documents, interrogating witnesses, questioning defendants – employable at the discretion of the EPP;
- investigative measures subject to review by the court (subpoenas, house searches, seizures, the freezing of assets, the interception of communications, covert investigation, controlled and supervised deliveries etc);
- investigative measures restricting defendants’ liberties and authorised by the judge of freedoms (e.g. the European arrest warrant, probation and custody orders).

Most of the proposed investigative powers are regulated differently in Slovenian law. As far as the first set of powers (Community investigation measures) is concerned, it is compatible only in part with Slovenian law.<sup>16</sup> The latter considers the interrogation of defendants to be a strictly formal act conducted only by the investigating judge or the trial judge: only statements obtained in this way are admissible as evidence in court. Put another way: the interrogation of the accused can be conducted neither by the police nor by the prosecutor. However, at the preliminary stage, police officers may summon citizens and carry out so-called informal gatherings of information – which are in content the same as interrogations; they only lack the form.<sup>17</sup> This means that the police are not obliged to inform suspects of their status as suspects nor of their rights, but only to conduct informal conversations. Statements obtained by these means are not admissible as evidence in court and investigating judges have to exclude them from the files (since trial judges must not get to know about them). In theory, informally obtained statements should only help investigating judges to decide whether there is enough evidence to proceed to the investigation phase. But in fact, as critics often point out, investigating judges read statements given to the police and act with full knowledge of such statements while formally interrogating the suspect. Therefore, through the investigating judge, statements given to the police play a crucial role throughout the course of proceedings.

The same is true for the examination of witnesses: during the preliminary proceedings it is the police who examine possible witnesses, while during the

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<sup>16</sup> The provision allowing the State prosecutor to require that the police collect useful information is similar to the one proposed by the GP.

<sup>17</sup> Article 148 (3) CPP is considered one of the weakest parts of our legislation.

investigation proceedings it is always the investigating judge who does this. Although the way the interrogation of suspects is organised in Slovenian law is open to serious objections, there is nevertheless an essential difference in the logic of the investigative measures proposed by CJ and the GP on one side, and the Slovenian legal system on the other. In contrast to CJ and the GP, the State prosecutors have no powers concerning the questioning of suspects, the accused or the witnesses in the pre-trial phase.

With regard to the second set of investigative measures (measures subject to review by national courts), Slovenian legislation is also mostly incompatible with the provisions of the GP. In Slovenia, the police may conduct a house search or search a person only on the basis of prior judicial approval in the form of a search warrant.<sup>18</sup> The State prosecutor does not have the power to issue subpoenas or to seize items of importance for criminal proceedings. Subpoenas are issued by the police or by the court, and objects (including documents) may be seized by the police on the basis of a written order issued by a competent judicial authority (usually the investigating judge). Police officers may also confiscate, at their own discretion, items that were used in, acquired by or came into existence as the result of a criminal offence.

So-called secret investigative measures (provided for by articles 150–154 of the CCP) including surveillance, telephone tapping, secret monitoring, access to banks' computer systems, can be ordered by investigating judges on the basis of reasoned proposals submitted to them by State prosecutors. The police may also use such secret investigative measures as feigning purchases, the acceptance or giving of gifts, the acceptance or offering of bribes (Article 155 CCP). These measures can be deployed by the police on the basis of written orders issued by State prosecutors, who must be satisfied of the existence of reasonable grounds for believing that the individuals against whom the measures are deployed are involved in activities associated with certain criminal offences.<sup>19</sup> These are the

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<sup>18</sup> There is an exception to this rule: under Article 36 (5) of the Constitution and Article 218 (1) of the CCP the police may, if circumstances make it necessary, conduct searches without a warrant, but they have to submit a report to the investigating judge or to the State prosecutor immediately afterwards.

<sup>19</sup> For example, offences connected with organised crime or other very serious criminal offences.

only circumstances in Slovenian criminal proceedings in which prosecutors issue orders authorising the deployment of investigative measures.

It is precisely in the regulation of investigative measures that the position of the Slovenian State prosecutor is most clearly seen. In certain cases, only s/he has the power to file an application for authorisation to undertake certain investigative acts (they cannot be ordered *ex offio*), but s/he *does not have any powers of his/her own*. The only exception to this rule concerns those known as ‘entrapment’ measures (feigned purchases or the feigned acceptance or offering of gifts or bribes). In general, even the police have more powers of independent initiative since in certain cases they can investigate without any kind of prior authorisation.

