

# Transnational Organized Crime and the UN Convention

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**Abstract:** The United Nations Convention against Transnational Organized Crime, as well as regional, national, and international collaboration to prevent and control transnational organized crime, are discussed in this paper. It investigates the transnational organized crime implementation mechanism and jurisdiction in light of international criminal law and the crimes and elements covered by the Convention. The paper recognizes that, as the importance of international criminal law in combating transnational organized crime grows, the ICC's approach to bringing transnational organized crime under its jurisdiction is gained importance. The main conclusion is that implementing the Convention's prevention and protection mechanism for transnational organized crime has been difficult; hence the ICC's jurisdiction would have an impact on the ground.

**Keywords:** Transnational Organized Crime, the UN Convention, corruption, obstruction of justice, serious crime.

## 1. GENERAL EXPLANATIONS

By the 1980s, organized crime was essentially considered an internal problem of a few states; with ongoing globalization, the phenomenon has increasingly developed into a transnational challenge. Transnational organized crime structures, which benefit more and more from the opportunities offered by the developing technology, have become a threat to all countries with their extensive cross-border activities. In parallel with the increasing trend of the danger that organized crime organizations bring to the security of countries as well as to their social and economic development, the importance that governments attach to combat this problem became a driving force. The emergence of global terrorism has given a further dimension to the problem.<sup>1</sup>

Bringing to light the need for improved international regulators, frameworks, and better capacity building by States will include new tools and strategies for combating impunity.<sup>2</sup> Because it undermines both the internal stability and social/economic conditions, "the issues of fighting against transnational organized crime affect all states without exception. Therefore, "the formation of national legislation in this area should consider the international experience in combating this

phenomenon and utilize international legal acts that serve as the basis for creating not only specific norms but also a national policy to counteract transnational organized crime."<sup>3</sup> Although international efforts to combat organized criminality are still nascent,<sup>4</sup> the national level, most of the conduct engaged in by "organized crime" is subject to existing substantive criminal norms. Yet, on an international scale, most of the antisocial behavior attributable to "organized crime" has to be defined as a transnational offense.<sup>5</sup>

Transnational organized crime (TOC) was recognized as a separate crime through UNGA Res. 55/25 of 15 November 2000. Although such UNGA resolutions are not binding, the United Nations Convention against Transnational Organized Crime (UNTOC) is a milestone in promoting and preventing transnational organized crime. For the first time in the history of international cooperation against transnational organized crime, the UN Convention has dealt with suppressing the phenomenon at the universal level. A high-level conference was held in Palermo, Italy, from 12 to 15 December 2000, where the Convention and the Protocols were open for signature. The Convention entered it into force in 2003, and representatives of 147 states signed the

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<sup>1</sup>Standing, André. *Transnational Organized Crime and the Palermo Convention: A Reality Check*. New York, NY: International Peace Institute, 2010.

<sup>2</sup>Pierre Hauck/ Sven Peterke (eds.): *International Law and Transnational Organized Crime*. Oxford University Press, Oxford 2016, xlvii+555 pages, ISBN 9780198733737.

<sup>3</sup>Saida Seilkhanova, Aigerim Shegebayeva, Azina Otarbayeva & Yestay Abilezov, *Criminal Procedure Aspects of the International Cooperation of States in the Field of Combating Transnational Organized Crime*, 10 J. ADVANCED Res. L. & ECON. 903 (2019).

<sup>4</sup>The Reports of the Council of Europe Committee on Crime Problems, Select Committee of Experts on International Cooperation as Regards Search, Seizure and Confiscation of the Proceeds from Crime, (1987-1989) <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800cb5de>

<sup>5</sup>Bassiouni, M. Cherif, ed. *A draft international criminal code and draft statute for an international criminal tribunal*. Martinus Nijhoff Publishers, 1987.

Convention consisting of 41 articles contained in 47 pages of text.<sup>6</sup>

*"With the signing of the United Nations Convention against Transnational Organized Crime in Palermo, Italy, in December 2000, the international community demonstrated the political will to answer a global challenge with a global response. If crime crosses borders, so must law enforcement. If the rule of law is undermined not only in one country but in many, then those who defend it cannot limit themselves to purely national means. Suppose the enemies of progress and human rights seek to exploit the openness and opportunities of globalization for their purposes. In that case, we must exploit those very same factors to defend human rights and defeat the forces of crime, corruption, and trafficking in human beings." -- Kofi Annan, United Nations Secretary-General*

This study purposes to analyses the nature of transnational organized crime and its reflection on the UN Convention (Palermo Convention), which includes different types of crimes within the scope of application. The paper will neither focus on analysing the conjunctions and the increasing nexus between terrorism and transnational organized crime nor reflect on how TOC has changed over almost two decades. This first-hand literature review will meet two objectives: a) to obtain the knowledge of TOC and the international instruments taking measures against it, and b) to analyses the critics for the implementation mechanism of the UN Convention through the ICC. The body of literature on the seriousness of measures against TOC is diverse and often merely expressive.

### **1.1. The Concept of Transnational Organized Crime (TOC)**

"Organized crime" entered the lexicon of news commentators and reporters.<sup>7</sup> The U.S. President Herbert Hoover employed the term "organized crime" in his Annual Message to Congress on the State of the Union on December 3, 1929.<sup>8</sup> he expression

"transnational crime" first developed by the United Nations Commission on Crime Prevention and Criminal Justice to identify certain criminal phenomena transcending international borders, transgressing laws of several states, or having a global impact."<sup>9</sup> In 1994, the UN World Ministerial Conference was held in Naples and summit recognized and summarized "a number of strategies and interventions in the prevention and control of organized crime that transnational organized crime is a global phenomenon and a common strategy should be pursued aimed at "defeating the economic power of criminal organizations, which should involve both criminal law measures, in particular appropriate sanctioning and sentencing, and adequate regulatory mechanisms." However, "transnational organized crime" (TOC) was a largely criminological term, and it was defined by the state that has claimed jurisdiction. The fact that no single country, no matter how strong, can fight against transnational organized crime alone has led the international community to adopt a legal basis in the combat against transnational organized crime.

