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Combating Transnational Organized Crime in Thailand

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COMBATING TRANSNATIONAL ORGANIZED CRIME IN THAILAND

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Title

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APRIL 26, 2023

Re: SJD Completion Certification

Dear Dr. Kiattisak Chanjana,

It gives me much pleasure to inform you that you have completed the requirements of the SJD program in International Legal Studies at Golden Gate University, School of Law.

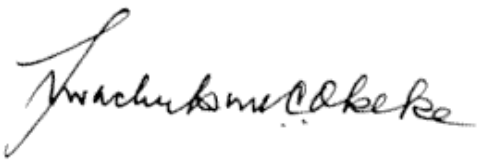
Your dissertation committee was satisfied with the quality of the dissertation you presented, as well as its successful FINAL oral defense on April 25, 2023. Accordingly, a recommendation was made to the appropriate authority that you be awarded the Scientiae Juridicae Doctor (SJD) of Golden Gate University, School of Law.

It has been a real pleasure and privilege to have you as a student in the SJD program. Your research and writings have brought you distinction, which in turn, bring honor to Golden Gate University School of Law.

I congratulate you on a job well done.

On my behalf, the University, and its School of Law, I wish you great success in your future academic and professional pursuits.

Kind regards,



Dr. Christian N. Okeke, Ph.D. (C.o.H)
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cc. Law Registrar: (By a copy of this letter to the Law Registrar's Office, I request that the student's record be updated to show completion of the final requirement of the SJD program: SJD 930 Dissertation).

Abstract

Globalization is described as the removal of barriers to facilitate the movement of goods and funds across national borders. However, this phenomenon has also benefited transnational organized crime networks by providing them opportunities to create new markets for illicit goods and services or infiltrate businesses or governments. In addition, the nature of criminal activities has changed due to the actions of organized criminal groups that commit crimes in one state but carry out the majority of their preparation, planning, direction, and participation in another state. As a result, transnational organized crime activities have an effect on the criminalization and collection of evidence in various countries based on their respective criminal law systems. Thailand, in particular, has experienced a disproportionate share of the direct effects of transnational organized crime due to its location as a source, destination, and receiving country for transnational criminal organizations. This puts Thailand at risk for offenses, such as human trafficking and drug trafficking, that are committed by transnational criminal groups.

Combating transnational organized crime is one of the international community's most significant challenges. On the one hand, this is because international laws require an explicit definition of transnational organized crime. On the other hand, the United Nations Convention against Transnational Organized Crime (UNTOC) has aimed to make transnational organized crime as broad and adaptable as possible in order to combat future instances of organized crime. Thus, measures to combat transnational organized crime must consider the concepts governed by international laws, especially transnational criminal law.

The purpose of this study was to seek and examine the adoption of applicable international laws, related international and regional conventions, model treaties, and agreements for combating

transnational organized crime in Thailand. As a result, the success of prosecuting transnational organized crime at all levels has increased the interest in cooperating with other countries and international, regional, and national organizations to fight against it. However, this study contended that although Thailand has domestic laws in place to combat transnational organized crime, there are challenges to prosecuting crimes, such as corruption, money laundering, participation in organized criminal groups, obstruction of justice, and other related offenses. Hence, this study demonstrated that Thailand needs to improve its operations in cooperative efforts, legal framework, administrative measures, political issues, and corruption.

Therefore, this study calls on international and regional organizations and the Thai government to address the highlighted challenges and suppress and prevent them through international cooperation and following international standards. Finally, the study suggests several recommendations for improving the fight against transnational organized crime at all levels.

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Finally, to my long-suffering parents, Mrs. Cha-on Janjana and Mr. Apichet Janjana, a big thank you for putting up with my sincere encouragement during this period in pursuit of achieving my goal.

Abbreviations

ACCT	ASEAN Convention on Counter-Terrorism
ACHPR	African Charter on Human and Peoples' Rights
ACTC	ASEAN Centre for Combating Transnational Crime
AFMM	ASEAN Finance Ministers Meeting
AFTA	ASEAN Free Trade Area
AHRD	ASEAN Declaration of Human Rights
AICHR	ASEAN Intergovernmental Commission on Human Rights
AmCHR	American Convention on Human Rights
AML/CFT	Anti-Money Laundering and Combating the Financing of Terrorism
AMLO	Anti-Money Laundering Office
AMM	ASEAN Ministerial Meeting
AMMTC	ASEAN Ministerial Meeting on Transnational Crime
AP	Additional Protocol
APG	Asia/Pacific Group on Money Laundering
ArCHR	Arab Charter on Human and Peoples' Rights
ARF	ASEAN Regional Forum
ASEAN	Association of Southeast Asian Nations
ASEANAPOL	ASEAN Chief of National Police
ASOD	ASEAN Senior Officials on Drugs Matters
B.E.	Buddhist Era
BLO	Border liaison offices
CCF	Commission for the Control of INTERPOL's Files

CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CND	Commission on Narcotic Drugs
COP	Conference of the Parties
COSP	Conference of the States Parties
CPI	Corruption Perceptions Index
DCL	Direct Communication Link
DSI	Department of Special Investigation
ECHR	European Convention on Human Rights
ECOSOC	United Nations Economic and Social Council
EEZ	Exclusive Economic Zone
EU	The European Union
Eurojust	European Union Agency for Criminal Justice
Europol	European Police Office
FATF	International Financial Action Task Force
FBI	Federal Bureau of Investigation
GC	Geneva Convention
HSU	Heads of Specialist Trafficking Units
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social, and Cultural Rights
ICJ	The International Court of Justice
ICRG	International Cooperation and Review Group

ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
INCB	International Narcotic Control Board
INTERPOL	International Criminal Police Organization
ISM-CT/TC	Inter-Sessional Meeting on Counter-Terrorism and Transnational Crime
LOAC	Law of Armed Conflict
LSD	Lysergic acid diethylamide
NACC	National Anti-Corruption Commission
NCB	National Central Bureau
NCCT	Non-Cooperating Countries and Territories
NGO	Non-Government Organization
nm	nautical miles
RICO	Racketeer Influenced Corrupt Organizations Act
SUA	Suppression of Unlawful Acts Against the Safety of Maritime Navigation Convention
SOMTC	ASEAN Senior Officials Meeting on Transnational Crime
TCCC	Transnational Crime Coordination Center
THC	Tetrahydrocannabinol
TraCCC	Terrorism, Transnational Crime, and Corruption Center
TOC	Transnational Organized Crime
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNC	United Nations Charter

UNCAC	United Nations Convention Against Corruption
UNCAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment
UNCLOS	United Nations Convention on the Law of the Sea
UNODC	United Nations Office on Drugs and Crime
UNTOC	United Nations Convention against Transnational Organized Crime
VCLT	Vienna Convention on the Law of Treaties
WHO	World Health Organization
WMD	Weapons of Mass Destruction

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Chapter 1

General Introduction of Criminal Activities in Thailand

1.1 Research Problem and Background

A crime is an act committed by a person referred to as a criminal. Thus, it appears as though it will occur everywhere that criminals have the opportunity to commit such crimes against their victims. Additionally, some criminals have altered their behaviors and actions due to globalization's advancement, which has enabled them to organize and expand their networks quickly and expand their operations beyond national borders. Globalization is frequently used to refer to how states reduce or eliminate their national borders to facilitate the flow of goods, services, capital, and labor.[1] While globalization has brought about some beneficial improvements, it has also fostered the expansion of organized crime and led to the current situation in which social, political, and economic events occurring in one part of the world directly impact other countries and regions.[2] Perhaps minor offenses appear to occur within national borders, while serious crimes have become borderless and transnational in nature. Then this incident is referred to as transnational organized crime. As a result, the influence of transnational organized crime (TOC) is more significant and more complex than ever before, as it frequently encompasses multiple countries.

