

TWENTY YEARS LATER: THE NEW PERSPECTIVES OF THE PALERMO CONVENTION

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Abstract

This essay illustrates the modernity and prospects of the United Nations Convention against Transnational Organized Crime twenty years after its adoption. The author focuses on the potential contribution that the so-called "Falcone Resolution" could bring to the strengthening of international cooperation in the field of preventive measures on assets, judicial cooperation, and transnational investigations, in particular thanks to new tools such as joint investigative bodies, liaison magistrates and the use of special investigative techniques.

Key words: United Convention against Transnational Organized Crime; Falcone Resolution; international investigative and judicial cooperation; asset prevention measures.

Questo saggio illustra la modernità e le prospettive della Convenzione delle Nazioni Unite contro il crimine organizzato transnazionale a venti anni dalla sua adozione. L'autore si sofferma sul potenziale contributo che la cosiddetta "Risoluzione Falcone" potrebbe apportare al rafforzamento della cooperazione internazionale in relazione alle misure di prevenzione patrimoniali, alla cooperazione giudiziaria e nelle indagini transnazionali, in particolare grazie a nuovi strumenti quali i "*joint investigative bodies*", i magistrati di collegamento e l'uso di tecniche investigative speciali.

Parole chiave: Convenzione delle Nazioni contro il crimine organizzato transnazionale; risoluzione Falcone; cooperazione internazionale investigativa e giudiziaria; misure di prevenzione patrimoniale.

1. Twenty years later: the ever-increasing role of a Convention envisaged looking to the future

The United Nations Convention against Transnational Organized Crime (otherwise referred as UNTOC or the Palermo Convention) was signed in Palermo in December 2000.¹ But at first glance it seems written yesterday, or perhaps tomorrow. It is increasingly proving to be a great factor of innovation, an essential resource for the international community facing new challenges, a universal regulatory framework designed with a view to the future.

Indeed, its leading role and relevance to law in action have been understood by judges and prosecutors in many countries, including Italy, much more today than it was twenty years ago.

In 2000 the practical utility of the new instrument just approved by the UN was not adequately valued by the Italian judiciary also because the notion of organized crime contained in its article 2, having a very general content, did not seem to reflect the typical way of being of the Sicilian mafia, which had become a real "State within the State", capable of exercising widespread control over the territory and over all the economic activities exercised therein.

Moreover, many observers doubted that the initial adherence of 124 states to the UNTOC would be followed by a strong commitment to implement it effectively in all legal systems of countries affected by a large presence of organized criminal groups. Both of these views appear clearly outdated today in the light of more recent developments.

First of all, the broad definition of "organized criminal group" (which includes any structured group existing for a period of time and composed of at least three people

¹ See G. Micheli, G. Polimeni, *Il fenomeno del crimine transnazionale e la Convenzione della Nazioni Unite contro il crimine organizzato transnazionale*, in *Criminalità organizzata transnazionale e sistema penale italiano: la Convenzione ONU di Palermo*, Elisabetta Rosi (a cura di), Ipsoa, Milano, 2007, p. 1-31; Andreas Schloenhardt, *Palermo on the Pacific Rim: Organised Crime Offences in the Asia Pacific Region*, UNODC - Regional Centre for East Asia and the Pacific, Study Series, Bangkok, 2009; Ian Tennant, *The promise of Palermo. A political history of the UN Convention against Transnational Organized Crime*, Global Initiative Against Transnational Organized Crime, 2020. See also M. Cherif Bassiouni, Eduardo Vetere, *Organized Crime*, Transnational Publishers, New York, 1998; Dimitri Vlassis, *The global situation of transnational organized crime, the decision of the international community to develop an international Convention and the negotiation process*, in *Current situation of and countermeasures against transnational organized crime*, Unafei, Tokyo, 2002, p. 475-494.

acting in concert with the aim of committing serious crimes, in order to obtain a financial or other material benefit)² turned out not to be a weakness, but a great strength of the Palermo Convention, which has thus been applied to an extremely wide range of collective criminal phenomena, including cybercrime, environmental crimes and several illicit activities linked to international terrorism.

Moreover, what is more important, the number of States parties to the Palermo Convention has grown over time: currently their number is 190³ (while UN member states are 193). Now the UNTOC is one of the most widely ratified United Nations treaties and is close to universal adherence.

Such participation does not result in a merely formal and generic commitment, or in a simple expression of good will; instead it consists of a comprehensive set of incisive obligations, which include criminalization of a wide range of criminal conducts, procedural measures, judicial and police cooperation, prevention, protection of victims and witnesses, exchange and analysis of information, training and technical assistance, up to economic development.

The effectiveness of the above-mentioned obligations is furtherly enhanced by the fact that their implementation in the domestic legal systems of all countries will be monitored by means of the Review Mechanism,⁴ which has just entered into force.

The Palermo Convention has become the main way to make a qualitative leap in the fight against today's most dangerous criminal phenomena, even those that have not been the subject of any other universal legal framework.

The mutual trust of people engaged in the fight against crime in the various

² Francesco Calderoni, *La definizione normativa di criminalità organizzata tra istanze nazionali e internazionali*, in Andrea Di Nicola (a cura di), *Contro la criminalità organizzata in Europa. Una prima valutazione delle politiche penali ed extrapenali*, Franco Angeli, Milano, 2011, p. 14-15; Stefano Manacorda, *La "parabole" de l'harmonisation pénale: a propos des dynamiques d'intégration normative relatives a l'organisation criminelle*, in *Les chemins de l'harmonisation penale / Harmonising criminal law*, Mireille Delmas-Marty, Mark Pieth, Ulrich Sieber (eds), Société de Législation comparée, Paris, 2008; Vincenzo Militello, *Participation in an Organized Criminal Group as International Offence*, in *The Containment of Transnational Organized Crime: Comments on the UN Convention of December 2000*, Hans Jörg Albrecht, Cyrille Fijnaut (eds), Iuscrim, Freiburg, 2002, p. 97-112; Christian Ponti, *Crimini transnazionali e diritto internazionale*, Giuffrè, Milano, 2010.