Crime prevention and treatment of offenders were on the agenda of the UN, and its regular international conferences were held every five years. However, for the first time, the category of organized crimes under consideration was defined as 'transnational' where issues related to organized crime were examined and discussed was the Fifth United Nations Congress.<sup>10</sup> The first undoubtedly comprehensive discussion on TOC was made in the United Nations Convention against Transnational Organized Crime. The Convention does not include the definition of transnational organized crime or organized crime. A clear explanation has been avoided since transnational organized crimes do not occur in all cases and can change over time. The Convention "determines to deny safe havens to those who engage in transnational organized crime," which reflects the conscious word choice of TOC.

Andre Bossard, Secretary-General of the International Criminal Police Organization (INTERPOL), has written that elements constituting transnational crime are; the crossing of a border either

<sup>6</sup>Accessed 19 August 2021. [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mdsg\\_no=XVIII-12&chapter=18&clang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mdsg_no=XVIII-12&chapter=18&clang=en)

<sup>7</sup>Chicago Vice Profit Put at \$13,500,000, N.Y. TIMES, May 22, 1928, at 10; Philadelphia Judge Opens War on Gangs, N.Y. TIMES, Aug. 18, 1928, at 15.

<sup>8</sup>President Herbert Hoover, Annual Message to Congress on the State of the Union (Dec. 3, 1929). The term infrequently appeared in popular usage but it became more common after 1930.

<sup>9</sup>Zagaris, Bruce. " Transnational Organized Crime. In International White-Collar Crime: Cases and Materials (pp. 168-211). Cambridge: Cambridge University (2015)

<sup>10</sup>United Nations Office on Drugs, and Crime. Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention Against Transnational Organized Crime and the Protocols Thereto. University of California Press, 2006.

by people (criminals, fugitives on the way to commit a crime, or victims-such as in the case of traffic in human beings) or by things (firearms-such as when terrorists put arms on a plane before take-off, techniques of money laundering).<sup>11</sup> The complexity of transnational organized crime does not authorize simple generalizations; there is no prototypical crime cartel.<sup>12</sup> Instead, the Convention defines "an organized criminal group." However, "the most obvious distinction between organized crime and other forms of criminal behaviour is that it is "organized." Organized crime largely focuses on planned, rational actions that reflect a collective effort, rather than random, unplanned, and individual criminal acts."<sup>13</sup> These characteristics include the purpose of organized crime to profit through crime financially.<sup>14</sup> In organized crime, mainly corruption, intimidation, threat, and force are also applied. However, the notion of TOC has been explained through standard features, the legal definition of the term is needed for further analysis.

The legal assistance strategy in international cooperation aimed at battling transnational organized crime is carried out through bilateral or multilateral treaties and within the framework of international organizations. The latter falls directly in line with the engagement to fight transnational crime. The United Nations aimed to put conventional international efforts to fight against transnational organized crime legally. The UN Convention, which forms part of this objective, represents one of the most critical developments in international criminal law.

## 2. INTERNATIONAL EFFORTS

The evolution of international cooperation against transnational organized crime started from the fight against piracy in the seventeenth century to the formal loots of criminal police cooperation in the late nineteenth century and the developments of the modern era.<sup>15</sup> By the beginning of the Cold War, the fight against transnational crime at the international level began when the negative influence of

international criminal syndicates on the economy of some states intensified and the whole international community perceived transnational crime as a serious threat. In the context of fighting against organized crime, the European legal framework has mainly developed in parallel with the United Nation's initiatives. The UN activities are crucial for the formation of a legislative framework in order to combat transnational crimes and ensure their theoretical understanding.

### 2.1. The EU

VI of the Treaty on European Union<sup>16</sup> provides the legal framework for all EU countries in the fight against crime. This clause added to the Amsterdam Treaty attempts to respond to the rapidly spreading transnational organized crime in the European Union region. Even if the EU system allows it to control a holistic structure with the single market and Schengen system, it cannot effectively deal with criminal groups beyond national borders that affect its borders. Consequently, tackling transnational organized crime and coordinating measures within and outside its walls, organized crime may be regarded as a top priority for the EU in its effort to create an 'area of freedom, security, and justice.'<sup>17</sup> As stated by the justice minister of Sweden, Thomas Bodström, "*the outcome of the European Council in Tampere in October 1999 was a fundamental step that addressed the fight against serious organized and transnational crime.*"<sup>18</sup>

The multifaceted efforts put in place to fight transnational organized crime, as it represents, along with terrorism and drug trafficking, one of the three areas where member states are called continuously to adapt their effort to establish minimum law enforcement mechanisms with constituent elements and penalties. Organized crime also appears to be a target of police cooperation in the joint evaluation of the member states' specific investigative techniques and authorities that play a central role. The EU has advanced its legal framework for cooperation in criminal matters by becoming a party to the UN Convention. It became the first international organization to sign. Under Article 36 of the Convention, it is regulated as "this Convention shall also be open for signature by regional economic

<sup>11</sup>Secretary-General of the International Criminal Police Organization (INTERPOL) between 1978 and 1985- McFarlane, John. "Transnational crime, corruption, and crony capitalism in the twenty-first century: An Asia-Pacific perspective." *Transnational Organized Crime* 4, no. 2 (1998): 1-30.