The third set of investigative measures proposed by the GP, those requiring authorisation by the Judge of Freedoms, are the most similar in terms of how they are regulated to the current provisions of Slovenian legislation. The latter ensures that all measures restricting the liberty of accused persons must be authorised by the courts – in the pre-trial proceedings by the investigating judge. Thus far Slovenian legislation and the provisions of the GP overlap. But when we take a closer look at the conditions provided for by CJ<sup>20</sup> we find that they are in fact quite different as compared to those provided for by Slovenian legislation.

There are many examples, but perhaps the most significant one concerns the grounds on which a suspect may be remanded in custody. These grounds are very vaguely defined in CJ, whereas Slovenian legislation is much stricter. One of the grounds on which a suspect could at one time be held on remand (‘concern that the accused would repeat the criminal offence, finish an attempted criminal offence or commit the criminal offence s/he is threatening to commit’: former article 201 (1) (3) of the CCP/94) was even struck down by Slovenia’s Constitutional Court on the basis that its vagueness violated the presumption of innocence.<sup>21</sup> ‘Good reasons to suspect’ (Article 201 (1) (3) CCP/94) also seem to offer a somewhat lower standard than the ‘well-grounded suspicion’ standard currently provided under Slovenian law. The length of time for which suspects

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<sup>20</sup> Article 25 quarter CJ. Since CJ is much more eloquent on the question than is the GP I will analyse the measures proposed by CJ

<sup>21</sup> Constitutional Court ruling U-I-18/93.

can be held on remand is also three months longer than the limits provided for by the Slovenian Constitution. Accepting the CJ project's standards for holding suspects on remand could therefore result in violation of, and lower, national legal and constitutional standards.

Comparing the competences of the EPP to those of the State prosecutor, one can easily see that the EPP has a much wider range of powers.

### **Problems of harmonisation**

For Slovene law to be fully compatible with the concept of the EPP, the whole structure of pre-trial proceedings would have to be changed. That would demand not only vast changes in the structure of the procedure, but also a substantial rearrangement of the powers of all of the protagonists. An entirely new pre-trial procedure would have to be introduced, with police, prosecution and the judiciary playing roles very different to the ones they play at present. Most probably the institution of the investigating judge would have to be abolished and replaced with something analogous to the Judge of Freedoms.

Besides extensive organisational adjustments and substantial changes of legislation, harmonisation would also bring the need for vast changes in the outlooks of everyone involved. It is true that changes in legislation in the last nine years have already shifted Slovenian criminal procedures in a more clearly adversarial direction,<sup>22</sup> thus making the existence of the institution of the investigating judge increasingly questionable.<sup>23</sup> In the pre-trial phase, investigating judges are acquiring the function of exercising judicial control over the investigative activities of the police. In partly losing their investigative functions they are thus coming closer to assuming a more purely objective and impartial

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<sup>22</sup> The Slovenian CCP was adopted in 1994 and amended in 1998 and 2001. A number of major changes concerning the structure of proceedings are currently in preparation.

<sup>23</sup> The aim of the proposed changes is a reduction in the role of the investigating judge and 'activation' of the state prosecutor.

judicial role. In a way, the introduction of a judge of freedoms could be perceived as a welcome novelty.<sup>24</sup>

The prosecution would probably be subject to the most wide-ranging changes since its responsibilities would have rapidly to evolve (to put it in somewhat exaggerated terms in order to emphasise the point) from the relatively straightforward ones of preparing ‘charge sheets’ and reading them aloud in court, into the more complex ones of being responsible for evidence and taking full responsibility for cases, without being ‘assisted’ by investigating or trial judges. The police would in turn have to get used to being directed by much more active State prosecutors. Such far-reaching changes surely cannot take place in the space of one year.

Of course, there is also the possibility of applying special criminal procedures to alleged offences involving EU funds while prosecuting other alleged offences according to existing procedures. But in that case, there would be two very different sets of criminal proceedings, which would not only create many logistical difficulties, but also subject defendants to unequal treatment, depending on the type of offence they had been accused of. This would apply particularly to those cases where given facts could equally qualify as instances of EU fraud as instances of fraud taking into consideration national legislation.