³ Per un aggiornamento si veda <https://www.unodc.org/unodc/en/treaties/CTOC/signatures.html>

⁴ Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Ninth Session, Vienna, 15-19 October 2018, Resolution 9/1: "Establishment of the Mechanism for the Review of the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto".

continents is growing thanks to an ever more intense application of the Palermo Convention. We are witnessing the spread of a common culture and a shared awareness of the real extent of the common problems to be faced, similarly to that change in the collective way of thinking that in Italy has led to a joint commitment of all public institutions and the best expressions of civil society in addressing a problem that has no longer been considered to concern only traditional settlement areas.

2. The 10th Conference of the Parties to the Palermo Convention: the adoption of the 'Falcone resolution'

The crucial role of the Italian experience in this field has been confirmed by the outcome of the tenth Conference of the Parties to the Palermo Convention (COP), held in Vienna from 12 to 16 October 2020.

The Conference, opened by the Permanent Representative of Italy to the United Nations, Ambassador Alessandro Cortese, was participated in by over 1,100 delegates representing 121 countries, and ended with the approval of seven important resolutions, including the one entitled “Celebrating the twentieth anniversary of the adoption of the United Nations Convention against Transnational Organized Crime and promoting its effective implementation”⁵.

This resolution, presented by Italy, was immediately referred to by institutional communication and the media as⁶ the 'Falcone resolution' not only because it specifically mentions, through a nominative indication that is very rare in the context of official United Nations documents, the great example of life and work of Giovanni Falcone, who has become the symbol of the commitment to justice throughout the international community, but also because all the measures that are planned in it put into practice the Falcone method.

The 'Falcone resolution', in addition to “reaffirming the importance of the

⁵ CTOC/COP/2020/L.7/Rev.1.

⁶ See, for example, Alessio Ribaudò, *L'Onu vota la «risoluzione Falcone». Il metodo del giudice ispirerà la lotta alle mafie del mondo*, in “www.corriere.it”; *Mafie, ok a Vienna a "risoluzione Falcone". La sorella Maria: "Grande traguardo"*, in “www.repubblica.it.”

Convention and the Protocols thereto as the main global tools available to the international community to prevent and fight all forms and manifestations of transnational organized crime, and protect the victims”, designs their perspectives for the future in a very significant way.

Obviously, the resolutions of the COP are soft law instruments, emblematic of emerging modern trends in the international community, which do not impose international obligations on States⁷.

The lack of mandatory force does not mean, however, that resolutions do not have legal effects.⁸ In fact, they, in addition to having a political impact that is often fundamental, have a relevant legal value.⁹ In particular, in addition to creating an obligation for States to take them into account in good faith, they provide each member State with the right to implement them.¹⁰

Furthermore, they make an increasingly significant contribution to the formation of new customary rules. This is the case where the recommendations reflect *an opinio juris* and are followed by a conforming practice.¹¹

In general terms, it should be noted that the process of creating international standards is facilitated and accelerated by the existence of organizations – such as those operating within the framework of the United Nations – which constitute a forum for discussion and debate at universal level, where states can express and harmonize their respective positions. Within these international organizations, there is often a general consensus at least on the basic principles on which states intend to inspire their behavior. These principles can therefore form the essential regulatory source from which a subsequent compliant practice of the States originates, and therefore the basis for the formation or development of customary or conventional rules.¹²

The principles contained in the resolutions adopted by the relevant international

⁷ See Antonio Cassese, *Diritto internazionale*, Micaela Frulli (a cura di), Terza edizione, Il Mulino, Bologna, 2017, pp. 316-317.

⁸ Benedetto Conforti, *Diritto internazionale*, Editoriale scientifica, Napoli, 2018 (XI Edizione), p. 37, 130-131, 161 ss.

⁹ Patrick Daillier, Mathias Forteau, Alain Pellet, *Droit international public*, LGDJ, Paris, 2009, p. 417.

¹⁰ Patrick Daillier, Mathias Forteau, Alain Pellet, *op. cit.*, p. 418.

¹¹ Patrick Daillier, Mathias Forteau, Alain Pellet, *op. cit.*, p. 419.

¹² In this sense, Antonio Cassese, *Diritto internazionale*, *op. cit.*, p. 247.

conferences also play a fundamental role as a driving force for the legislative reforms to be introduced, and the guidelines to be followed throughout the process of interpretation and application of the laws, within the domestic legal systems of the States that are parties to the UN Conventions which have given rise to "transnational criminal law", building a network of multilateral obligations of criminalization and cooperation aimed at combating some of the most serious and widespread forms of crime at global level: namely, the Vienna Convention of 1988, the Palermo Convention of 2000, the Merida Convention of 2003.

These are, therefore, principles that 'point the way forward'¹³ in the development of both international law and domestic law implementing it, particularly in the field of the prevention and repression of illicit trafficking in narcotic drugs and psychotropic substances, transnational organized crime and corruption.

From the point of view of effectiveness, the role of the recommendations contained in the resolutions depends on the circumstances and the manner in which they are adopted: the legal and political authority of the body adopting them, the majority reached during the vote, the number and importance of the States expressing 'reservations' on this occasion, whether or not there are control mechanisms for implementing the recommendations.¹⁴

In the light of these parameters, it is clear that the role that the Falcone resolution can play in the near future is very incisive, because:

- it was adopted by the Conference of the Parties specifically established to improve the capacity of States to combat transnational organised crime and to promote and monitor the implementation of the Palermo Convention, which has almost universal membership;
- it was approved by *consensus*, without any opposition or reservation, and with the co-sponsorship of a large number of States,¹⁵ representative of very diverse geographical areas and political tendencies, at a meeting of historical importance, such as that held on the occasion of the 20th anniversary of the Convention;

¹³ *Ibidem*.

¹⁴ Patrick Daillier, Mathias Forteau, Alain Pellet, *op. cit.*, p. 420.

¹⁵ Precisely: the European Union and all its Member States, Albania, Algeria, Brazil, Canada, Colombia, Egypt, the Philippines, Japan, Guatemala, Honduras, Indonesia, Israel, Morocco, Mexico, Montenegro, Nigeria, Norway, Palestine, the United States, Sudan, and Thailand.