<sup>12</sup>Shelley, Louise I. "Transnational Organized Crime: An Imminent Threat to The Nation-State?" *Journal of International Affairs* (1995): 463-489.

<sup>13</sup>E4J University Module Series: Organized Crime Module 1: Definitions of Organized Crime: <https://www.unodc.org/e4j/en/organized-crime/module-1/key-issues/defining-organized-crime.html>

<sup>14</sup>Accessed 18 August 2021. <https://www.unodc.org/e4j/en/organized-crime/module-1/key-issues/defining-organized-crime.html>

<sup>15</sup>Madsen, Frank. *Transnational Organized Crime*. Routledge, 2009.

<sup>16</sup>Treaty on European Union, Title VI, Provisions on Police and Judicial Cooperation in Criminal Matters, OJC 340, 10.11.97

<sup>17</sup>Series, Civil Liberties. "The European Union and the United Nations Convention against Transnational Organized Crime."

<sup>18</sup>Ruyver, Brice. *Strategies of the EU and the US in Combating Transnational Organized Crime*. Maklu, 2002.

integration organizations in the extent of their field of competence."<sup>19</sup>

## 2.2. The UN Convention

The international community has given legal answers to this global challenge by adopting the United Nations Convention against Transnational Organized Crime ("the UN Convention"). General Assembly resolution 55/25 of 15 November 2000<sup>20</sup> was adopted and included the Convention and two additional protocols, which are the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Protocol I) and the Protocol against the Smuggling of Migrants by Land, Sea, and Air, supplementing the United Nations Convention against Transnational Organized Crime (Protocol II). The states not to ratify only the UN Convention but also two protocols as well. Under Article 17 of the UN Convention, "regional economic integration organizations' this Protocol shall enter into force on the ninetieth day after the date of deposit of the fortieth instrument of ratification, acceptance, approval or accession [...] of the Convention".<sup>21</sup>

The Convention is divided into four main sections: criminalization, international cooperation, technical cooperation, and implementation.<sup>22</sup> It imposes the obligation of the 'prevention, investigation and prosecution of transnational organized crime on state parties. However, UNTOC has attracted various criticism:

- The major criticism is direct at lack of the review mechanism which enables the assessment of whether state parties meet the obligations under the Convention or not.
- The lack of definition of organized crime led to the concept of transnational organized crime remaining unclear or too general.
- The broad and ambiguous scope of the convention that accepts the offences as to

criminalize intentionally. "The interpretation of what is to be effectively addressed will depend on various circumstances and social contexts in which the countries are inserted."<sup>23</sup>

- The problematic position of the countries that limit the meaningful contributions of civil society and stay silent with regards to combatting organized crime and corruption.<sup>24</sup>
- There is a lack of the governing body to coordinate the implementation of the Convention. Therefore, the individual states have accepted themselves as the governing body.

## 3. THE ELEMENTS OF THE TOC- FOUR CRIMES

Under Article 3/1(a) of the UN Convention applies to the "prevention, investigation and prosecution of": the specific organizational and logistical offenses of participation in an organized criminal group as defined in Article 5; money laundering as defined in Article 6; corruption as defined in Article 8; and, obstructing justice as defined in Article 23.<sup>25</sup> The instrument is set "to promote cooperation to prevent and combat transnational organized crime more effectively."<sup>26</sup> The Convention requires the criminalization of four specific offenses: many organized criminal groups utilize money laundering, participate in an organized group, corruption, and obstruction of justice to protect their operations from law enforcement. The essential requirement to criminalize is to take offense to participate in the organized criminal group. Apart from the primary one, money laundering, corruption, and obstruction of justice are subsidiary conditions associated with organized crime.<sup>27</sup>

The UN Convention requires the existence of the crimes for the prevention, investigation and prosecution of transnational organized crime where it is **transnational in nature** and involves **organized criminal group**:

- (a) The offences established in accordance with **articles 5, 6, 8 and 23 of this Convention**;

<sup>19</sup>Article 36

<sup>20</sup><https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html>

<sup>21</sup>Travaux Préparatoires, Article 17 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, pg.432

<sup>22</sup>Vlassis, Dimitri. "Overview of the provisions of the United Nations Convention Against Transnational Organized Crime and its Protocols." UN. Resource Material Series 59 (2000).

<sup>23</sup>Pereira, Paulo. "The UN Convention against Transnational Organized Crime and Its Ambiguities." *The International Relations and Security Network* 8 (2013).

<sup>24</sup><https://uncaccoalition.org/the-10th-untoc-cop-links-between-organized-crime-and-corruption/>

<sup>25</sup><https://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCbook-e.pdf>

<sup>26</sup>Article 1. Statement of purpose

<sup>27</sup>Clark, Roger S. "The United Nations Convention against transnational organized crime." *Wayne L. Rev.* 50 (2004): pg.165

- (b) **Serious crime** as defined in Article 2 of this Convention;

The question is that in what way the organizational crime is transnational. And the offence is **transnational in nature** only if it met one of the four conditions;

- (a) It is committed in more than one State;
- (b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;
- (c) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or
- (d) It is committed in one State but has substantial effects in another State.

The “**organized criminal group**” that is regulated under Article 2(a) of the Convention, refers to a structured group of three or more persons established over a period of time and having the purpose to commit a serious crime in order to derive, directly or indirectly, financial profit or other material benefit. Rather than attempt a single definition of transnational organized crime to encompass all forms of offenses, the Convention regulates the crimes and their elements individually.