In conclusion, it is of course always possible to change legislation, even when the Constitution is in question. Indeed, many of the Member States have done so in the past. Since criminal law is always a delicate area, heavily dependant on prevailing outlooks, involving many conflicting aims and values and the possible violation of rights, it is necessary carefully to consider all of the possible consequences of such a decision. And this is certainly not only true at the level of national legislation.

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<sup>24</sup> In Slovenia serious objections have been made to the idea of abolishing the investigating judge. Advocates of the idea claim that the investigating judge also acts in favour of the accused and that abolition of the role would most probably weaken the position of bring poorer defendants as they would not be able to afford extensive investigation in their favour. On the other hand they also oppose to the idea of introducing an accusatorial system seeing the investigating judge as a much more reliable investigator than the police or the prosecutor.

## A critical assessment of the EPP

### *Imbalance between the positions of the Prosecutor and the defendant*

The area of criminal law is a particularly sensitive one. This is true because basic human rights and freedoms are at stake; because of the serious consequences of criminal procedures and their outcome on the individual's well-being (especially in cases of judicial mistakes), and because of the basic inequality between the parties that is inherent in criminal procedures. On the one side there is the State, represented by the public prosecutor; on the other side there is usually a lower class, poorly educated, single individual. It is therefore claimed, with good reason, that criminal law (especially the law on criminal procedure) should be deliberately framed so as to redress this inequality and to do so at all stages of the investigation and trial process. While this demand is usually met fairly well at the trial stage (where there are guarantees ensuring 'equality of arms' or, in broader terms, 'the right to a fair trial')<sup>25</sup>, the extent to which it is satisfied at the preliminary stage is often open to question. CJ and the GP are no exception.

Perhaps the greatest weakness of CJ and the GP is the imbalance they embody between the position of the EPP on the one hand and the position of the defendant on the other. The EPP has a near monopoly on the organisation of criminal proceedings. It is clear that the office has been designed especially with the purpose of achieving efficiency, and from a perspective of mistrust of national systems. The institution of the EPP thus seems to be a non-negotiable issue, although, as some of the critics from the Member States have explicitly stated, its existence and powers are not a necessary condition for efficient prosecution.

If we consider first the investigative measures available to the EPP, we can see that they are vast and extensively regulated. However, from the point of view of achieving equality of arms, the restrictions on the deployment of such measures are inadequate. The situation was even worse in the first, 1997 version of the CJ document, which attracted numerous criticisms for its neglect of the rights of the accused. Though some new articles were added with the purpose of redressing the imbalance, the relative absence of limitations on the powers

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<sup>25</sup> Most of the European Courts of Human Rights' cases on criminal procedure centre on Article 6 providing the right to a *fair trial*. The notion of a fair trial has basically two elements: equality of arms and the right to a contradictory trial.

of the EPP remain a weak point: for example, the extent and nature of judicial controls remain unspecified; the grounds on which suspects can be remanded in custody are very vaguely defined and there is no provision for the application of less severe measures such as bail; almost no standards of proof are specified,<sup>26</sup> nor is there any specification of the places or objects that can be the subject of searches (...)

The GP suffers from the same shortcomings: it almost completely fails to specify the standards of proof required in specific cases or principles governing the deployment of the investigative powers; the substance and the extent of prior judicial controls remain undefined, which implies that it remains unclear how the exclusion of evidence is to be regulated. All of the measures that should restrict the wide powers of the EPP are either left to national legislation or regulated by reference to general principles protecting the defendant's rights. (e.g. article 29 of CJ) Depending on the jurisdiction in question such a solution might raise standards, but on the other hand, there is no guarantee that in many other cases the regime outlined by the GP would not lower existing standards.

A value judgement is obviously relative; but the authors went to great trouble to guarantee the EPP's powers in great detail. Therefore, there is no excuse for not doing the same for the position of the accused. Many important questions, such as who will decide in which courts cases are to be tried, remain unanswered. Given this, it may be concluded that the basic intention of the GP's authors was actually to strengthen the position of the EPP and make it a non-negotiable issue.