- it was accompanied by the launch of the effective operation of the Review Mechanism aimed at monitoring the implementation of the Convention in the domestic legal systems of all States, under the authority of the Conference of the Parties.

3. The first mention of the 'economic dimension of organized crime' in a UN document and the special modernity of the 'Falcone method'

The great innovative potential of the 'Falcone resolution' is made clear by its content, which launches a real program for the future of the fight against transnational organized crime, combining a broad overview with the indication of specific operational measures.

For the first time in a UN resolution, there is an express mention of the 'economic dimension' of transnational organized crime.

Such a concept,¹⁶ which is the most widespread paradigm used since the 1980s to illustrate the evolving dynamics of organized crime, includes the following aspects:

- a) the economic roots of crime
- b) the illegal markets managed by organized criminal groups
- c) the infiltration of organized crime into the legal economy
- d) the macroeconomic effects of organized crime on freedom of competition and development.

The preamble to the resolution stresses the importance of strengthening efforts to address the economic dimensions and manifestations of transnational organized crime, including through international cooperation.

This is not only a general principle, but also a precise guideline of criminal policy, to be implemented through a series of concrete measures, such as those relating to non-conviction-based confiscation.

¹⁶ See Federico Varese, *What is Organised Crime?*, in *Redefining Organised Crime. A Challenge for the European Union?*, Stefania Carnevale, Serena Forlati, Orsetta Giolo (eds.), Hart Publishing, Oxford and Portland, 2017, p. 33-40.

In order to plan the future of our economies and our democratic systems, in a historical phase in which the pandemic creates very dangerous opportunities for organized criminal groups capable of mobilizing enormous financial flows and thus influencing not only the business world but also the mechanisms to obtain the political consensus, the international community is building on a common framework of strategies and values that has its origin at a precise moment in our recent history.

Precisely in that season, certainly dramatic but full of signs of hope, in which the attack on the State launched by "Cosa Nostra" was fought, and won, by the courage and joint commitment of institutions and civil society, which became protagonists of a reaction that was not limited to criminal law but had a profound impact on the economy, politics and culture.

The intention to tackle the enormous financial power of organised crime, in order to defend democracy and the rule of law, is one of the most meaningful factors of continuity among all those who have dedicated their lives to the fight against the Mafia.

Indeed there is a very significant coherence between the first in-depth analysis of the economic dimension of the Sicilian Mafia, delivered by Carlo Alberto dalla Chiesa to the Anti-mafia Parliamentary Committee in 1971, the ideas expressed by magistrates like Gaetano Costa and Rocco Chinnici, the Rognoni-La Torre Law (which introduced the preventive measures on assets in the Italian legal system), the method developed by Giovanni Falcone, and the resolutions approved by the Conference of Parties to the Palermo Convention last October.

By reading these latest resolutions, everyone can realize the special modernity of the 'Falcone method', based on an in-depth analysis of the economic dimension of organized crime, on the use of the most advanced technologies in investigations and criminal proceedings, on the development of innovative forms of international judicial cooperation, on the awareness that the fight against the mafia can only be fought and won with the weapons of the rule of law and democracy.

As Giovanni Falcone said, "men pass, but their ideas remain and will continue to walk on the legs of other men".

The close link between the accumulation of huge economic resources resulting from

international criminal activities, the exploitation of the most sophisticated money laundering channels through illicit financial flows, and the strategy of "political-mafia terrorism", had been clearly underlined by Pio La Torre in 1980, after the murders of police officers, magistrates, politicians, and journalists such as Boris Giuliano, Gaetano Costa, Piersanti Mattarella and Mario Francese.

This is also the scenario that Rocco Chinnici had outlined - albeit with all the caution imposed by the need for a thorough verification - at the root of the murder of Pio La Torre.¹⁷

Significantly, Rocco Chinnici was one of the main supporters of the principles underlying the Rognoni-La Torre law, which he considered as "an instrument of exceptional validity", particularly because "it allows the use of means and instruments that can affect the mafia at the very heart of its activity: investigations in banks, control of contracts and sub-contracts."

The technique of banking and corporate investigations against organized crime was tested for the first time with extraordinary results in the 'Spatola trial', which was assigned by Rocco Chinnici to Giovanni Falcone. This choice marked a decisive turning point in the judicial history of Palermo and Italy, as highlighted by Gioacchino Natoli.¹⁸

The 'Spatola trial' was also the starting point for the opening of a new international horizon, which forever changed the characteristics of investigations on mafia. The experience developed over about ten years by Giovanni Falcone in the field of judicial cooperation involved the US, Canada, Brazil and other countries of Central and South America, as well as several States of Europe - starting with France and Switzerland - and all other continents, from Asia to Africa and Australia.

Such a historic turning point was followed by one of the most dramatic seasons of the life of our Republic. The decision to kill Giovanni Falcone, which was implemented through the massacre in Capaci on 23 May 1992, was the result of a convergence of interest between "Cosa Nostra" and other entities, as underlined by

¹⁷Rocco Chinnici, *L'Arcipelago della mafia*, in *L'illegalità protetta*, Glifo Edizioni, Palermo, 2017.

¹⁸ Gioacchino Natoli, *L'organizzazione giudiziaria antimafia*, in *Mafie d'Italia nel nuovo millennio: Analisi e Proposte*, a cura di Libera e Magistratura Democratica, Roma, 2005.

the court rulings issued in recent years.¹⁹

However, the method experienced in that trial has now become the main model on which the international community is planning the future of combating transnational organised crime, twenty years after the signature of the Palermo Convention.

4. The need for multilateral cooperation against the socioeconomic implications of the pandemic

The special importance of the aforementioned approach in the 'Falcone resolution' is furtherly reinforced by the preambular paragraphs expressing a serious concern about the penetration of organized criminal groups into the licit economy and, in this regard, about the increasing risks relating to the socioeconomic implications of the Covid-19 pandemic, which "create new opportunities for organized criminal groups and bring new challenges to the fight against transnational organized crime". The resolution stresses the importance of addressing these challenges through the effective implementation of the Palermo Convention and underlines the need for multilateral cooperation in this respect (operative paragraph 5).