### 3.1. Protected Legal Values

The United Nations defined transnational crime as offenses “whose inception, perpetration and direct or indirect effects involve more than one country.”<sup>28</sup> International crime is distinguished from transnational crime, so the protected legal values are. In the first place, “TOC poses a serious threat to human beings as well as to the rule of law, and consequently to the values protected by the European Convention on Human Rights.”<sup>29</sup> In general, the prevention and the combat of organized crime and the protection and the assistance of the victims of such crime (with respect for their human rights) are the main objectives of the UN Convention. Thus, depending on the kind, the organized crime committed, the right to life, the right to liberty and security, sexual autonomy, and the prohibition of individuals' torture is protected.

For instance, the type of organized crime is that money laundering undermines public finance and negatively affects the rule of law, democratic values, and human rights due to the power and influence gained by criminal organizations while also corrupting society. Therefore, the assistant professor at Department for Foreign and International Criminal Law, Stefanie Bock points out the adoption of “common values which may serve as guidance in all transnational cases regardless of where and in which jurisdiction they are tried.”<sup>30</sup> As stated in the Transnational Organized Crime Threat Assessments<sup>31</sup>, transnational organized crime has direct and indirect effects, and so irrespective of geography, the national and international community is protected as a whole. Whereas it directly leads to drug addiction, sexual exploitation, environmental damage, and a host of other scourges, transnational organized crime can undermine the rule of law and good governance.

### 3.2. Participation in An Organized Criminal Group (Article 5)

Four criteria give rise to the definition of organized criminal groups regulated under Article 2(a) of the Convention.

1. a structured group of three or more persons,
2. existing for a period of time,
3. acting in concert with the aim of committing one or more serious crimes or offences,
4. to obtain directly or indirectly, a financial or other material benefit.

During the time of negotiations, some delegations proposed the necessity of definition of “transnational organized crime,” and one state party offered its meaning as “*transnational organized crime is any serious crime that either has ramifications in more than one country or is perpetrated in any one country by an organized criminal group operating from the territory of another country.*”<sup>32</sup>

Some common characteristics of the definitions in academic writings include (1) *the commission of*

<sup>28</sup>In 1995, United Nations Office on Drugs and Crime

<sup>29</sup>White paper on transnational organised crime, Council of Europe, December 2014, pg. 9. <https://rm.coe.int/168070afb>

<sup>30</sup>Bock, Stefanie. “The Prerequisite of Personal Guilt and the Duty to Know the Law in the Light of Article 32 ICC Statute.” *Utrecht L. Rev.* 9 (2013): 184.

<sup>31</sup>United Nations Office on Drugs and Crime: <https://www.unodc.org/unodc/data-and-analysis/TOC-threat-assessments.html>

<sup>32</sup>India proposed the following definition: [https://www.unodc.org/pdf/ctoccp\\_2006/04-60074\\_ebook-e.pdf](https://www.unodc.org/pdf/ctoccp_2006/04-60074_ebook-e.pdf)

crimes, in some cases limited to certain types; (2) the type of organization, in some cases rigid, hierarchical, and disciplined; (3) violence or the threat of violence, such as muscle, fear, and intimidation, or the need for an enforcer; and (4) corruption.<sup>33</sup> There is no such a time bar and the specific perpetrator in this definition. However, including these or other characteristics would tend to confuse the issues on which this paper focuses: that organized crime consists of acts, not groups; that violence is but one of the means of executing the crimes; and that the crimes are committed for political as well as economic reasons.

First, by definition, organized crime cannot be committed by a single individual; groups commit both these categories of conduct. It defines both the nature of the behaviour and the structure of the criminal group. It is a broader definition of the group which does not require both the hierarchical structure and the belonging of a specific national, ethnic or religious group. The term "structured group" was to be "used in a broader sense and that it would include both groups with a hierarchical or other elaborate structure and non-hierarchical groups where the roles of the members of the group did not need to be formally defined."<sup>34</sup>

Corporate bodies can also be the perpetrators of organized crime or their accomplices. As it is regulated under Article 10 of the Convention, individuals and legal persons, such as corporations, can be considered offenders of organized crime if the elements of the general definition are met. The commitment of the organized crime intentionally is adopted as "(ii) Conduct by a person who, with knowledge of either the aim and general criminal activity of an organized criminal group or its intention to commit the crimes in question." During the negotiation meetings, it was suggested that such liability should be incurred only if the perpetrator's intent or (serious) negligence could be shown. In contrast, others noted a need to define such terms as "profit" and "participation in."<sup>35</sup> Moreover, the time period is set as a "for a while" period of time that is opposed by the two-state parties<sup>36</sup> by offering the

replacement of the criteria with "having the aim of committing a serious crime." In other words, continuity is required for the commitment of the organized crime for a period of time but not a strict sense.

Another form of organized crime is terrorism, and it is used as violence to motivate crime among perpetrators. However, terrorism is essentially distinguished from organized crime with namely the motive of the actor. In general, terrorism involves the political and social objectives characterized by an ideological justification, while organized crime pursues a financial or another benefit that is a profit motive.<sup>37</sup> As the mental element (*mens rea*), the specific intention (*dolus*) is required for the crime of participation in an organized group.<sup>38</sup> The criminalization of organized crime excludes solely political objectives but involves the aim of "profit." Though there is a similarity between them, these two forms of criminality are also quite different.