The provision declaring that the EPP should be responsible for gathering 'all the evidence for and against the accused' (pp. 24 and 44 GP) is not a guarantee that the principle of equality of arms will be upheld.<sup>27</sup> It is true that both documents contain references to the rights of the accused, but the GP does not explain how accused persons are to exercise their right to gather evidence during preliminary proceedings. This is especially problematic, since some or most of the evidence in such cases will reside in foreign countries. Thus, we have the

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<sup>26</sup> The term 'standard of proof' refers to the burden of proof required in a particular type of case, as in, for example, a criminal case where the prosecution normally has to be able to demonstrate that the accused is guilty 'beyond reasonable doubt'.

<sup>27</sup> See the critical response of the UK Criminal Bar Association to the Green Paper at: [http://europa.eu.int/comm/anti\\_fraud/green\\_paper/contributions/pdf/gp\\_criminal\\_bar\\_association\\_en.pdf](http://europa.eu.int/comm/anti_fraud/green_paper/contributions/pdf/gp_criminal_bar_association_en.pdf) (29.1. 2003)

immense powers to gather evidence of the EPP on one side, and nearly no counterbalancing powers on the other.

*The mutual admissibility of evidence*

Since, from the point of view of prosecution, the success of the whole procedure ultimately depends on the question of whether there is enough evidence to secure a conviction, the issue of evidence is crucial. The central idea and the point at which the whole project of creating a single legal area really stands or falls is, in my opinion, the admissibility of evidence.<sup>28</sup> The Commission has therefore proposed the only logical solution from its point of view, namely that the whole set of measures should be valid and executable throughout the single legal Community. This entails the idea of the mutual admissibility of evidence. Given the EPP's power to choose the Member State in which prosecutions and trials will take place (forum shopping), the key to the EPP's success lies in the principle of the mutual admissibility of evidence.

It is true, as the authors of the GP claim, that a certain degree of harmony among the States already exists. It is also true that there already exists a common core of principles guiding criminal procedures in different countries<sup>29</sup> and that certain instruments have already been adopted or are in preparation under the third pillar.<sup>30</sup>

Let us also look more closely at some of the possible problems: it hardly needs stressing that the Member States do not all have the same procedural rules on evidence, as they do not have the same coercive provisions, while the procedure for issuing warrants differs very much too (Spencer, 2002; 602–610). Some States, for example, lack the legal bases for certain investigative measures, or even

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<sup>28</sup> Commentators based at the Max Planck Institute see this principle as analogous to the principle of free movement of persons, calling it 'free movement of evidence': [http://europa.eu.int/comm/anti\\_fraud/green\\_paper/contributions/pdf/gp\\_mplanck\\_de\\_en.pdf](http://europa.eu.int/comm/anti_fraud/green_paper/contributions/pdf/gp_mplanck_de_en.pdf) (21. 2. 2003), p.37

<sup>29</sup> For example, all of the Member States are obliged to respect the principles set out in the European Convention for the Protection of Human Rights and Fundamental Freedoms.

<sup>30</sup> For example provisions for the freezing of assets; the temporary transfer of persons in custody for questioning; questioning by videoconference or teleconference; controlled deliveries; telecommunications interception; the European arrest warrant (COM (2001) 522).

explicitly forbid them.<sup>31</sup> Different Member States also have very different procedures as far as the deployment of given investigative measures are concerned. It is not only a question of variation in procedures – as, for example, between *prior* and *post facto* authorisation, written and oral warrants, normal and emergency procedures – but mainly a question of whether the procedure exists at all and of the standards and rights of the person being investigated.

Another puzzling issue concerns the following: differences in procedures for deploying the investigating measures can be so great that in one State a specific action can be deemed unconstitutional while being lawful in another State. Again, let us take Slovenia as an example. The Slovenian Constitutional Court has annulled earlier provisions concerning the so-called special methods and measures, such as eavesdropping and surveillance, because it considered that they did not meet the standards required to guarantee the constitutional rights of the accused (standards of proof were too low, orders insufficiently specific and so forth). Accepting the possibly lower standards of other national legal systems is at the very least undesirable, but in specific cases the results of so doing would even be considered unconstitutional. Therefore, lower standards, but also higher ones, could produce problems with mutual recognition. And in such standards lies the core of the criminal legal culture.