Transnational crime is a term coined by the United Nations Crime Prevention and Criminal Justice Branch to refer to certain criminal phenomena that transcend international borders, violate

[1] JAY, S. ALBANESE, *Transnational Crime and the 21st Century: Criminal Enterprise, Corruption, and Opportunity* 1, (Oxford Univ. Press., 1st ed., 2011).
[2] TOM OBOKATA, *Transnational Organised Crime in International Law* 4, (Hart Pub., 2010).

the laws of multiple states, or affect another country.[3] Moreover, under Article 3 on the 'Scope of Application' of the United Nations Convention against Transnational Organized Crime (UNTOC),[4] a range of offenses is 'transnational in nature,' if:

> "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 and 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."

It is important to note that the UNTOC Convention itself does not define 'organized crime.'[5] The definitions of organized crime were heavily influenced by the hierarchical nature of crime networks and syndicates. This became explicit in UNTOC Convention under Article 2(a):

> An "[o]rganized criminal group shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with the Convention, in order to obtain, directly or indirectly, a financial or other material benefit."

Additionally, this UNTOC Convention has become essential as the legal framework for facilitating international cooperation among State Parties in combating criminal activities.[6] Countries that have ratified the UNTOC Convention must establish legislation criminalizing these activities, including participation in organized crime groups, money laundering, corruption, and obstruction of justice.[7] The UNTOC Convention, on the other hand, does not contain a precise

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[3] G. MUELLER, *Transnational Crime: Definitions and Concepts, in* P. WILLIAMS & D. VLASSIS (EDS), *Combating Transnational Crime,* 13 (Milan/London: ISPAC/Frank Cass, 2001).

[4] Opened for signature December 16, 2000, 2225 UNTS 209; in force September 29, 2003.

[5] It should be noted, however, that the very first draft of the UNTOC contained a definition which provides 'group activities of three or more persons, with hierarchical links or personal relationships, which permits their leaders to earn profits or control territories or markets, internal or foreign, by means of violence, intimidation or corruption, both in furtherance of criminal activity and in order to infiltrate the legitimate economy.' A/AC.245/2 (December 18, 1998).

[6] PAULO PEREIRA, *THE UN CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME AND ITS AMBIGUITIES*, (E-International Relations, October 25, 2013) Available at: https://www.e-ir.info/2013/10/25/the-un-convention-against-transnational-organized-crime-and-its-ambiguities/

[7] JAY, S. ALBANESE, *supra* note 1, at 4.

definition of transnational organized crime or the types of crimes that can result in it. The reason is to ensure that the UNTOC Convention remains applicable to evolving forms of crime as global, regional, and local circumstances change over time. Furthermore, the United Nations (UN) has identified eighteen distinct categories of transnational crime, including money laundering; terrorist activities; theft of art and cultural objects; theft of intellectual property; illicit arms trafficking; sea piracy; land hijacking; insurance fraud; computer crime; environmental crime; human trafficking; trade-in human body parts; illicit drug trafficking; fraud, bankruptcy; infiltration of legal businesses; corruption; bribery of public officials; and other offenses committed by organized criminal groups.[8]

However, transnational crime is a non-traditional security threat that has spread to various countries, including Southeast Asia. Because of its geographical location, it was surrounded by other significant markets for illicit activities in neighboring countries, including East Asia, South Asia, and the ocean, which were particularly vulnerable to the reach and influence of transnational organized criminal groups. As a prominent source, destination, and transit point for these illicit movements, the region is vital to the unlawful global traffic in methamphetamine, heroin, people, wildlife, wood, and counterfeit goods and medications. The remarkable rise of these illegal flows over the last few years has been facilitated in part by enhanced freedom of movement of people, products, and capital across Southeast Asia and into the rest of the world, facilitated in part by free trade agreements and connectivity programs aimed at improving trade and general economic growth.[9] Simultaneously, criminal networks have taken advantage of lax border restrictions and increased illicit trade in response to the region's rising legitimate trade flow. As a result, ASEAN

[8] G. MUELLER, *supra* note 3, at 14.
[9] United Nations Office on Drugs and Crime, *Transnational Organized Crime in Southeast Asia: Evolution, Growth and Impact*, (2019).

member states strengthen their ties with other regions, primarily through multilateral and bilateral initiatives with rapidly growing consumer markets such as China and India.[10]

One aspect of transnational crime has received significant attention in the past few years: human trafficking for labor exploitation. People in the ASEAN region are compelled to work in industries such as fishing, construction, agriculture, manufacturing, hospitality, and domestic help industries.[11] Additionally, some Rohingya people have been victims of human trafficking, most notably in Thailand. Although Thailand has transnational organized crime activities such as drug trafficking, prostitution, illegal CD copying, money laundering, illicit firearms trafficking, human trafficking, vehicle smuggling, and financial and securities fraud, there was one notable case of human trafficking on July 19, 2017. The Criminal Court has sentenced 62 defendants, including a general, police officers, and provincial officials, on 13 different charges, including, for example, the offense of being a member of a transnational criminal organization, human trafficking, conspiracy, money laundering, the offense of supporting foreign migrants to the kingdom of Thailand and giving them inhabitance, the offense of firearms act, the offense against liberty, ransom, and assault to death.[12] These concerns have sparked debate and resulted in the development of concrete solutions within the ASEAN region and its member states. However, transnational criminal groups now pose a serious threat to the region's public security, health, and long-term development.

[10] United Nations Office on Drugs and Crime, *supra* note 9
[11] *Id.*
[12] The case number Kor Mor 27-29, 32/ 2558 (2015) and case number Kor Mor 19, 35, 36, 40, 41, 47, 63/ 2559 (2016) for pronouncement of the judgment of the Rohingya Migrant Trafficking Case whereby the prosecutor as the plaintiff prosecuted 103 defendants in charge of human trafficking offense All procedures proceeded through the Rohingya, Bengali and Burmese interpreters for defendants who do not understand Thai. During the trial, one of the defendants had been death by a serious disease and the Court disposed of the case for such defendant. Recently, this is not a final judgment.

1.2 Purpose of This Study

The study aims to explain the problems, evolution, and solutions in Thailand's fight against transnational organized crime, which has become a threat to the country's national, regional, and international communities. The study's specific aims are to alleviate the problem of transnational organized crime, which is rapidly growing and developing inside the borders of each country, particularly Thailand, which can serve as a source, destination, or transit country. Additionally, the study will look at how officers and advanced technology may help officers better cope with transnational criminal networks' financial or material rewards and facilitate information exchange between ASEAN members and other countries. Further, the study suggests traditional and non-traditional means to combat transnational crime that might contribute to the building of international cooperation with neighboring nations and seek the benefits of the international legal framework at both the bilateral and multilateral levels to overcome divergent legal systems.

1.3 Research Questions

From the study, three research questions will be addressed as follows:

1) How is a transnational organized crime defined and explained among other kinds of crime?

2) To what extent do courts have the authority to hear cases involving transnational organized crime?

3) What are the most effective legal and policy instruments that countries employ to combat transnational organized crime?