By the general explanation, it is clear that the size of an organized criminal group can be reasonably small, and it does not have to exist for an extended period of time. The group commits the crime—their profit-driven motive is its defining element.

### 3.3. Money Laundering (Article 6)

Money laundering is an effective form of transnational organized crime as financial profit is the primary motivation for engaging the organized crime. The UN Convention Articles 6 and 7 include the obligation of state parties to criminalize money laundering. However, there is no legal definition of the concept in the Convention. In the Draft Protocol the money laundering was provided as;

*"any act carried out directly or through an intermediary with a view to the acquisition, disposal, administration, safekeeping, exchange, deposit, guaranteeing, investment, transport, possession, granting or transfer of funds, rights or property of any kind, knowing that such funds, rights or property are derived from, or represent the proceeds of crime, to conceal, disguise or preventing the discovery of the illicit origin thereof or of*

<sup>33</sup>Maltz, Michael D. "On Defining" Organized Crime" The Development of a Definition and a Typology." *Crime & Delinquency* 22, no. 3 (1976): pg. 338. "It is a revised and expanded version of the first section of "Policy Issues in Organized Crime and White-Collar Crime," in J. A. Gardiner and M. Mulkey, ed., *Crime and Criminal Justice: Issues in Public Policy Analysis* (Lexington, Mass.: D. C. Heath, 1975).

<sup>34</sup>Pereira, Paulo. "The UN Convention against Transnational Organized Crime and Its Ambiguities." *The International Relations and Security Network* 8 (2013). Referenced from Duyne; Nelemans, 2013:43

<sup>35</sup>Article 10. Liability of legal persons: Rolling text (A/AC.254/4): Negotiation texts

<sup>36</sup>India proposed the deletion of the phrases that was supported by the Syrian Arab Republic (see A/AC.254/L.131))

<sup>37</sup>Cressey, Donald R. "The functions and structure of criminal syndicates." Task force report: Organized crime (1967): 25-60.

<sup>38</sup>Article 5(1) of the Convention.

*assisting any person who is involved in the commission of the predicate offense to evade the legal consequences of his or her actions."*<sup>39</sup>

In 1989 the Group of Seven (G7) created the Financial Action Task Force (FATF) "to combat money laundering and in 1999 established the Lyon Group to increase international cooperation against this transnational crime."<sup>40</sup> It is formulated in various international legal instruments, which are Article 3(b) of The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988), Article 6(1) of The European Convention on Laundering, Search, Seizure, and Confiscation of Proceeds from Crime (1990), Article 1 of The European Community Council Directive on Prevention of the Use of the Financial System for the Purpose of Money-laundering (2001), Article 6(2) of The United Nations Convention against Transnational Organized Crime, 2000.

All instruments define the elements of money laundering, but they are relatively remaining the same. The exact material details (*actus reus*) are included that are "the conversion or transfer of property; the concealment or disguise of the true nature, source, location, disposition, movement, right concerning, or ownership of the property; the acquisition, possession, or use of property; the participation in, association to or conspiracy to commit, attempts to commit, and aid, abet, facilitate, and console."<sup>41</sup>

It is a cyclical process that includes three phases that are the placement, layering, and integration. Placement is the process of entering the proceeds of crime into a legitimate financial system. Layering refers to the separation of illegal money from its source through a series of complex financial transactions. Lastly, in the integration stage, the laundered funds are returned to the perpetrator from legitimate sources.

The mental/subjective element (*mens rea*) of money laundering crime requires "*knowing or intent that funds, rights or property are resulted of the proceeds of crime*" as an essential element to punish a defendant. The "proceeds of crime" concept is ambiguous and needs

to be clarified in respect of the knowledge of the offender required under the subparagraph, that is, whether it would require that the offender knew only that the proceeds were the result of a particular activity or that the offender also knew that the action was a crime. The issue of dual criminality would also arise in that connection. However, proving the intent is not an easy task. Therefore, the formulation of the Vienna Convention of 1988<sup>42</sup> accepted the inference of knowledge, intent, or purpose from objective factual circumstances. It means that the mens rea of money laundering does not only dependent on the defendant's subjective intent.

Concerning the perpetrator of money laundering, there are four categories of offenders which are; the one who launders the money itself and the one who helps the crime of money launderer, and the one who received the illegal money, and the one who helps the stature of the process of corruption like the accountants. It is a type of transnational organized crime with the occurrence of criminal activities in more than one jurisdiction. Unlike the other offenses, it has a unique characteristic that requires the placement of corruption into the country's financial system, and complex financial transactions to another county, and finally, the combination of laundering money with legal funds.

The FATF narrated the common indicators of money laundering criminal activity and concluded that "red flags" are the transactions that reflect the potential criminal activity. According to FATF:<sup>43</sup>

- Size and frequency of transactions (making multiple high-value transactions in a certain period of time)
- Transactions concerning new users (new or inconsistent with the customer profile)
- Transactions concerning all users (*by more than one person, from the same IP address by one, concerning large amounts.*)
- Irregularities observed during account creation (*non-trusted IP addresses*)

<sup>39</sup>Third Session: 28 April-3 May 1999: Rolling text (A/AC.254/4/Rev.3) Article 4, Money-laundering

<sup>40</sup>Wilson, John R. " Transnational Crime." Human Security in World Affairs: Problems and Opportunities (2nd edition), Chapter 13.

<sup>41</sup>Madinger, John. Money laundering: A guide for criminal investigators. CRC Press, 2011.

<sup>42</sup>The United Nations Vienna Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988:

<sup>43</sup>Force, Financial Action Task. "Virtual assets red flag indicators of money laundering and terrorist financing." (2020).