As we know, the means by which a result is obtained always forms part of the result itself. Or put in the language of criminal procedure: evidence is never evidence *per se*, it is always constitutively defined by the method by which it is gathered or obtained. In this respect, large differences still exist among states whether they are EU Member States or not (Delmas-Marty, 1997; 36). But the Commission proposes what in my view is the weakest and the most authoritarian point: the mutual admissibility of evidence. As much as this idea is understandable from the point of view of efficiency, it is nevertheless questionable. It forces all Member States to admit evidence obtained by following the possibly very different procedures of another Member State. On the other hand, it forces all the national legal systems to accept evidential solutions that for them could be quite odd given their legal cultures or even unconstitutional. It even fails to reduce the problems of traditional forms of judicial co-operation. It would oblige national courts to use the law on evidence gathering of another jurisdiction,

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<sup>31</sup> At the time CJ was published, Greek criminal law, for example, forbade telephone tapping.

which is not likely to shorten trials since courts will have to interpret the laws of other states within their own national legal frameworks or inquire whether evidence that is presented was obtained legally in the country of origin.<sup>32</sup>

Letting the EPP choose the country in which an investigation is to be conducted will actually lead to a lowering of evidential standards. The knowledge that there are quite large differences in the extent of use of the exclusionary rule or in the conditions for use of certain investigative powers, could lead the EPP to choose the States with the most permissive legislation regarding the deployment of investigative powers.

### Value promotion

Granted, the proposals for the establishment of an EPP concern the relatively narrow field of protection of the financial interests of the EU. But they nevertheless also reflect important global questions and open the door to new ways of thinking about the criminal law. Once the door is open, anything will be able to come through.<sup>33</sup> Let us not forget that though the range of powers of the EPP is limited to certain criminal offences, CJ and the GP also have strong symbolic significance. It can hardly be denied that the procedural model set out by the two documents is likely to lead to a slow but unstoppable process of unification of European criminal procedures and to serve as a role-model for future European Criminal Codes.

Such a result may come about on at least two levels. The first concerns the *de facto* pressure to which States will be subject to adopt certain solutions or at least accept certain ideas in order for the model to work. The second concerns the symbolic pressure that will exist from the moment at which the critical debate

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<sup>32</sup> Admissibility will be especially problematic in the case of evidence ‘transferred’ from common law traditions to jurisdictions of the Continental type. For an analysis of the possible implications see the Max Planck Institute’s discussion at: [http://europa.eu.int/comm/anti\\_fraud/green\\_paper/contributions/pdf/gp\\_mplanck\\_de\\_en.pdf](http://europa.eu.int/comm/anti_fraud/green_paper/contributions/pdf/gp_mplanck_de_en.pdf) (21. 2. 2003) p. 38-40.

<sup>33</sup> As one commentator has remarked, the EPP is a Trojan horse ignoring the efforts of other authorities and wanting to become in the long run the only authority in the field. [http://europa.eu.int/comm/anti\\_fraud/green\\_paper/contributions/pdf/gp\\_twolf\\_de\\_en.pdf](http://europa.eu.int/comm/anti_fraud/green_paper/contributions/pdf/gp_twolf_de_en.pdf) (21. 2. 2003), p. 7.

on the EPP is deemed *passé* and the EPP itself considered an institution beyond negotiation. This is especially relevant for the Candidate States, the negotiating positions of which are, of course, much weaker than those of the States that are already Members.<sup>34</sup>

The irony is that during the last decade of socialism and even more so during the first decade of transition, Slovenia tried to democratise its criminal procedure and in so doing looked to the example of countries that followed what it perceived to be more liberal, or in procedural language, more accusatorial practices. It strengthened the independence and impartiality of the judiciary; it tightened the standards required for the authorisation of nearly all of the investigative acts limiting the basic rights of citizens; it even introduced (against a number of protests) the ‘fruit of the poisonous tree’ doctrine<sup>35</sup> concerning the exclusion of evidence. Slovenia felt it was doing something good for democratisation. And now it is the ‘higher goal’ (protection of the EU’s financial interests) set by precisely those countries whose examples it was following, that will, it seems, oblige Slovenia to lower its labouriously acquired standards of criminal procedure.