Thus, the awareness of the enormous seriousness of the consequences of the current health emergency has given rise to a renewed sense of the indispensability of the commitment of States to effectively address the socioeconomic implications of the pandemic and the infiltration of the mafia in the business world.

¹⁹ See in particular the evidence referred to in the judgement issued on 20 April 2017 by the Court of Assizes of Caltanissetta in the so-called "Borsellino quater" trial.

5. The Palermo Convention as a legal basis for international cooperation in the field of preventive measures on assets

A measure capable of making a qualitative leap forward in action to combat the economic dimension of transnational organized crime is set out in operative paragraph 7 of the resolution, which encourages the States Parties to make use of the Palermo Convention as a legal basis for effective international cooperation for the purposes of the timely freezing, seizure, confiscation, and disposal of the proceeds of crime, including non-conviction-based proceedings.

The general category of non-conviction-based proceedings covers a wide range of modern forms of confiscation, applied following an asset-related trial, which does not need a conviction as a prerequisite. The prototype of this model is constituted by civil forfeiture increasingly widespread in common law countries (UK, USA, Australia, Ireland, etc.). Also, the Italian model of preventive measures on assets falls into this category.

The 'Falcone resolution', therefore, explicitly acknowledges that the Palermo Convention constitutes the legal basis for the execution of Italian preventive measures on assets also in the territory of foreign states, including those located outside the European Union.

This interpretation, marked by a very high degree of authority and universality, is fully consistent with the broad scope of the notion of confiscation, which, according to Article 2 of the UNTOC, means «the permanent deprivation of property by order of a court or other competent authority» and includes forfeiture where applicable.

The aforementioned formulation reiterates the wording already contained in Article 1 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna Convention of 1988), which, in turn, reflects the suggestions made by the second expert group meeting on the forfeiture of the proceeds of drug crimes, which took place in Vienna from 29 October to 2 November 1984, with the participation of Giovanni Falcone.

In expressing its desire to “provide an international instrument to deprive drug traffickers of proceeds of drug crimes”, the group of experts suggested that the “elements which might be included in any clause setting out definitions” should

comprise the following notion: “Forfeiture of proceeds: means an order by a court of criminal or civil jurisdiction or other competent authority for deprivation of proceeds derived from drug trafficking”.

There is no doubt that the provisions on confiscation contained in the Palermo Convention are applicable also to non-conviction-based proceedings.

A precise argument can be drawn in this sense from the wording of Article 2 of the UNTOC, which does not contain any specification either on the nature of the confiscation procedure or on the authority competent to issue the relevant decision. Consequently, such proceedings or authorities need not necessarily be of a judicial nature.

Such a wording is even more significant when compared with the definition contained in the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, drawn up within the Council of Europe and opened for signature in Strasbourg on 8 November 1990.

According to Article 1 of the Strasbourg Convention, “confiscation” means a penalty or a measure, ordered by a court following proceedings in relation to a criminal offence or criminal offences resulting in the final deprivation of property.

It is therefore clear that the scope of the Palermo Convention is wider than that of the Strasbourg Convention as regards the types of confiscation.

In that respect, it should be noted that the non-conviction-based confiscation ordered by a judicial authority was already covered by the provisions of the Strasbourg Convention. Indeed, the Explanatory Report to the Convention²⁰ provides the following clarifications:

“The definition of “confiscation” was drafted in order to make it clear that, on the one hand, the Convention only deals with criminal activities or acts connected therewith, such as acts related to civil in rem actions and, on the other hand, that differences in the organisation of the judicial systems and the rules of procedure do not exclude the application of the Convention. For instance, the fact that confiscation in some States is not considered as a penal sanction but as a security or other measure is irrelevant to the extent that the confiscation is related to criminal

²⁰ *Explanatory Report to the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime*, Council of Europe, European Treaty Series - No. 141.

activity. It is also irrelevant that confiscation might sometimes be ordered by a judge who is, strictly speaking, not a criminal judge, as long as the decision was taken by a judge. The term "court" has the same meaning as in Article 6 of the European Convention on Human Rights. The experts agreed that purely administrative confiscation was not included in the scope of application of the Convention. The use of the word "confiscation" includes also, where applicable, "forfeiture".

The Explanatory Report outlines the existence of

“considerable differences in respect of the procedural organisation of the taking of decisions to confiscate (decisions taken by criminal courts, administrative courts, separate judicial authorities, in civil or criminal proceedings totally separate from those in which the guilt of the offender is determined (these proceedings are referred to in the text of the Convention as "proceedings for the purpose of confiscation" and in the explanatory report sometimes as "in rem proceedings", etc.)”.

Such arguments lead to the conclusion that the Palermo Convention refers both to non-conviction-based confiscation ordered by a judicial authority, which also falls within the scope of the Strasbourg Convention, and to administrative confiscation, which is not included in the scope of application of the latter Convention.

The same conclusions can be reached on the basis of the indications contained in the *Legislative Guide for the implementation of the United Nations Convention against Transnational Organized Crime*,²¹ which makes reference to the “practice in some legal systems of not requiring a criminal conviction as a prerequisite to obtaining an order of confiscation” (no. 375).

Similarly, the *Commentary on the United Nations Convention against Illicit Trafficking in Narcotic Drugs and Psychotropic Substances*, published in 1998 by the UN,²² specifies that the provision on confiscation “has been carefully drafted to avoid specifying whether a court order is needed and what legal processes must be carried out. In particular, no reference is made to the use of criminal as opposed to civil forms of confiscation proceeding; in some States, both will be available” (pages 119-120).

²¹ <https://www.unodc.org/unodc/en/treaties/CTOC/legislative-guide.html>

²² United Nations publication, Doc. E/CN.7/590, October 1998.

Also, the questionnaire for the review of the implementation of the Palermo Convention, with specific regard to articles 12 and 13, explicitly invites States to provide, on a voluntary basis, information regarding both “whether their domestic legal framework allows for non-conviction-based asset confiscation”, and “whether their domestic legal framework allows for non-conviction-based asset forfeiture at the request of another State party”.²³ Furthermore, the use of non-conviction-based confiscation and the related international judicial and legal cooperation are included in the examples of “experiences and challenges in promoting cooperation to prevent and combat transnational organized crime more effectively”.