1.4 Methodology

This research employs four distinct interpretative and analytical designs in order to examine practical tools for combating transnational organized crime in Thailand:

1. Conducting doctrinal research in order to gain a better understanding of the various primary sources of law;
2. Conducting doctrinal research and examining secondary sources;
3. Socio-legal research seeks to examine the content of legal practice from various disciplinary viewpoints;
4. A comparative cross-jurisdictional study examines international and regional scale issues of context, comparison, interaction, and interpretation.

These resources are all pertinent to the chapters' particular topics.

1.5 Limitations of this Study

The United Nations Core Conventions on Transnational Organized Crime, including the 1961, 1971, and 1988 UN Drug Control Conventions, the UNTOC Convention and its protocols, and the UNCAC Convention, are examined in this study. Additionally, the Thai legal system and law enforcement are evaluated through the viewpoint of the Thai legislative framework, notably the criminal law system, as it existed at the time of this study. However, this study examines the UNTOC Convention's four criminalization provisions, including participation in an organized criminal group,[13] money laundering,[14] corruption,[15] and obstruction of justice.[16] Therefore, this

[13] Article 5 of the UNTOC Convention, *supra* note 4
[14] Article 6
[15] Article 8
[16] Article 23

study does not provide details about specific organized crime activities, such as cybercrime, environmental crimes, terrorism, and illicit cultural property trafficking.

1.6 Chapter Overview

The study is divided into seven chapters, beginning with the "General Introduction of Criminal Activities in Thailand," which offers an overview of the research problem and context, the objective of this study, the research questions, the methodology, and its limitations.

Chapter Two refers to several legal and scholarly sources that provide some broad and concise definitions and concepts relating to TOC. First, it explores the Convention's history and evolution to comprehend better how it defines terms such as 'transnational in nature' or 'organized criminal group' for State Parties. In addition, it illustrates the distinction between transnational and international crime. There are three basic types of transnational criminal activities: the provision of illicit goods, illicit services, and infiltration of business or government affecting multiple countries. Then it enables readers to analyze the Convention's significance, including the relevance of legal definitions of transnational organized crime, the UNTOC Convention's offenses, jurisdiction over transnational organized crime, and a Party's responsibility to the Convention.

The third chapter examines the "Applicable International and Regional Conventions, Treaties, and Agreements for Transnational Organized Crime," an interesting and critical subject formerly associated with the specification of transnational organized crime at the international and regional levels. Additionally, this chapter discusses several aspects of international law that permit the examination of TOC in international law, including the use of force, international humanitarian law, human rights law, the law of the sea, and international criminal law. Further, the chapter

discusses applicable model treaties and the United Nations Core Conventions on Transnational Organized Crime, which are critical for resolving transnational organized crime-related issues. Thus, the ASEAN framework for fighting transnational crime will be analyzed via the lenses of different ASEAN bodies directly or indirectly involved in developing policies and initiatives to combat transnational organized crime.

Chapter Four focuses mainly on the "Thai Criminal Legal System and Law Enforcement." The chapter provides and discusses Thailand's laws governing the prevention and suppression of transnational organized crime, such as the Criminal legal system of Thailand for enforcing TOC. These laws include the Thai Penal Code and Criminal Procedure Code, the Anti-Human Trafficking Act, B.E. 2551 (2008), the Anti-Participation in Transnational Organized Crime Act, B.E. 2556 (2013), the Narcotics Code, and the Drug Prosecution Procedure Act, B.E. 2564 (2021), the Anti-Money Laundering Act, B.E. 2542 (1999), the Organic Act on Counter Corruption B.E. 2561 (2018), the Mutual Assistance in Criminal Matters Act, B.E. 2535 (1992), Extradition Act, B.E. 2551 (2008).

The fifth chapter examines the techniques used by international, regional, and national law enforcement agencies to combat transnational organized crime in Thailand. This chapter describes how each institution-level has been active in fighting TOC and aiding Thailand. From an international perspective, the chapter discusses the International Criminal Court (ICC), the Terrorism, Transnational Crime, and Corruption Center (TraCCC), the International Financial Action Task Force (FATF), the United Nations Office on Drugs and Crime (UNODC), and the International Criminal Police Organization (Interpol). Additionally, while the ASEAN institutional framework serves as a foundation for regional coordination on transnational organized crime, including the AMMTC, SOMTC, and the ASEAN Secretariat, the European Union

significantly collaborates through Europol and Eurojust with ASEAN member states to address this issue. Then, Thailand's systems for preventing and repressing transnational criminal organizations are composed of multiple related institutions, including the Royal Thai Police, the Attorney General's Office, the Department of Special Investigation, the Anti-Money Laundering Office, the National Anti-Corruption Commission, the Narcotics Control Board, and the Court of Justice.

The following chapter (Chapter 6), "Challenges in Combating Transnational Organized Crime in Thailand," examines the difficulties in combating transnational organized crime in five dimensions: a lack of collaborative efforts, a legislative framework, administrative measures, political issues, and corruption.

The concluding chapter (Chapter 7) summarizes the study's findings and makes recommendations to assist Thailand in fighting transnational organized crime more effectively.

Chapter 2

Theoretical Reference to Transnational Organized Crimes

2.1 Introduction

Crime occurs daily, everywhere around the world. The crime triangle presents three factors that create a criminal offense.

[1] A criminal offense happens because of unlawful desires to commit a crime against a vulnerable victim by seizing an opportunity.[2] Suppose that a victim knowingly breaks up the crime triangle by neither giving the criminal opportunity nor committing a crime. In that case, the capabilities to avoid becoming an easy target may depend on their ability to stay alert and use their good judgment by knowing whom and what is around them in advance at all times.[3] Therefore, criminologists, academics, and law enforcement authorities should pay particular attention to understanding this problem because criminals commit increasingly sophisticated organized crimes.

In the 1990s, many criminologists paid attention to the side effects of globalization.[4] "Globalization" refers to the considerable advantages that arise when national borders can be reduced and removed to facilitate and benefit from the flow of goods, services, funds, and labor in their countries.[5] Unfortunately, globalization has also been a good opportunity for criminal networks who take advantage of the interdependent world economy to supply their illicit goods

[1] ASU Center for Problem-Oriented Policing, *The Problem Analysis Triangle*, Available at: https://popcenter.asu.edu/content/problem-analysis-triangle-0
[2] *Id.*
[3] *Id.*
[4] MITCHEL P. ROTH, *Chapter 1: Historical Overview of Transnational Crime, in* HANDBOOK OF TRANSNATIONAL CRIME AND JUSTICE 5 (PHILIP REICHEL & JAY ALBANESE ED., SAGE PUB., 2nd ed. 2014).
[5] JAY S. ALBANESE, *TRANSNATIONAL CRIME AND THE 21ST CENTURY* 1 (Oxford U. Press, 2011).

and services.[6] Moreover, many have understood globalization differently and this has increasingly challenged the several stages of the relationship between law and its practice.[7] Thus, globalization has many drawbacks that have directly resulted in the increasing complexity of criminality and transformed opportunities for crimes to be committed transnationally.[8]

Transnational crime is currently considered to be one of the main threats to the social, economic, public, and private sectors.[9] In 2000, the United Nations Convention against Transnational Organized Crime (Palermo Convention, UNTOC), adopted a scheme to serve as a suppression convention for combating organized crime.[10] In 2010, the Globalization of Crime: The United Nations Office on Drugs and Crime (UNODC) launched a Transnational Organized Crime Threat Assessment.[11] This assessment analyzed a range of transnational crime threats, including human trafficking, migrant smuggling, illicit drugs trades, cybercrime, piracy, trafficking in environmental resources, firearms, and counterfeit goods.[12] In 2011, US President Barak Obama expressed his concern about the expanding and diversifying range of criminal network activities, which bring convergent and evolving transnational threats.[13] The White House also announced overarching policy objectives that are consistent with the intention and priorities to combat