### 3.4. Corruption (Article 8)

Transnational criminals challenge the political and economic institutions of the state through the corruption and bribery of the police, immigration, customs officials, and the judiciary.<sup>44</sup> Corruption and bribe are not regulated as international crimes. Corruption is the method and activity engaged by the organized criminal groups and is held as one of the offenses of transitional organized crime by the UN Convention. Though the Convention contains the measure and the strategy for preventing and criminalizing the corruption, it does not provide the definition of the concept.

It is defined by the Secretary-General Kofi Annan as;

*"Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish"*<sup>45</sup>

While the international efforts are augmented against transnational organized crime, other international agreements are promoted by the United Nations. The more specific one, the United Nations Convention Against Corruption (UNCAC)<sup>46</sup> was welcomed and helped to raise international attention to such an offense. Both Conventions purposed the same that enabling states to enhance their legal mechanism to combat the corruption at the international level.

As to Article 8 of the Convention, the state parties have to take adequate measures to combat corruption. The Convention addresses the criminalization of corruption in the public sector in Article 8 and the measures against corruption under Article 9.

A special status is required for the commitment of the corruption crime. According to Article 8(1), the perpetrator does need to be public officials. According to the United Nations Convention against Corruption, the term public official is *"any person holding a legislative, executive, administrative or judicial office of a State Party, whether appointed or elected, whether*

*permanent or temporary, whether paid or unpaid."*<sup>47</sup>

Since there is no definition of a public official in the Convention, UNCAC refers to it as a person who provides a public service as defined in the domestic law and as applied in the criminal law of the state party in which the person in question performs that function.

Although the best targets are the politicians, bureaucrats, army officers, lawyers, solicitors, industrialists, there is no such a list of specific victim groups. Moreover, criminalizing corruption involving a foreign public official or international civil servant should be considered by the state parties. (Art. 8(2))<sup>48</sup> The following subparagraph regulates the criminality of the "participation as an accomplice" in corruption.

The parties of the corruption crime include the supply and demand side. The actus reus of corruption is constituted when a public official offers or accepts a bribe. And the demand side asks for "the official act or refrain from acting in the exercise of his or her official duties." When it is committed intentionally, two criminal offenses as active and passive might be claimed. About the active form of corruption, (a) *the promise, offering, or giving to a public official, directly or indirectly*, state parties are required to criminalize the offense. The passive form of corruption is regulated as (b) *the solicitation or acceptance by a public official, directly or indirectly*. Both active and passive bribery might create an undue advantage for the official himself or herself or another person or entity. There is a debate on whether the retention or deletion of the words 'when committed intentionally' in the clause. In the chapeau of paragraph 2<sup>49</sup>, the intention appeared as a matter of law and not only a textual issue but required further consideration. During the Ad Hoc Committee meetings, "the undue advantage" was drafted to provide "any article of monetary value or other benefits such as gifts, favors, promises or advantages"<sup>50</sup> to a public official.

The mental element of the crime of corruption is criminal intent, which entails "the benefit is made or received for an illegal purpose," which is generally established by the circumstances of the case. At the same time, the perpetrator's intentional or is too promising or soliciting the benefit owing to any act or refraining from any act of official or to gain undue advantage. However, the intention must include doing

<sup>44</sup>Wilson, John R., Chapter 13.

<sup>45</sup>UNODC, IDS. "World Drug Report." United Nations New York, NY (2009).

<sup>46</sup>G.A. Res. 58/4 of 31 October 2003, [https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026\\_E.pdf](https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf)

<sup>47</sup>[https://www.unodc.org/pdf/corruption/publications\\_unodc\\_convention-e.pdf](https://www.unodc.org/pdf/corruption/publications_unodc_convention-e.pdf)

<sup>48</sup>Article 8, para. 2.

<sup>49</sup>Report of the Chairman on the informal consultations (A/AC.254/L.120)

<sup>50</sup>Mexico (A/AC.254/L.119) "Article 4 ter "Offences of corruption



so "corruptly" to influence or be influenced in an official act or duty. As the US Supreme Court said in *the United States v Sun-Diamond Growers*, the prosecution must establish a *quid pro quo*, that is, "specific intent to give or receive something of value in exchange for an official act."<sup>51</sup>

It is because this much broader offense is not regulated in detail under the Convention, separate anti-corruption Convention -Corruption Convention- regulates acts of corruption in both mandatory and optional provisions. However, transnational organized criminal groups use all forms of corruption, which include;<sup>52</sup>

- Article 15. Bribery of national public officials
- Article 16. Bribery of foreign public officials and officials of public international organizations
- Article 17. Embezzlement, misappropriation or other diversion of property by a public official
- Article 18. Trading in influence
- Article 20. Illicit enrichment
- Article 21. Bribery in the private sector

### 3.5. Obstruction of Justice (Article 23)

Another characteristic of organized crime is reflected in the attempt to protect the criminal groups from justice through the obstruction of justice. It is exercised by eliminating witnesses, using physical force against the justice and law enforcement officials, or bribing those officials. Article 23 provision establishes the offense of obstruction of justice that captures the use of force, intimidation, or bribery to interfere with witnesses or experts testifying, as well as with the performance of the duties of justice or law enforcement officials. Therefore, the offense includes protecting both the ones whose life and safety are at risk and the criminal justice system. The legal definition of the obstruction of justice offense is provided and included exact requirements in Article 25 of the U.N. Convention against Corruption.