It is therefore clear that the Palermo Convention can make an important contribution to solving one of the major problems encountered so far by the national judicial authorities in the fight against the most serious forms of organized crime: that is, the issue of international cooperation for enforcement of preventive measures on assets located, in whole or in part, abroad.

The importance of what is at stake is quite evident if we take into account that in Italy, thanks to preventive measures, it has been possible to recover assets for tens of billions of euros from organized criminal groups.

At the European Union level, the issue was only addressed with the recent Regulation (EU) 2018/1805 of 14 November 2018²⁴ on the mutual recognition of freezing and confiscation orders. After the entry into force of the Regulation, the jurisprudence of the European and national courts will be able to clarify whether or not its provisions cover the preventive measures, which might perhaps fall within the scope of the concept of “confiscation orders issued within the framework of proceedings in criminal matters”, referred to in recital 13.²⁵

Such a concept certainly goes beyond the scope of Directive 2014/42/EU of 3 April 2014²⁶ on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, which pursued the objective of harmonizing national

²³ UN Doc. CTOC/COP/2020/L.4/Rev.18 October 2020, p. 81.

²⁴ See OJEU L 303/1, 28 November 2018.

²⁵ See Anna Maria Maugeri, *Il Regolamento (UE) 2018/1805 per il reciproco riconoscimento dei provvedimenti di congelamento e di confisca: una pietra angolare per la cooperazione e l'efficienza*, in “Diritto Penale Contemporaneo”, Rivista Trimestrale, 2019.

²⁶ See OJEU L 127/39, 29 April 2014.

legislations on the subject matter.

Indeed recital 13 specifies that the aforementioned term

“covers all types of freezing orders and confiscation orders issued following proceedings in relation to a criminal offence, not only orders covered by Directive 2014/42/EU. It also covers other types of order issued without a final conviction. While such orders might not exist in the legal system of a Member State, the Member State concerned should be able to recognise and execute such an order issued by another Member State”.

However, it is still controversial whether that term covers the Italian preventive proceedings, which do not involve the determination of a criminal charge and have been considered by the European Court of Human Rights as concerning “civil rights and obligations” within the meaning of the first paragraph of Article 6 of the ECHR.²⁷ In fact, according to recital 13, “freezing orders and confiscation orders that are issued within the framework of proceedings in civil or administrative matters should be excluded from the scope of this Regulation”.

De jure condito, the most widely used instrument to activate international judicial cooperation in relation to Italian preventive measures on assets has been the Strasbourg Convention. Of particular interest, in this regard, are the judgment issued on 13 November 2003 by the French Court of Cassation,²⁸ and the judgments pronounced on 2 June 2016, 21 January 2011 and 1st December 2010 by the Swiss Federal Criminal Court.²⁹

However, through the Palermo Convention, it is possible to obtain the enforcement of preventive measures on assets located abroad, as well as the related financial investigations as indicated in its Article 13, not only in a much wider territorial area (that of 190 States parties) but also to a much greater objective extent than under

²⁷ See, *inter alia*, the decision issued by the European Court of Human Rights on 5 July 2001 in the *Arcuri and others v. Italy case*.

²⁸ Giovanni Melillo, *L'esecuzione all'estero delle misure di prevenzione patrimoniali (Una interessante pronuncia della Corte di cassazione francese)*, in “Questione Giustizia”, 2004; Antonio Balsamo, G. De Amicis, *L'art. 12-quinquies della l. n. 356/1992 e la tutela del sistema economico contro le nuove strategie delle organizzazioni criminali: repressione penale “anticipata” e prospettive di collaborazione internazionale*, in “Cassazione. Penale”, 2005, p. 2078 ss.

²⁹ Emanuele Nicosia, *Il Tribunale penale federale svizzero accoglie una rogatoria della Procura di Milano finalizzata alla confisca “di prevenzione” di conti bancari*, in 11 luglio 2011, in www.penalecontemporaneo.it, 11 July 2011.

the Strasbourg Convention.

The Strasbourg Convention, in fact, has a more limited membership (made up of 49 States parties, all members of the Council of Europe, with the sole exception of Australia and Kazakhstan) and in any case requires the conduct of criminal proceedings, even if prior or parallel to a "trial on assets".

6. The enhancement of the Italian experience of the reuse of confiscated assets for social purposes in the international context

Not less important, from the point of view of enhancing the most meaningful Italian experience in the international context, is the operative paragraph 9 of the 'Falcone resolution', which makes explicit reference to the social reuse of assets for the benefit of communities as a model that the States Parties are encouraged to take into account in their respective national regulations.

As a result of this paragraph – which immediately follows the similar one already included at the request of the Italian delegation in Resolution 8/1 adopted on 20 December 2019 by the Eighth Conference of States Parties to the United Nations Convention against Corruption³⁰ – the social reuse of assets for the benefit of communities is included within that common framework of "agreed language", guidelines and commitments that forms the basis for further multilateral and bilateral initiatives on a subject, such as the disposal of confiscated proceeds, which is really topical not only for international cooperation, but also for technical assistance to several countries in which significant on-going legislative and institutional reforms may find their natural point of reference in the Italian experience.

This option aligns the UN legal framework of the United Nations with the most advanced trends in EU legislation, where Article 10 of Directive 2014/42/EU has imposed on Member States a procedural obligation to consider taking measures allowing confiscated property to be used for public interest or social purposes.

The formulation adopted in the aforementioned resolution has the positive effect of

³⁰ See <https://www.unodc.org/unodc/en/corruption/COSP/session8.html>

enhancing on the international scenario the overall inspiring logic of Italian Law No 109 of 7 March 1996, strongly supported by important expressions of civil society such as Libera and based on the consideration of the destination of confiscated assets as a form of compensation for communities that have been damaged by criminal phenomena.

This aspect has been highlighted in the 'Falcone resolution' as a link between the model of the social reuse of confiscated assets and the provisions of the Palermo Convention. The same was done, in relation to the corresponding provisions of the Merida Convention, through Resolution 8/1, entitled: "Strengthening of international cooperation on asset recovery and of the administration of frozen, seized and confiscated assets".