[6] JAY S. ALBANESE , *supra* note 5 at 1.
[7] ZUMBANSEN, PEER C., *Defining the Space of Transnational Law: Legal Theory, Global Governance & Legal Pluralism*, Osgoode CLPE Research Paper No. 21/2011, Sept. 26, 2011, at 19-20. Available at: https://ssrn.com/abstract=1934044 or http://dx.doi.org/10.2139/ssrn.1934044
[8] JAY S. ALBANESE, *supra* note 5, at 1.
[9] NEIL BOISTER, AN INTRODUCTION TO TRANSNATIONAL CRIMINAL LAW 126 (Oxford U. Press, 2nd ed. 2018).
[10] NEIL BOISTER, *The UN Convention against Transnational Organised Crime 2000*, *in* INTERNATIONAL LAW AND TRANSNATIONAL ORGANISED CRIME 126 (PIERRE HAUCK & SVEN PETERKE ed., (Oxford U. Press, 1st ed. 2016).
[11] United Nations Office on Drugs and Crime, *The Globalization of Crime: A Transnational Organized Crime Threat Assessment*, (2010), Available at: https://www.unodc.org/documents/data-and-analysis/tocta/TOCTA_Report_2010_low_res.pdf?bcsi_scan_E6B5D3DA0AAC65B7=0&bcsi_scan_filename=TOCTA_Report_2010_low_res.pdf
[12] *Id.*
[13] Strategy to Combat Transnational Organized Crime: Letter from the President, National Security Council (July 19, 2011), Available at: https://obamawhitehouse.archives.gov/administration/eop/nsc/transnational-crime/letter

transnational organized crime.[14] Recently, in 2020, global threats have been posed by the COVID-19 pandemic. Due to the outbreak of COVID-19, law enforcement authorities have also played a significant role in supporting endeavors to curb the disease and deal with criminal activities linked to this pandemic.[15] Consequently, INTERPOL has focused on how criminals seek opportunities created by the high demand for personal protective equipment and legitimate vaccines.[16] In particular, INTERPOL has issued new guidelines for law enforcement to draw on the lessons learned and best practices developed globally to help the law enforcement community distinguish crimes caused by the COVID-19 pandemic.[17] Europol has also realized that the pandemic has enabled criminals to devise both new *modus operandi* and have adapted to exploit the crisis.[18]

This chapter aims to cast light on the UN Convention against organized crime. First, it examines the historical background of development of the Convention. It then turns to the Convention's significance, including legal definitions, a set of offenses developed to prosecute transnational organized crime, and jurisdiction over those transnational organized criminals.

[14] Strategy to Combat Transnational Organized Crime, National Security Council, Available at: https://obamawhitehouse.archives.gov/administration/eop/nsc/transnational-crime/strategy
[15] INTERPOL, *COVID-19 crime: INTERPOOL issues new guidelines for law enforcement*, (NOV. 17, 2020), Available at: https://www.interpol.int/en/News-and-Events/News/2020/COVID-19-crime-INTERPOL-issues-new-guidelines-for-law-enforcement
[16] *Id.*
[17] *Id.*
[18] Europol, *Internet Organised Crime Threat Assessment (IOCTA) 2020*, (OCT. 5, 2020), Available at: https://www.europol.europa.eu/activities-services/main-reports/internet-organised-crime-threat-assessment-iocta-2020

2.2 Historical Background of Development of the UN Convention against Transnational Organized Crime (UNTOC)

To understand the efforts and significance of the United Nations Convention Against Transnational Organized Crime (UNTOC), in terms of both the concept and its actual drafting, it is worth noting that the development of the Convention can be divided into two stages: 1) early legislative steps against organized crime; and 2) responding to transnational organized crime.[19]

i. Early Legislative Steps Against Organized Crime

There are two reasons why the activities of organized criminals can be difficult to suppress: the first is that criminalizing participation would be too remote from the actual perpetration because the offense would not be considered criminalized under the normal criminal principle, and the second is that it is unclear when preparatory actions would be considered guilty under the inchoate liability principle.[20] It is difficult to prove the involvement of the leaders of these organizations because they may have directly participated via legal activities or indirectly participated in inchoate crimes, such as conspiracy; therefore, it can be impossible to establish that a particular offense has been committed.[21]

In 1970, the US government attempted to respond to very broad models of organized crime by taking the influential step of enacting the Racketeer Influenced Corrupt Organizations Act (RICO).[22] A RICO requires criminals to commit more than one predicate offenses in a "pattern of

[19] N. BOISTER, *supra* note 9, at 129-130.
[20] *Id.* at 129.
[21] *Id.*
[22] 18 USC §§ 1961-68; *See* M. CHERIF BASSIOUNI & EDUARDO VETERE EDS., *ORGANIZED CRIME: A COMPILATION OF UN DOCUMENTS, 1975-1998*, Ardsley, New York, Transnational, 1998; 'INTRODUCTION', *TRAVAUX PRÉPARATOIRES OF THE NEGOTIATIONS FOR THE ELABORATION OF THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL*

racketeering" activity.[23] Under the RICO Act § 1961(1), a 'pattern of racketeering activity' is defined as the commission of two or more statutorily defined crimes within a span of 10 years.[24] For instance, RICO charges can be relevant to two or more counts of gambling, passport forgery, criminal copyright infringement, prostitution, drug offenses, credit card fraud, extortion, bribery, embezzlement from labor unions, cigarette bootlegging.[25] It is also an offense:

> For any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.[26]

A criminal "enterprise" has to prove an ongoing, truly organized criminal group. The Supreme Court held in *United States v. Turkette*[27] that an 'enterprise' is something more than simply a pattern of racketeering acts:

> The enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct . . . [Proof of an enterprise requires] evidence of an ongoing organization, formal or informal, and . . . evidence that the various associates function as a continuing unit.[28]

ORGANIZED CRIME AND THE PROTOCOLS THERETO, New York, United Nations, 2006, UN Pub. Sales No. E.06.V.5, p.ixff; *See also* REBERTA BARBERINI, 'ITALY AND THE INTERNATIONAL COMMUNITY IN THE FIGHT AGAINST ORGANIZED CRIME', *in* STEFANO BETTI, *SYMPOSIUM: THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANISED CRIME: REQUIREMENTS FOR EFFECTIVE IMPLEMENTATION,* Turin: UNICRI *et al.,* 2002, pp. 25-7; PETER GASTROW, 'THE ORIGIN OF THE CONVENTION', *in* HANS-JÖRG ALBRECHT & CYRILLE FIJNAUT EDS., *THE CONTAINMENT OF TRANSNATIONAL ORGANISED CRIME: COMMENTS ON THE UN CONVENTION OF DECEMBER 2000,* FREIBURG IM BREISGAU, Edition Iuscrim, 2002, p. 19ff.; CARRIE-LYN DONIGAN GUYMON, 'INTERNATIONAL LEGAL MECHANISMS FOR COMBATING TRANSNATIONAL ORGANIZED CRIME', (2000) 18 *Berkeley Journal of International Law*, 53, 90ff.; ALMIR MALJEVIĆ, *PARTICIPATION IN A CRIMINAL ORGANISATION AND CONSPIRACY; DIFFERENT LEGAL MODELS AND CRIMINAL COLLECTIVES,* Berlin: Duncker & Humblot, 2011, p. 123ff.

[23] N. BOISTER,*supra* note 9, at 129.