In the initial phase of the provision, it was named as "*Bribery of witnesses and intimidation of witnesses and officials*" and included the commission of a "*serious*

*crime*"<sup>53</sup>. The approved text changed the sixth session of Travaux Préparatoires, and all offenses covered by the Convention were included.<sup>54</sup> During the eleventh session, the Ad Hoc Committee has interpreted the concept of "proceeding" as covering "all official governmental proceedings, which may include the pre-trial stage of a case."<sup>55</sup> The perpetrator of the obstruction of justice does not have to be a state agent/official. Any person can commit a crime; no special status is required. However, the perpetrator has to incite, induce or cause another person to give false testimony or provide false evidence. The victim might be a private person or public official and does not need to have any link with the state. Therefore, the incited, induced, or forced to give a shred of false evidence and the judicial system are the victims of the crime.

Because of the broad nature of this crime, many acts can result in charges for obstruction of justice. It might include the overlapping crimes of the Convention. The material element of the obstruction of justice offense is the conduct to influence potential witnesses and others to provide the authorities with relevant evidence.

The elements of the offense give rise to the material element of the obstruction of justice. The pending judicial proceeding, knowledge of the proceeding, use of physical force, threats or intimidation or the promise, corruptly endeavouring to obstruct justice through providing false testimony or destruction or alteration of evidence of the offenses covered by the Convention. Therefore, the forms of corruption (like bribery) and the coercive measures (physical force or threats) may constitute the obstruction of justice offense.

The mens rea is required for the state parties to adopt legislative and other measures to obstruct justice. It involves specific intent to interfere with the investigative and judicial process. "It is not necessary to succeed in the attempt to obstruct justice, as long as the defendant carries out the required actions with the necessary intent."<sup>56</sup> This is why the defendant's act with the intention to induce false testimony or to interfere in the giving of testimony or the production of evidence is sufficient. The false testimony or the

<sup>51</sup>United States v Sun-Diamond Growers, 526 US 398 at 404-405.

<sup>52</sup>"United Nations Convention Against Corruption." (2003).

<sup>53</sup>Fourth session: 28 June-9 July 1999 Rolling text (A/AC.254/4/Rev.4)

<sup>54</sup>Approved text adopted by the General Assembly (see resolution 55/25, Annex I)

<sup>55</sup>Travaux préparatoires: Article 23: Interpretative notes

<sup>56</sup>E4J University Module Series: Organized Crime: Enabling offence: obstruction of justice: <https://www.unodc.org/e4j/en/organized-crime/module-2/key-issues/enabling-offence.html>

evidence is not needed to be the result of the offender's conduct. In addition, the intention to interference with state official's duty is sufficient as it does not matter whether the behaviour perverts the administration of justice or not. For instance, in the U.S. v. Price case<sup>57</sup>, the perpetrator made a conditional threat that if he were forced to meet with the tax authorities, he would bring a gun, and someone might be shot. American court found that the threatening act constituted obstruction of justice.

### 3.6. Serious Crime

According to Article 2 of the Convention, the term "serious crime" is used in the definition of the organized criminal group. The definition of what exactly amounts to 'serious' is set out in the following article. It means "the conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty". It includes the potential of at least four years deprivation of liberty.<sup>58</sup>

Both "the requirement of an aim to commit "serious crime" according to article 2(b) and the requirement that the group is "organized" and thus "structured" according to article 2(a) and (c) respectively narrow the types of conspiracy that must be criminalized."<sup>59</sup> It is a specific content definition that requires the actual conduct and exercise by the particular group. As defined in the Convention, the purposes of subparagraph (b) involve the seriousness of the specific activities and organized criminal groups. To realize the ambit of subparagraph (b), the perpetrator must either be active in the group's criminal activities or involved in its other activities with the appropriate knowledge, explicitly the intent to contribute to the achievement of the criminal aim. Otherwise, clearly, "a perpetrator may contravene this standard without doing acts that make him or her complicit under traditional principles for a serious crime as defined in the Convention."<sup>60</sup>

## 4. ANALYSIS/CONCLUSION

In light of the mentioned above, the UN Convention includes forms of regional, national, and international

cooperation to prevent and control transnational organized crime, including intelligence networks, preventive strategies, sanction of participation in criminal organizations. On the other side, though the transnational criminal organizations have confirmed as the core issue of the international criminal plan, the organizations demonstrate their ability to adapt to different circumstances, quickly recover and gain more strength.

Reducing and controlling these crimes is only possible if governments at the local level allocate proportional resources for this purpose. In other words, the current system of international criminal law conventions provides a patchwork of mechanisms for judicial cooperation. Still, it is entirely dependent on prosecution at domestic levels to produce any results.<sup>61</sup>

The Convention leaves enforcement, prosecution, and punishment of the offenses to individual nations. Otherwise, if states do not cooperate effectively against these crimes, the purpose of the Convention will not fulfil that affect the whole world. However, the gaps will invariably remain in the international legislative framework and, consequently, in the enforcement capacities of different states.<sup>62</sup> Indeed, the threat posed by transnational organized crime is a "vicious circle" facing the world through the exercise of this systemic corruption.

International regulations within the United Nations offer a solid response for transcending threats. However, this set of tools is not sufficiently equipped to address problems that transnational organized criminal groups pose today. Although the UN conventions, national-level legislation, and non-governmental organizations have agreed to international cooperation to fight against transnational crime, different obstacles stand before this aim. There is no precise definition for the enforcement mechanism of the Convention and how to exercise the law and practice in preventing and combating organized crime.

The crimes covered under the Convention and their elements are not repeated in the analysis part. Instead, the implementation mechanism of transnational organized crime and jurisdiction is analyzed with respect to international criminal law. Still, as the

<sup>57</sup>United States v. Price, 951 F.2d 1028, 1031 (9th Cir. 1991).