The fact that this model is mentioned in two recent United Nations resolutions is a strong boost to its extension to other countries, where the construction of a culture of legality plays a crucial role.

7. The new forms of international cooperation envisaged: joint investigative bodies using modern technologies, liaison magistrates, bilateral or multilateral agreements for the use of special investigative techniques

The resolution envisages a highly innovative set of tools in order to adapt the organizational models and investigation methods used in the context of international cooperation³¹ to the great changes that have affected the world of technology, communication, and the economy.

In particular, operative paragraph 11 invites States Parties to consider establishing new mechanisms that allow for the most effective and expeditious international cooperation, such as liaison magistrates and joint investigative bodies making use of modern technologies.

Such instruments that can take on strategic value in the fight against a wide range

³¹ See. Ercole Aprile, Filippo Spiezia, *Cooperazione giudiziaria penale nell'Unione Europea prima e dopo il trattato di Lisbona*, Ipsoa, Milano, 2009.

of criminal phenomena, including trafficking in human beings, illicit drug and arm trafficking, many serious criminal activities related to international terrorism.

The invitation to appoint liaison magistrates is certainly likely to promote a further extension of the important experience developed in recent years at the Public Prosecutor's Offices of Palermo and Catania and at the National Antimafia and Counter-Terrorism Directorate, where, in the context of projects carried out in partnership with UNODC and the Italian Ministry of Foreign Affairs, it was possible to benefit of the cooperation of three magistrates, respectively from Nigeria, Ethiopia and Eritrea.³²

A significant peculiarity of this experience consists of the enhancement of the functions of the liaison magistrate, employed not only as an intermediary (or facilitator of contacts) between the competent authorities of two countries, but also as a real partner in investigation. The advanced model of cooperation thus created has been described as a “co-working system”, where the liaison magistrate performs the functions of an investigative link with the host country, working side by side with the Italian prosecutors. The liaison magistrate participates personally in operational and coordination meetings, learning new techniques and building up new experiences, and, at the same time, providing the Italian colleagues with his/her know-how and legal/judicial knowledge, and with the keys to decrypt criminal behavior and strategies.³³

The concept of “joint investigative bodies”, referred to in the ‘Falcone resolution’, is based on the text of Article 19 of the Palermo Convention and may include a plurality of advanced forms of judicial cooperation, some of which have already been extensively tested with important results – as in the case of “joint investigative teams” – while others are still to be explored and can give rise to legal developments

³² Federico Cafiero de Raho, *La Convenzione di Palermo per il contrasto globale del crimine organizzato*, presentation delivered at the high-level side event held on 12 October 2020 on “The Palermo Convention 20 years after: celebrating its anniversary and unleashing its full potential through the implementation of the review mechanism”, in “www.dirittopenaleglobalizzazione.it”; Chervine Oftadeh, Annalisa Pauciullo, *Rethinking Judicial Cooperation between Africa and Europe*, in *Eucrim*, 2019, 3, p. 194-198.

³³ G. Russo *Strengthened judicial cooperation between Nigeria and Italy: key results and case briefs*, presentation delivered at the COP side event held on 14 October 2020 on “Deploying African Liaison magistrates to fight transnational organized crime: Building on the Nigerian experience” (<https://www.unodc.org/unodc/en/treaties/CTOC/CTOC-COP-session10.html>).

of extraordinary interest. An increasingly stronger coordination of investigations may lead to the creation of an official legal entity with its own investigative functions complementary to the tasks of the other investigating bodies of the States involved.³⁴

Recently, within the activity of the Working Groups of the Conference of the Parties to the Palermo Convention, it was stressed that a distinction could be drawn between “joint investigative teams”, established for a limited duration and for the specific purpose to carry out investigations on particular criminal cases, and “joint investigative bodies”, having a more permanent structure and suitable for investigating certain types of crime over a longer period of time.³⁵

Both “joint investigative teams” and “joint investigative bodies” are formed on the basis of bilateral or multilateral agreements or arrangements and may include magistrates (such as prosecutors and investigative judges) or law enforcement officers of two or more States. The special usefulness of carrying out investigations through the use of the most modern technologies by these advanced judicial cooperation structures was highlighted, in particular, in relation to the need to combat the phenomenon of migrant smuggling managed by transnational organized criminal groups in ways that often overlap with trafficking in human beings.³⁶

Equally important is operative paragraph 12, which encourages States parties to make effective use of special investigative techniques for the purpose of effectively combating organized crime, and to conclude appropriate bilateral or multilateral agreements or arrangements for the use of such techniques in the context of international cooperation.

In this respect, it should be stressed that the category of “special investigative techniques”, as regulated by Article 20 of the Palermo Convention, includes undercover operations and, even more significantly, electronic surveillance, which

³⁴ Antonio Balsamo, Andrea Mattarella, Roberto Tartaglia, *La Convenzione di Palermo: il futuro della lotta alla criminalità organizzata transnazionale*, Giappichelli, Turin, 2020, p. 360.

³⁵ See the *Background paper* prepared by the Secretariat for eleventh session of the Working Group on International Cooperation, held in Vienna on 7 and 8 July 2020, on the topic: *The use and role of joint investigative bodies in combating transnational organized crime*.

³⁶ A meaningful intervention on this point was made by the Vice- President of Eurojust, Filippo Spiezia, at the seventh session of the Working Group on the Smuggling of Migrants, held in Vienna on 8 and 9 September 2020.

covers all the most advanced forms of collection of digital evidence and interception of communications made possible by technological evolution, such as the so-called "captatore informatico" (i.e. roving bug).

The latter tool is one of the most modern forms of electronic surveillance, allowing judicial authorities to lawfully bypass the adverse impact of encryption capabilities on the efficiency of investigations.

Even the simplest and most widespread communication encryption systems seriously hinder the functioning of traditional interception tools. It is therefore necessary to make use of the "captatore informatico", which allows the judicial authority to obtain, through a simple technological mechanism (in particular, a *Trojan horse* program installed in a hidden way on an electronic device), the effects of a plurality of means of collection of evidence in the all areas of audio surveillance, visual surveillance, tracking surveillance and data surveillance: wiretapping, bugging, interception of IT communications, videotaping, search of an electronic device, seizure of electronic data, etc.