[24] *Id*

[25] *Id.*

[26] 18 USC §§ 1962(c).

[27] *United States v. Turkette*, 452 U.S. 576, 589 (1981).

[28] *Id.* at 583.

However, it does not constitute a "pattern of racketeering activity if a couple of random crimes planned by two or more persons."[29] The Supreme Court also held in *H.J. Inc. v. Northwestern Bell Telephone Co.*[30] that a "pattern" requires proof of "continuity plus relationship."[31] Thus, the predicate crimes must be associated within the sense that they "have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events."[32] The Court also explained that continuity "is both a closed-and open-ended concept, referring either to a closed period of repeated conduct or to past conduct that by its nature projects into the future with a threat of repetition."[33] Thus, the Rico legal framework's definition of a criminal enterprise was recognized to be flexible enough to allow law enforcement to gather admissible evidence about the whole picture of what the alleged offender was doing instead of merely proving involvement in different fragmented crimes.[34]

A different statutory approach to organized crime was taken by Italy in 1982 when the Italian Penal Code Article 416*bis* defined 'mafia-type organizations' as follows:[35]

> An association is a mafia-type organization when its members make use of intimidation derived from their association, and the ensuring subjection and 'gagging' in order to commit crimes or to manage either directly or indirectly, or otherwise control, business activities, concessions, authorizations, public markets or public services, or to obtain unfair profits or advantages for themselves or others.

[29] DAVID LUBAN ET AL., INTERNATIONAL AND TRANSNATIONAL CRIMINAL LAW 515 (Wolters Kluwer Law & Business, 2nd ed. 2014).
[30] *H.J. Inc. v. Northwestern Bell Telephone Co*., 492 U.S. 229 (1989).
[31] *Id.* at 239.
[32] 492 U.S. 229 (1989). at 240
[33] *Id.* at 241.
[34] *See* E WISE, *RICO AND ITS ANALOGUES: SOME COMPARATIVE CONSIDERATIONS,* 27 Syracuse Journal of International and Commercial Law 303, 310 (2000).
[35] N. BOISTER, *supra* note 9, at 130.

In 1992, the amendment of Article 416*bis* included "preventing or impeding the free exercise of voting rights or procuring votes for oneself or for other persons during elections."[36]

In summary, the dual dimensions of organized crime prosecution have been presented through these specific examples of national laws.[37] First, these laws define an entity by what the accused does (i.e., a type of crime or continuity of activity) or what it is (i.e., organizational features and size).[38] Second, these laws then proscribe membership or participation instead of direct participation in criminal activity.[39] The purposes of prosecuting participation are to clarify that the accused has been involved with a criminal organizations by actually being part of them for criminal liability purposes.[40]

ii. Responding to Transnational Organized Crime

Although there are drawbacks to these examples of national laws, they have played a significant role as models for the international community to initially respond to transnational organized crime.[41] Based on 'transnational crime,' the UN Crime Prevention and Criminal Justice Branch in 1974 defined it as a "certain criminal phenomena transcending international borders, transgressing several states' laws or impacting another country."[42] Its meaning then changed in the 1980s because the opening of borders facilitated international trade and because of the changes introduced by the development of information technology.[43] These phenomena are called

[36] N. BOISTER, *supra* note 9, at 130.
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] GERHARD MUERLLER, *TRANSNATIONAL CRIME: DEFINITIONS AND CONCEPTS*, *in* PHIL WILLIAMS & DIMITRI VLASSIS EDS, *COMBATING TRANSNATIONAL CRIME*, Milan/London, ISPAC/Frank Cass, 2001, at 13.
[43] N. BOISTER, *supra* note 9, at 130.

'globalization,' which produced opportunities for the growth in licit economies, bilateral and regional mutual legal assistance treaties, and border multilateral cooperation.[44] However, globalization stimulated organized criminal groups to take advantage of global markets or connectivity by expanding and changing their operations across borders.[45] Consequently, developing states have been the target of transnational criminal organizations because weak government control and convenient physical locations provide a friendly environment for them and make them difficult to suppress.[46]

On 14 December 1990, the General Assembly expressed its concern about the surge in transnational crime and restructured the United Nations Crime Prevention and Criminal Justice Programme framework.[47] On 30 July 1992, the UN Congress's agenda on the Prevention of Crime and Treatment of Offenders supported the UN Economic and Social Council (ECOSOC) by taking "action against national and transnational organized and environmental crime."[48] In December 1992, the General Assembly adopted a resolution on "International Cooperation in combating organized crime," in which it called global efforts for dealing with national and transnational crime.[49] Subsequently, the major political step happened when the World Ministerial Conference on Organized Transnational Crime was convened in 1994 of the Naples Political Declaration and Global Action Plan against Organized Transnational Crime.[50] The Naples Conference triggered

[44] The Globalization of Crime: A Transnational Organized Crime Threat Assessment, at ii, paras. 1-2. United Nations Office on Drugs and Crime, 2010.
[45] N. BOISTER,*supra* note 9, at 130-1.
[46] *Id.* at 131.
[47] *See* Creation of an Effective United Nations Crime Prevention and Criminal Justice Programme, A/RES/46/152, para. 1.
[48] ECOSOC Res 1992/24 of 30 July 1992; N. BOISTER, *supra* note 9, at 131.
[49] *See* International Cooperation in combating organized crime, UN GA Res 47/87 of 16 December 1992 (UN Doc A/RES/47/87).
[50] UN GA Res 49/159, 23 December 1994; Introduction', *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto, supra* note 22, at xiv-xv., paras. 2, 5.

the Crime Commission to start weighing of the impact of possibly having one or more conventions against organized transnational crime.[51] However, two main issues still existed at that time. The first issue was the progressive occurrence of crime internationally, and the readiness of the police and judicial authorities to overcome their operations against other states' sovereignties.[52] The second was concerned with the progressive organization of crime and the uniformity of criminalization of organized criminal groups across jurisdictions.[53] According to this approach, the United States and Italy raised awareness among several countries because they had already enacted the national laws for countering organized criminal groups.[54] During the treaty negotiation process, the Government of Poland submitted a draft text for a UN General Assembly in convention 1996.[55] A meeting of the working group of experts was held in Warsaw in 1998 and an ad hoc committee was formed to produce a preliminary draft of a possible comprehensive international convention and three draft protocols—in illegal trafficking in migrants, on illicit manufacturing of and trafficking in firearms and ammunition, and on trafficking in women and children.[56]

In 2000, a high-level political conference held in Palermo, Italy, finalized the adoption and then opened the agreement for signatures by the Member States to the United Nations Convention

[51] Report of the World Ministerial Conference on Organized Transnational Crime, Naples, 21-23 November 1994 (A/49/748).
[52] United Nations Office on Drugs and Crime, UNTOC AT 20: Commemorating the 20th anniversary of the adoption by the General Assembly of the United Nations Convention against Transnational Organized Crime, 2020 at 28, Available at: https://www.unodc.org/documents/treaties/UNTOC
[53] *Id.*
[54] In 1970 and 1982 respectively. *See* MICHELINI, GUALTIERO, *The Palermo Convention/2. The role of Italy in the drafting of the final text.* Cross Vol.5 N2 (2019), at 24.
[55] *Question of the Elaboration of an International Convention against Organized Transnational Crime,* UN DOC A/C.3/51/7, 1 October 1996; United Nations Office on Drugs and Crime, UNTOC AT 20: Commemorating the 20th anniversary of the adoption by the General Assembly of the United Nations Convention against Transnational Organized Crime, *supra* note 52 at 29.
[56] N. BOISTER, *supra* note 9, at 132.