<sup>58</sup>Article 2. Use of term, subparagraph (b)

<sup>59</sup>Roger S. Clark, "The United Nations Convention against Transnational Organized Crime," *Wayne Law Review* 50, no. 1 (Spring 2004): 161-184

<sup>60</sup>Transnational Crime Convention art. 5 (1) (a). A member of the U.N. Secretariat who was close to the drafting, describes art. 5 (1) (a) (ii) as a form of "enterprise liability." "It is enough to prove that a crime has been committed on behalf or in the interest of a boss of an organized crime group without his/her knowledge of the particular crime."

<sup>61</sup>McConville, Molly. "A global War on Drugs: why the United States should support the Prosecution of Drug Traffickers in the International Criminal Court." *Am. Crim. L. Rev.* 37 (2000): 75.

<sup>62</sup>S, Louise I. "Transnational organized crime: an imminent threat to the nation-state?" *Journal of international affairs* (1995): pg.488.

extension of the international criminal law, the relationship between transnational organized crime and international criminal law gains momentum in the academic pieces. The issue of obstacles for the inclusion of transnational organized crime in the Rome Statute and into the level of international jurisdiction falls within the scope of international criminal law.

The practical trial mechanism in the fight against transnational organized crime is a problem that needs a solution. The International Criminal Court (ICC), which covers only four major crimes, aggression, crimes against humanity, genocide, and war crimes<sup>63</sup>, is an excellent example of prosecuting this issue.

The recognition of transnational organized crime as a 'fundamental international crime' along with war crimes, genocide, and crimes against humanity would place these crimes under the jurisdiction of the International Criminal Court. Thus, it will enable the direct application of international criminal law regarding transnational organized crime. Bassiouni has pointed out that there is often a link between organized crime and conflicts that lead to such atrocities as genocide and crimes against humanity.<sup>64</sup>

In addition, as stated over, countries represented at the Rome Conference agreed to limit the jurisdiction of the ICC to what is regarded as the most serious crimes of international concern. Article 5 of the ICC Statute now grants the ICC jurisdiction over aggression, crimes against humanity, genocide, and war crimes. As will be discussed shortly, there has been a consensus that only those four crimes are well established under customary international law. The Statute of the ICC only seeks to consolidate established rules of customary international criminal law rather than codifying other principles of international law.<sup>65</sup>

Although the ICC does not cover transnational organized crime, the actions and corruption of criminal gangs do no more minor damage than other crimes and offer a safe haven to seemingly inaccessible and uncontrollable mafia bosses and drug cartels. The ICC provides perhaps a step towards a global criminal justice system where there is no safe haven for those

engaging in transnational organized crime.<sup>66</sup> Considering that the ICC Statute is not a comprehensive codification of international criminal law and that countries continue to put their sovereignty before criminal justice for their benefit; The ICC's request to expand its mandate has abstained.

Considering the transnational and complex nature of transnational organized crime and the concept of state sovereignty, the place of international criminal law in the fight against transnational organized crime gains importance. To this end, the ICC's approach to including transnational organized crime within its jurisdiction is a step in the right direction. In addition to the cooperation of states to prevent these crimes, the introduction of a sanctioned court of international criminal law would be a more consistent and effective strategy.

*"Transnational organized crime is a problem in need of a solution; the newly created International Criminal Court is a solution in need of problems. The creation of the International Criminal Court has created an opportunity to overcome many of the past deficiencies. It offers a **new forum** to prosecute cases that would otherwise not be dealt with. It offers a more reliable tool to prosecute **seemingly unreachable and uncontrollable mafia bosses and drug cartels**, as it is less vulnerable to intimidation and corruption by criminal gangs. It offers perhaps a step towards a global criminal justice system in which there is **no safe haven** for those engaging in transnational organized crime."*

In other words, it suffices to show that the ICC might have a substantial role to play in ensuring the law enforcement mechanism. From the optimistic perspective, the ICC jurisdiction might give a ride to momentum to the global efforts to combat transnational organized crime. The functionality of the ICC, like international courts, can converse, but that is beyond the scope of this paper. The main conclusion reached is that implementing the prevention and protection mechanism of the Convention pertinent to transnational organized crime has not been an easy task. Still, the

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<sup>63</sup>Article 5 of the ICC Statute now grants the ICC jurisdiction over aggression, crimes against humanity, genocide, and war crimes.

<sup>64</sup>M. Cheriff, Bassiouni International Criminal Law 2ed Vol 1 (1999) 933.

<sup>65</sup>Schloenhardt, Andreas. "Transnational organised crime and the International Criminal Court developments and debates." University of Queensland Law Journal 24, no. 1 (2005): 93-122.

<sup>66</sup>Schloenhardt, Andreas. "Transnational organized crime and the International Criminal Court developments and debates." University of Queensland Law Journal 24, no. 1 (2005): 93-122.

jurisdiction of ICC may surely be making a difference on the ground. International institutions will do their job if they develop the ability to grasp and handle the realities of today and the challenges of tomorrow.<sup>67</sup>

## TABLE OF ABBREVIATIONS

TOC	=	Transnational organized crime
UNTOC	=	United Nations Convention against Transnational Organized Crime
UNGA	=	United Nations General Assembly
INTERPOL	=	The International Criminal Police Organization
G7	=	The Group of Seven
FATF	=	The Financial Action Task Force
ICC	=	The International Criminal Court

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Received on 05-11-2022

Accepted on 05-12-2022

Published on 24-12-2022

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