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<sup>34</sup> A good example is the CJ project. As a Candidate Country, Slovenia wrote a 500-page report on the state of its national legislation; on extremely detailed questions of harmonisation, and on its assessment of how harmonisation could be achieved (Korošec, Šugman and Jager, 2001). All that was received in reply was a series of instructions and suggestions regarding those aspects of the legislation that were not consistent with CJ. Implicit in this was the assumption that the provisions of CJ were axiomatic, that Slovenia should respect these provisions and try to approximate them as closely as possible. Nobody responded to any of Slovenia’s criticisms or objections. There were several points at which Slovenia’s procedural standards were much higher, providing for a stricter interpretation of rules, a better position for the accused and greater respect for human rights (Korošec, 2001; Šugman, 2001) But there was no response whatsoever to the issue that Slovenia explicitly raised, namely, that the provisions of CJ would lower the country’s standards.

<sup>35</sup> The ‘fruit of the poisonous tree’ doctrine is the exclusionary rule with the broadest reach to be formed in American legal practice. According to the doctrine, courts must exclude not only illegally obtained evidence but also evidence obtained (whether legally or not) on the basis of this evidence (see *Wong Sun v. United States*, 371 U.S. 471 (1963)). Article 18/2 CPP: ‘The court may not base its decision on evidence obtained in violation of the human rights and basic freedoms provided by the Constitution, or on evidence which was obtained in violation of the provisions of criminal procedure (and which under the present Code may not serve as the basis for a court decision) or which was obtained on the basis of such inadmissible evidence’.

There is another vital question: how will the old and ever-present dilemma of how to ensure both liberty and safety be resolved in the case of EU criminal law? If we agree, at least partly, with the claim that in the case of the proposed EU criminal law the result is to favour the safety side of the coin, then the issues at stake are worth discussing in even greater detail.

On the one hand we have the figures showing the huge amounts of money involved in Community fraud (GP p.7). On the other hand, even if the figures can be interpreted in the way suggested by the GP, there is still the question of whether this ‘terrifying’ fraud calls for special measures, for more efficiency?<sup>36</sup> I certainly do not want to understate the significance of the objectives. Indeed, it is important that the funds be protected and the perpetrators of fraud punished. But is the proposed solution the only one available? Is EU fraud really such an enormous danger that we have to use special measures? Is the aim worth the price? And even more: is any aim worth the price? The logic of ‘special crime calling for special measures’ has a number of historical precedents, the logic of efficiency also. Both logics have usually (if not always) ended in contestable systems of law.<sup>37</sup>

We can observe similar tendencies not only in the case of the financial interests of the EU, but also with issues like ‘organised crime’,<sup>38</sup> ‘legal efficiency’ and so forth. We find ourselves in the paradoxical situation where, in the name of a higher goal, EU law (in broad terms) has shifted the legal framework from the

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<sup>36</sup> Fijnaut and Groenhuijsen (2002) claim that although there is a general assumption that anyone who still has questions about the legitimacy of the EPP is behind the times, the basic questions concerning the need for such an institution have still not been answered. There is no proof that most EU fraud is really connected to the organised crime that would demand special measures. There is also no evidence, that the traditional mutual assistance is inefficient (Fijnaut and Groenhuijsen, 2002: 324).

<sup>37</sup> Let me take a perhaps extreme example, but one which, for that very reason, will help to illustrate the point. History shows us that the inquisitorial process, with its image of criminal procedures that are utterly unfair and rotten, developed from the same logic. The heretics, the enemies of the only true religion, were considered so unworthy and so degenerate that they deserved only ‘the special treatment’. And that treatment included being subject to sweeping investigative powers. The same logic was often used in numerous trials against political prisoners, for example, after the Second World War in the former Yugoslavia.

<sup>38</sup> See Van Duyne in this volume and the connections typically made in legislation between organised crime and money-laundering (Van Duyne, 2003).