Against Transnational Organized Crime (the Palermo Convention of UNTOC) and three supplementary protocols.[57] The convention and the protocols also required 40 ratifications to enter into force.[58] Under Article 1 of the UNTOC, its goal is to "promote cooperation to prevent and combat transnational organized crime more effectively."[59] Furthermore, the UNTOC contains detailed regulations for the objective of international procedural cooperation and a group of criminalization provisions.[60] In 2020, according to Article 32[61] of the convention, the tenth Session of the Conference of the Parties to the Convention had vigorously called attention to the COVID-19 pandemic as an accelerator for criminal activity and it urged governments to apply a multilateral approach in combating organized crime via resolution 10/5, which mainly focuses on "preventing and combating the manufacturing of and trafficking in falsified medical products as forms of transnational organized crime." [62] Thus, transnational organized criminals are adaptable to situations appropriate for gaining benefits from operating their criminal activities.

[57] The Convention was adopted by resolution A/RES/55/25 of 15 November 2000 at the fifty-fifth of the General Assembly of the United Nations. In accordance with its article 36, the Convention will be open for signature by all States and by regional economic integration organizations, provided that at least one Member State of such organizations has signed the Convention, from 12 to 15 December 2000 at the Palazzi di Giustizia in Palermo, Italy, and thereafter at United Nations Headquarters in New York until 12 December 2020, 2225 UNTS 209, enter into force 29 September 2003, with 190 states parties as of 9 October 2020.

[58] *See* United Nations Convention against Transnational Organized Crime: Procedural History, at para. 25.

[59] N. BOISTER, *supra* note 9, at 132.

[60] Article 16-21 and 27; *See* NEIL BOISTER, *A "TOOLBOX" RARELY USED?*, 16 International Criminal L. Rev. 39 (2016).

[61] Article 32(1) of the Convention, a Conference of the Parties to the Conventions was established to improve the capacity of States Parties to combat transnational organized crime and to promote and review the implementation of the Convention.

Article 32(3) or the Convention states that the Conference shall agree upon mechanisms for achieving the objectives mentioned in paragraph 1 of this article, including:

(a) Facilitating activities of States Parties for training and technical assistance, implementation of the Convention, and prevention, including by encouraging the mobilization of voluntary contributions;

(b) Facilitating the exchange of information among States Parties on patterns and trends in transnational organized crime and on successful practices for combating it;

(c) Cooperating with relevant international and regional organizations, and non-governmental organizations;

(d) Reviewing periodically the implementation of the Convention;

(e) Making recommendations to improve the Convention and its implementation.

[62] Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Tenth Session of the Conference of the Parties, Resolution 10/5, Available at:

2.3 Concepts of Transnational Crime from an Interdisciplinary Perspective

When globalization emerged in the 1990s, transnational crime was presented as a new threat to global governance from a legal aspect. One legal perspective proposes that the definition of transnational crime comprises of those phenomena.[63] An interdisciplinary perspective has been adopted, including political, economic, sociological, and legal viewpoints, to differentiate transnational crime from other types of crime.[64] An interdisciplinary approach is adopted because of the essentially contested concepts of 'transnational crime,' 'organized crime' and allied terms such as 'transnational organized crime.'[65] These words are components of language puzzles regarding certain phenomena depending on when different times and places and their application trigger global governance to adjust its policies.[66] Consequently, the problem of transnational crime and transnational organized crime risks becoming controversial because of the terms' contestability and because these definitions should be neutral, constant, subjective, and proper.[67] There are three problems with the phrase 'transnational organized crime,' which are: 'transnational,' 'organized,' 'crime.' Thus, there are two main ways of recognizing criminal organization: as a set of actors or as a set of activities.[68] This section aims to give practical consideration to the various theoretical approaches and structural analyzes to define these terms.

https://www.unodc.org/documents/treaties/UNTOC/COP/SESSION_10/Resolutions/Resolution_10_5_-_English.pdf

[63] JAMES SHEPTYCKI, *Transnational crime: an interdisciplinary perspective, in* NEIL BOISTER & ROBERT J. CURRIE EDS., ROUTLEDGE HANDBOOK OF TRANSNATIONAL CRIMINAL LAW 41 (Routledge, 1st 2015).

[64] J. SHEPTYCKI,, *supra* note 63, at 41.

[65] *Id.*

[66] J. SHEPTYCKI, *supra* note 63, at 41.

[67] *Id.* at 42.

[68] L. PAOLI & C. FIJNAUT, *Organised Crime and Its Control Policies*, 14 European Journal of Crime, Criminal Law and Criminal Justice 307, 308 (2006).

i. A Set of Actors

Understanding transnational organized crime's relevant terms becomes quite challenging because these words are debatable by the etymology.[69] For example, we may refer to large criminal organizations, especially the Italian Mafia and Japanese Yakuza, when mentioning organized crime.[70] However, the term 'organized crime' has been used to describe gambling and prostitution, and also to describe "illegal business deals involving politicians, police officers, lawyers of professional thieves."[71] This phrase has also been linked to the American–Italian mafia of the 1950s.[72] In addition to organized crime's discourse as a set of actors, the two main models have been heavily criticized by politicians, law enforcement authorities and academics.[73] Hence, these terms should be described within various theoretical models for further content analysis.

A corporate model theory first portrays organized crime in criminal organizations, especially the Italian mafia, as having both highly centralized and corporate hierarchical structures.[74] This model is widely acceptable to the law enforcement and political communities in the United States.[75] Owing to the so-called 'alien conspiracy theory,' gangster or mafia-type organizations were strongly influenced and portrayed as "a coherent and centralized international conspiracy of evil" threatening to the political, economic, and US legal systems.[76] In the essay entitled 'Transnational Organized Crime: The Strange Career of an American Concept', Woodwiss

[69] J. SHEPTYCKI,, *supra note* 63 at 42.
[70] TOM OBOKATA, TRANSNATIONAL ORGANISED CRIME IN INTERNATIONAL LAW 14 (Hart PUB., 2010).
[71] L. PAOLI & C. FIJNAUT, *Introduction to Part I: The History of Concept, in* L PAOLI & C FIJNAUT EDS, *Organised Crime in Europe: Concepts, Patterns and Control Policies in the European Union and Beyond* 24 (Dordrecht, Springer, 2006).
[72] T. OBOKATA, *supra* note 70 at 14.
[73] *Id.*
[74] A. COHEN, *The Concepts of Criminal Organisation*, 17 British Journal of Criminology 97, 98 (1977).
[75] L. PAOLI, *The Paradoxes of Organized Crime,* 37 Crime, Law and Social Change 51, 53 (2002).
[76] M. WOODIWISS, *Transnational Organised Crime: The Global Reach of an American Concept, in* A. EDWARDS & P GILL EDS, *Transnational Organized Crime: Perspectives on Global Security* 15 (London, Routledge, 2005).

traces the evolution of the concept of organized crime, which was useful in building up the apparatus of US federal law enforcement.[77] Subsequently, in the late-1960s, the Crime Commission under President Johnson defined organized crime as:

> A society that seeks to operate outside the control of the American people and their governments. It involves thousands of criminals, working within structures as complex as those of any large corporation . . . Its actions are not impulsive rather the results of intricate conspiracies carried on over many years and aimed at gaining control over whole fields of activity in order to amass huge profits.[78]