The recent legislation enacted in Italy³⁷ and in other countries has struck a fair balance between the competing needs to update investigative capacities and to strengthen the protection of fundamental rights. Encrypted communications can now be subject to investigations, but, at the same time, specific provisions have been adopted to ensure that the related restrictions on the right to privacy are consistent with the principles of legality, necessity, and proportionality.³⁸

It is clear, however, that, in the absence of an adequate legal basis for its use on targets located abroad, electronic surveillance could become a blunt weapon:

³⁷ Legislative decree no. 216 of 29 December 2017, Law no. 3 of 9 January 2019, Decree law n. 161 of 30 December 2019 converted into Law no. 7 of 28 February 2020.

³⁸ In particular, the new provisions introduced in the Italian legal system include the requirement of prior judicial authorisation by the judge presiding over the preliminary investigations on the application of the public prosecutor. This authorisation may be granted only if the judge considers the use of the tool to be absolutely necessary for the continuation of the investigation. Additional safeguards concern the scope of the use of trojan horse for interceptions, which is limited to mafia-related crimes, terrorism, and serious offences against public administration, within the framework of a common strategy against corruption and organized crime, based on the main principles established by UNCAC and UNTOC. Further legislative provisions, protecting against the overuse or abuse of a trojan's extensive functionalities, entail the limitation of its duration, the secure storage of data, the deletion of non-relevant data, the full removal of the software from the targeted device once an investigation has finished.

national borders, which are not a real obstacle to several forms of illicit trafficking, would prevent the efficient functioning of the most modern investigative tools, just in a historical phase characterized by a rapid evolution both of the global communications system and of the way of acting of organized crime (increasingly accompanied by the use of information technology, even outside the area of cybercrime in the strict sense: it is enough to mention the key role of IT communications for the development of international terrorism, arms and drug trafficking, trafficking in human beings, illicit trafficking in cultural property, money laundering, etc.).

Therefore, the new investigation tools made possible by technological development can express their potential in relation to transnational criminal phenomena if they are included in the framework of international judicial cooperation on the basis of appropriate bilateral or multilateral agreements.

An important step in this direction with reference to the Merida Convention was taken by its eighth Conference of States Parties, which on 20 December 2019 adopted Resolution 8/6 entitled: "Implementation of international obligations to prevent and combat bribery as defined under the United Nations Convention against Corruption". Indeed, its operative paragraph 18 encourages States parties to conclude appropriate bilateral or multilateral agreements or arrangements, for the use of special investigative techniques in the context of international cooperation to investigate and prosecute transnational bribery cases.

The same approach has now been followed also in the implementation of the Palermo Convention through operative paragraph 12 of the 'Falcone resolution', which refers to all forms of organized crime, as well as to the related proceeds.

The perspectives opened by operative paragraphs 11 and 12 are particularly important also because they allow EU countries to cooperate effectively with third countries in the fight against criminal phenomena with a global dimension, removing obstacles to the collection of evidence in places where the public institutions often go through a difficult process of reconstruction, while large areas of the territory may still be under the control of organized criminal groups or terrorist organizations engaged in various illicit activities.

This development has been accompanied by a significant change in the overall role

of judicial cooperation, which is no longer confined to a purely intergovernmental perspective, and is, instead, firmly rooted in the protection of fundamental human rights, based on the recent jurisprudence of the Strasbourg Court, within the framework of an evolutionary interpretation of the provisions of the ECHR in the light of the Protocol on trafficking in persons additional to the Palermo Convention.³⁹

8. The key role of the Palermo Convention in combating new and emerging forms of crime (cybercrime, environmental crimes, illicit trafficking in cultural property, international terrorism etc.)

In the preambular part of the 'Falcone resolution', the reaffirmation of the importance of the Convention as the main global tool available to the international community to prevent and fight all manifestations of transnational organized crime is accompanied by the awareness of its continued relevance "in countering new, emerging and evolving forms of transnational organized crime".

This wording highlights the special modernity of an international Treaty whose scope of application covers:

- a) "historical" mafias (such as "Cosa Nostra", the 'ndrangheta, the Camorra);
- b) "new mafias" of foreign origin;
- c) white-collar crime, whether economic or administrative in its nature; among the crimes expressly regulated by the Convention there are, significantly, money laundering and corruption;
- d) some specific criminal phenomena that have turned into global emergencies as a result of climate change, economic and social inequalities, situations of political-institutional instability and, last but not least, the pandemic, such as trafficking in human beings, smuggling of migrants, illicit manufacturing of

³⁹ See Serena Forlati, *The notion of Organised Crime and the European Convention on Human Rights*, in, *Redefining Organised Crime. A Challenge for the European Union?*, *op. cit.*, p. 171-190; Maria Assunta Accili Sabbatini, *La Convenzione di Palermo e i negoziati per il rafforzamento della cooperazione internazionale*, in "Rivista di Studi e Ricerche sulla criminalità organizzata", 2019, 4, p. 35-37.

and trafficking in firearms; from this point of view, the choice to focus the three additional protocols to the Convention on these types of crime certainly appears far-sighted;

e) a wide range of serious criminal phenomena of a collective nature, including those which had very different characteristics at the time the Convention was signed, such as:

- cybercrime, and more generally the use of communication and information technologies for criminal purposes; this is the challenge faced by some of the most relevant measures envisaged by the "Falcone resolution" (e.g. joint investigative bodies making use of modern technologies; bilateral or multilateral agreements for the use of electronic surveillance in cross-border investigations; cooperation between public authorities and communication service providers);
- environmental crime, which is the target of the resolution adopted on 16 October 2020 by the Conference of the Parties on the initiative of France and aimed at "preventing and combating crimes that affect the environment falling within the scope of the United Nations Convention against Transnational Organized Crime";
- manufacturing of and trafficking in falsified medical products: an issue which is highly topical due to the Covid-19 pandemic and is specifically addressed by another resolution adopted by the Conference of the Parties on the initiative of Belgium;
- illicit trafficking in cultural property, which is the main subject of the resolution adopted by the same Conference of the Parties on the initiative of Egypt for the purpose of "combating transnational organized crime against cultural property";
- some of the most serious crimes linked to international terrorism; in this regard, the preambular part of the 'Falcone resolution' calls upon all States to recognize the links between transnational organized crime activities and acts of terrorism, and to apply the Convention in combating all forms of criminal activity which fall within its scope.