‘liberty side’ to the ‘security side’ of the coin, which in certain cases will result in legal solutions limiting the rights of the accused and the rights of other citizens far more than was the case in the last decade. In some cases those solutions will be even more repressive than they were in socialist times. Sometimes unbridled EU euphoria in the Candidate Countries, combined with such countries’ weak negotiating positions, lead legislators in them uncritically to copy measures without fully understanding their consequences or without questioning their necessity.<sup>39</sup> ‘Europe requires it of us’, is an unquestionable magic phrase that produces instant legislative changes.

I hope it is clear that, although I have taken Slovenian legislation as my example, it is not those specific national standards I am arguing in favour of. Every country could have similar objections in specific areas.<sup>40</sup> Ultimately, however, it is not even a question of good or bad, better or worse. Perhaps in the end it comes down to a question of *power*: who and in the name of what can tell us what is better and what is worse? And it comes down to a question of differences, to the well-known ‘particularisation versus universalisation’ debate. Is protection of the financial interests of the EU a cause for which it is worth losing all the few remaining but nevertheless important differences in our criminal law cultures? If, in the end, we ‘harmonise’ all of the differences, from whom will we learn?

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<sup>39</sup> It is the same with the decisions of the European Court of Human Rights. By failing to understand that these decisions represent merely the lowest common denominator of legal cultures ranging from the Albanian to the British, from the Armenian to the French, legislators in Slovenia are subject to strong tendencies to want to equalise the standards of criminal procedure in their country with the standards set by the European Court’s decisions. Usually the explanation that is given is that it is necessary to conform to ‘European standards’. However, in most cases that would mean limiting the rights of defendants and – equally importantly – the rights of other citizens, again with the illusion that something good was being done for democratisation.

<sup>40</sup> The Danish Minister of Justice, for example, accepted the Commission’s proposal in principle, but then followed this with a list of conditions, objections and questions. The list was so long that one had the impression that the minister had accepted the proposal not because of any real belief in it, but strictly out of political necessity (Fijnaut and Groenhuijsen, 2002: 325).

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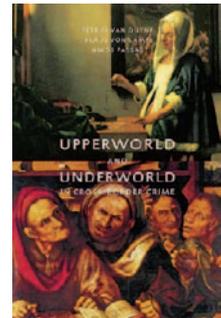
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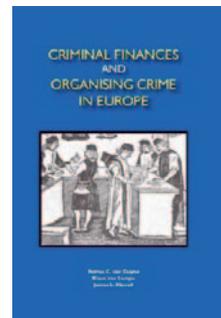
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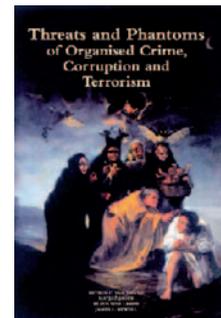
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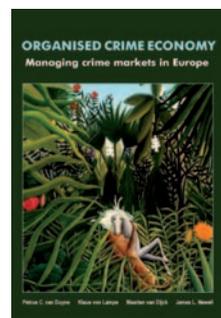
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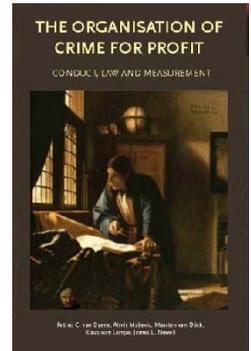
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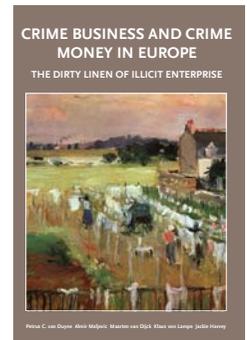
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As the European Union is taking a giant leap towards incorporating all of the “Old Continent”, Pan-European enthusiasm is dampened by lingering and newly fanned fears of such dark phenomena as organised crime, corruption and terrorism. In general, fear is a bad councillor, but it can be used as a very effective policy making tool, as is the case with organised crime and terrorism.

In this fourth volume of the European Colloquium Group on Cross-border Crime, expert researchers from Central and Western Europe critically examine these anxieties, the underlying threats and the feasibility of adequate responses. They raise crucial questions, including: how does the “management of fear” operate politically, to what extent are we successful in delineating and penetrating the underlying phenomena, and are we sufficiently aware of the political costs of current strategies to counter organised crime, corruption and terrorism?

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