Although American government policy widely accepted the corporate model, many have mentioned that they should reexamine this model because it reflected the contemporary organized crime groups.[79] A well-known academic criminologist, Donald Cressy, initially attempted to conduct a systematic study of organized crime. In his seminal book, entitled *Theft of a Nation*[80], he described La Cosa Nostra's basic structure as labor in the American Mafia by making symbolic use of military ranks alongside Italian terminology and references to family ties.[81] According to Cressy, the hierarchical structure of Cosa Nostra families is headed by a boss or *il capo* (literally 'the head') who managed their family's businesses to maximize profits by providing illicit goods and services order within their family.[82] Beneath each boss were several 'under-bosses,' also known as a *sotto capo* (literally 'under the head'), who can be equated with vice presidents or deputy directors in the illicit enterprise.[83] To communicate effectively to the working subordinates, bosses communicate via a *capporegima*—the 'head of the régime,' who are called 'lieutenants' or

[77] M. WOODIWISS, *Transnational Organized Crime: The Strange Career of an American Concepts, in* M. BEARE ED., *Critical Perspectives on Transnational Organized Crime, Money Laundering and Corruption,* 1 (Toronto: University of Toronto Press, 2003).
[78] M. WOODIWISS,*supra* note 76 at 16.
[79] T. OBOKATA, *supra* note 70 at 15.
[80] D. CRESSEY, *Theft of a Nation: The Structure of Organized Crime in America,* (New York: Harper and Row, 1967).
[81] D. CRESSEY, *Criminal Organization: Its Elements Forms,* (New York: Harper and Row, 1972).
[82] D. CRESSEY, *supra* note 80 at113.
[83] *Id.*

'captains,' and were on duty chiefs of operating units within a family.[84] The section below the 'lieutenant' has 'deputy lieutenants' and the 'rank-and-file' 'soldiers' are under them.[85] There also hierarchical, corporate structures in the Russian mafia and Japanese Yakuza, or even hierarchical groups in Sicily, which are bound by 'the Commission.'[86]

The corporate model is extremely simplistic and insufficiently reflects the reality of contemporary organized crime because highly structured, hierarchical organizations ran organized criminal groups in many cases.[87] A network model could be applied to further understanding of criminal organizations, in which existing groups of offenders have different sizes:

> Small, loose associations of two to five offenders without an internal hierarchy; core groups of five to ten offenders divided into planning and operational levels and closed to the outside, and large groups of twenty of fifty offenders with a high level of organization, a multilevel structure, and a chain of command among the various operational level.[88]

These groups use a variety of methods to work together and maintain informal communication.[89] In the 1970s, based on anthropological and political science scholars, the network model gained importance as an alternative form of understanding a criminal organization.[90] In *Crimes of the Powerful* (1976) by Pearce, the Italian mafia were linked to this corporate model.[91] This led to many studies of networks in the Italian mafia, which mostly illustrate some forms of hierarchical structures; however, this argument possibly remains unsustainable.[92] Nevertheless, some scholars

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[84] D. CRESSEY, *supra* note 80 at113.
[85] *Id.*
[86] *Id.*
[87] P. WILLIAMS & R. GODSON, *Anticipating Organized and Transnational Crime,* 37 Crime, Law and Social Change 331, 332 (2002).
[88] ARNDT SINN, *Transnational Organised Crime: Concepts and Critics, in* PIERRE HAUCK & SVEN PETERKE, INTERNATIONAL LAW AND TRANSNATIONAL ORGANISED CRIME 30 (Oxford U. Press, 1st ed. 2016).
[89] A. SINN, *supra* note 88, at 30.
[90] JS MCILLWAIN, *Organised Crime: A Social Network Approach,* 32 Crime, Law and Social Change 301, 303 (1999).
[91] F. PRARCE, *Crimes of the Powerful: Marxism, Crime and Deviance*, 177-21 (London, Pluto Press, 1976).
[92] L. PAOLI, *Mafia Brotherhoods: Organized Crime, Italian Style* (Oxford, Oxford University Press, 2003).

argue that the Italian mafia and other criminal organizations functioning in the United States are also based on a network rather than having strict hierarchy.[93]

The network model is also applied to explain criminal organizations in many locations. This model is also dominant in the forms of organized crime, especially in the Netherlands[94] and Germany.[95] It is worth noting that the Hong Kong Triads would mostly be organized through informal networks rather than formal organizational structures.[96] From these examples, we can conclude that the network model is appropriate for understanding organized crime and particularly reflects contemporary organized crime.[97]

However, some might question why the network model has become so dominant recently. The reason for this is that criminal networks can be reorganized quickly and, depending on a changing operational environment, they can better infiltrate. Hierarchical organizations, by way of comparison, are inflexible and easily detectable by law enforcement authorities.[98] Paoli clarifies the virtue of forming smaller criminal organizations within *The Paradoxes of Organized Crime.*[99] When the scale of a criminal organization becomes more extensive, the trade in illicit goods and services becomes easier. Another advantage of the network model is that a long-term relationship is not its main characteristic.[100] It depends on each illegal entrepreneur's opportunities to work together with other partners to maximize their own profits.[101] Conversely, the network model's

[93] P. WILLIAMS & R. GODSON, *supra* note 87 at 331-32.
[94] *Id.* at 332.
[95] L. PAOLI, *supra* note 75 at 67.
[96] P. WILLIAMS, *Organizing Transnational Crime: Networks, Markets and Hierarchy, in* P. WILLIAMS & D VLASSIS EDS, *Combating Transnational Crime: Concepts, Activities and Responses* 77 (London, Frank Cass, 2001).
[97] T. OBOKATA, *supra* note 70 at 17.
[98] *Id.*
[99] *Id.*
[100] L. PAOLI, *supra* note 75 at 64.
[101] T. OBOKATA, *supra* note 70 at 17.

disadvantages are still extant.[102] A strong bond is a key point because rather than cooperation, criminal actors would select their counterparts to work together for competition with other illegal enterprises.[103] Thus, trust in their grouping is essential to form and maintain a network and promote various relational ties.[104] For example, the Columbian cartels worked together with Russian mafias to operate the heroin and cocaine trade in Eastern European markets, in which financial interests are significant but conflicts of interest may occur.[105] Therefore, the network model does not need various actors to be adherent.

From an interdisciplinary perspective, a social and cultural analysis can broaden the comparative perspective to help us perceive the different structures of organized crime. A social perspective that consists of "ethnic or tribal ties, family relations, friendship and sharing a common geography (neighborhood)" tightens the relationship between individuals and organizations.[106] For example, blood relations connect the members' status within each Italian mafia family.[107] The Nigerian criminal organizations who were pre prominent in the 1980s subject to "family and ethnic ties in diasporas and developed links between domestic and overseas bases," especially Nigerian criminal gangs in London.[108] While a cultural perspective comprises rituals, codes, symbols and other shared norms and values, those factors are important in attracting members together.[109] Some scholars view organized crime as a cultural phenomenon. For example, Chinese organized criminal

[102] T. OBOKATA, *supra* note 70 at 17.
[103] *Id.*
[104] JS MCILLWAIN, *supra* note 90 at 305.
[105] JH MITTELMAN & R. JOHNSTON, *The Globalization of Organized Crime, the Courtesan state, and the Corruption of Civil Society,* 5 Global Governance 103, 113 (1999).
[106] P. KLERKS, *The Network Paradigm Applied to Criminal Organisations: Theoretical Nitpicking or a Relevant Doctrine for Investigators? Recent Developments in the Netherlands, in* A. Edwards & P Gill eds, *Transnational Organised Crime,* 102 (London, Routldge, 2005).
[107] JS MCILLWAIN,, *supra* note 90 at 305.
[108] JH MITTELMAN & R. JOHNSTON, *supra* note 105 at 113 This is also the case in South Africa. *See* T. LEGGETT, *Rainbow Vice: The Drugs and Sex Industries in the New South Africa* (London, Zed Books, 2002).
[109] T. OBOKATA, *supra* note 70 at 18.