The Palermo Convention therefore emerges, with increasing importance, as an

instrument of general scope, flexible and able to adapt to the evolutionary dynamics of all the most dangerous criminal phenomena, including those that are not expressly mentioned in its text but, at the same time, have not yet been the subject of international Treaties with an almost universal membership.

9. The strategy of proactive financial investigations against organized crime, corruption, money laundering and terrorist financing

One of the main guidelines planned by the 'Falcone resolution' in order to effectively combat the economic dimension of criminal phenomena is a strategy focused on illicit financial flows linked to the proceeds of crime, as part of a general approach aimed at addressing the links between organized crime, corruption, money laundering, and other serious crimes falling within the very wide scope of the Convention, as set out in operative paragraph 4.

This perspective is further developed in operative paragraph 6, which contains a call to States to conduct proactive financial investigations in order to identify and disrupt any possible linkages between existing and emerging manifestations of transnational organized crime, money-laundering and the financing of terrorism.

Such a strategy is closely connected to the holistic approach which is typical both of UNTOC and UNCAC.

10. The forthcoming commitments requested from UNODC

Operative paragraph 15 of the 'Falcone resolution' contains a precise plan of the forthcoming activities to be carried out by the UNODC (United Nations Office on Drugs and Crime) within its mandate, to provide technical assistance and capacity-building to Member States. In particular, the following activities are expressly mentioned:

a) advisory services or *ad hoc* legislative assistance, including on the basis of model legislative provisions;

- b) assistance in the development of national strategies to prevent and fight transnational organized crime;
- c) promotion of modern types of international judicial and law enforcement cooperation, such as the establishment of specialized judicial and law enforcement units and asset recovery networks, as well as those aimed at expediting procedures for extradition and mutual legal assistance;
- d) updating of model instruments and publications, such as the Guide on *Current practices in electronic surveillance in the investigation of serious and organized crime*, the *Model Law on Mutual Assistance in Criminal Matters*, and the *Manual on Extradition and Mutual Legal Assistance*, also with a view to including provisions and updated material on the use of special investigative techniques and the gathering of electronic evidence.

Furthermore, operative paragraph 14 encourages Member States to populate, update and use the knowledge management portal SHERLOC (Sharing Electronic Resources and Laws on Crime),⁴⁰ developed by the UNODC, in order to facilitate international cooperation in criminal matters and promote the sharing of good practices and experiences.

11. Not just repression. The involvement of civil society and the fight for rights and freedoms

The 'Falcone Resolution' makes a clear choice in favour of a cultural approach that considers the fight against organized crime an essential step to guarantee the human rights and fundamental freedoms of all, in particular the most vulnerable people.

The need to accompany repressive action with a strong commitment to economic development – and in particular, to ending poverty in all its forms – is emphasized by the preambular paragraph that outlines the close interrelationship between the fight against organized crime, the achievement of the Sustainable Development Goals and the full implementation of the principles of the rule of law.

In fact, the UNTOC can be considered a *bridge convention*, able to connect the specific

⁴⁰ <https://sherloc.unodc.org/cld/v3/sherloc/>.

field of contrast against transnational serious crimes to the main idea, pervading the United Nations, of the rule of law as a precondition of a well ordered, safe, fair, and equal society.⁴¹

Based on the awareness – common to all the magistrates who have dedicated their lives to the fight against organized crime – of the “insurmountable limits of the judicial response to the mafia”,⁴² the resolution tends to create a “virtuous circle” of collaboration between the different institutions and the best energies of civil society,⁴³ private sector and academia.

It is no coincidence that the tenth Conference of the Parties was participated in by some of the most significant expressions of the Italian civil society, such as the Falcone Foundation, the Pio La Torre Center, Libera.

Of particular interest is operative paragraph 13, which invites States to adopt measures to strengthen cooperation between their judicial and law enforcement authorities and the private sector, including communication service providers and the financial sector, in preventing and combating emerging manifestations of transnational organized crime. This paves the way for a closer cooperation between public institutions, banks, and internet providers to combat cybercrime and all forms of use of new technologies for illicit purposes.

The system of values on which the resolution is based finds its most significant expression in the preambular paragraph that pays “special tribute to all those persons, such as Judge Giovanni Falcone, whose work and sacrifice paved the way for the adoption of the Convention” and affirms “that their legacy lives on through our global commitment to preventing and combating organized crime”.

The approach adopted today by the United Nations on the fight against transnational crime is meaningfully consistent with the expectation of an internationalization of criminal law implemented through a framework of guarantees thanks to which the

⁴¹ G. Salvi, *Convention as an instrument to enhance international judicial and law enforcement cooperation*, presentation delivered at the high-level side event held on 12 October 2020 on “The Palermo Convention 20 years after: celebrating its anniversary and unleashing its full potential through the implementation of the review mechanism”.

⁴² Paolo Borsellino *Preface* to Rocco Chinnici, *L'illegalità protetta. Attività criminose e pubblici poteri nel meridione d'Italia*, La Zisa, Palermo, 1990.

⁴³ See Christian Ponti, *Le prospettive della Convenzione di Palermo e il ruolo della società civile dopo l'istituzione del Review Mechanism*, in “Rivista di Studi e Ricerche sulla criminalità organizzata”, 2019, 4, p. 54.

"right to hope" and the "revolution of dignity" can be extended to a truly universal dimension, in such a way as to include the collective right to hope for the strength of democracy as a means of protection for everyone against organized violence.⁴⁴

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⁴⁴ Nando dalla Chiesa, *Introduzione*, in *La Convenzione di Palermo: il futuro della lotta alla criminalità organizzata transnazionale*, Antonio Balsamo, Andrea Mattarella, Roberto Tartaglia, Torino, 2020.

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