groups rely on the notion of 'guanxi,' or "reciprocal obligation or relationship, to bind groups together."[110] Triad groups appreciate "specific oaths, rituals, and other shared norms and values" to magnify a sense of loyalty and brotherhood.[111] A similar notion, called 'giri,' is used among the Japanese Yakuza.[112] At the same time, initiation rituals and secret codes have helped the Italian mafias and criminal groups in Germany to carry out their business.[113]

The distinction between criminal organizations and hierarchical structures further leads to systematic examination of how a social analysis framework would crystallize a better understanding of crime's transnational organization. Phil Williams and Roy Godson consider several models to illustrating the nature of this difference through three social models.[114] The first model is a cultural model concerned about patron–client relations, and family and kindship ties.[115]

The second is the ethnic model, which examines the loyalty of a criminal group's members based on shared language and other ethnic characteristics.[116] This model further contemplates that "ethnically-based criminal networks are . . . difficult to penetrate since they have inbuilt defense mechanisms provided by their language and culture."[117] The third social network models refer to "webs of influence linking criminals."[118] William and Godson further envisage that "networks are sophisticated organizational structures that are well suited for criminal activities," because they

[110] P. WILLIAMS & R. GODSON, *supra* note 87 at 329-30.
[111] *Id.* at 329.
[112] D. KAPLAN & A. DUBRO, *Yakuza: Japan's Criminal Underworld* 17 (Berkeley, University of California Press, 2003).
[113] K. LANGE, *"Many a Lord is Guilty, Indeed for Many a Poor Man's Dishonest Deed": Gangs of Robbers in Early Modern Germany, in* L. PAOLI & C. FIJNAUT, *Introduction to Part I: The History of Concept, in* L PAOLI & C FIJNAUT EDS, *Organised Crime in Europe: Concepts, Patterns and Control Policies in the European Union and Beyond* 24 130-131 (Dordrecht, Springer, 2006).
[114] J. SHEPTYCKI,, *supra note* 63 at 48.
[115] *Id.*
[116] J. SHEPTYCKI,, *supra note* 63 at 48.
[117] P. WILLIAMS & R. GODSON, *supra* note 87 at 331.
[118] *Id.*

stay "flexible and adaptable," and are "resistant to between licit and illicit sectors of the economy."[119] The network model also draws in "politicians, bureaucrats, judges and law enforcement agents who are susceptible to bribery."[120] It becomes apparent then that these models can be hybridized and combined in various ways.

Finally, organized crime is assembled by "a wide variety of legitimate individuals and organizations" who are involved, directly or indirectly, in criminal networks or hierarchical organizations.[121] Most of the members in criminal networks are part of criminal activities.[122] For example, money laundering has been described as the process by which criminals attempt to conceal the illicit origin and ownership of the proceeds from their unlawful activities.[123] This is the means of obtaining money through illegal activities to transfer into various legitimate financial institutions before returning to the criminals' possession.[124] In a trafficking in person case, individual broker, agencies and others sometimes bribe public officials for the ease of doing their business, which is to traffic persons who are involved in labor, services or commercial sex acts.[125] Their customers' demand capitalizes the illicit goods and services, thus promoting supply.[126] In summary, transnational organization crime can be seen as a set of actors who are directly or indirectly involved in criminal organizations. Furthermore, the corporate and network models help us to understand how and why criminals gather themselves to commit various illegal activities.

[119] J. SHEPTYCKI, *supra note* 63 at 48.
[120] P. WILLIAMS & R. GODSON, *supra* note 87 at 332-333.
[121] T.OBOKATA, *supra* note 70 at 19.
[122] *Id.*
[123] T. OBOKATA, *supra* note 70 at 19.
[124] *Id.*
[125] *See* T. Obokata, *Trafficking of Human Beings from a Human Rights Perspective: Towards a Holistic Approach* (Leiden, Martinus Nijhoff Pub., 2006).
[126] T. OBOKATA, *supra* note 70 at 19.

ii. A Set of Activities

Organized crime has been highlighted as a set of activities. From this view, the term 'organization' does not refer to a wide variety of participants who are involved in organized crime but instead the 'organization' is the "structure of a chain of events, of an interaction process, in which different individuals and groups participate in different ways at different stages."[127] Indeed, the nature of the illegal activities by their organization is more important than the types of individuals, groups, or organizations who are involved.[128] Consequently, viewing organized crime as a set of activities pays attention to illegal enterprises who supply illicit goods and services to unlawful markets.[129] Schelling's view has primarily influenced many scholars' mindset to shape the modern understanding of organized crime in the 1960s and the 1970s.[130] Shelling proposes that organized crime intends to equip the public with illicit goods and services to supply strong public demand by its manipulative behavior.[131] He also focuses on the economic aspect that leads to law enforcement authorities' giving attention to identifying organized crime's financial incentives and disincentives, estimate cause and effect, and then redesign their laws, regulations, and policies.[132] This focus could pave the way for understanding the *modus operandi*, regardless of the organization's types.[133]

Many US scholars have recently shifted their attention from criminal organizations to their activities.[134] For example, Dwight Smith criticizes organized crime as an illegal enterprise that

[127] A. COHEN, , *supra* note 74 at 98.
[128] T. OBOKATA, *supra* note 70 at 19.
[129] *Id.*
[130] *Id.*
[131] T SCHELLING, *'What is the Business of Organized Crime?',*20 Journal of Public Law 71, 71 (1971); T SCHELLING, *Choice and Consequence* 160 (Cambridge, Harvard University Press, 1984).
[132] T SCHELLING, *supra* note 131 at 159.
[133] T. OBOKATA, *supra* note 70 at 20.
[134] *Id.*

seeks profit.[135] While Alan Block and William Chambliss oppose and define organized crime as "those illegal activities involving the management and coordination of racketeering and vice."[136] William and Godson[137], and Schloenhardt[138] also mention the relationships between organized crime, and illegal goods and services in the unlawful markets.[139] This is the reason why the dynamics of the illegal market affect how criminal organizations will flourish.[140] Accordingly, in the 1980s the consensus of American criminologists on organized crime concludes that it involved a continuing enterprise, who operates rationally and is focused towards obtaining profits through illegal activities.[141]

In Europe, enterprise theory deals with organized crime as a reasonable, well-organized enterprise.[142] Consequently, many can hardly distinguish organized crime from a legitimate commercial enterprise by overlooking the relationship between criminals and their environment, subculture and society.[143] Van Duyne and van Dijick advise that we should think systematically about the organization of crime by looking at which way "social actors interact with their environment in the manufacture of specific types of criminal opportunity is the way forward for a scientifically engaged, empirical, and realistic approach to the issues."[144] In Italy, contemporary scholars, Paoli and Fijnaut, focus particularly on organized crime's economic aspects and confirm that enterprise theory is caused by domestic legislation and working definitions in many European

[135] D. SMITH, *The Mafia Mystique* 335 (New York, Basic Books, 1975).
[136] A. Block & WJ Chambliss, *Organizing Crime* 13 ((New York, Elsevier, 1981).
[137] P. WILLIAMS & R. GODSON, , *supra* note 87 at 324.
[138] A. SCHLOENHARDT, *Organised Crime and the Business of Migrant Trafficking: an Economic Analysis*, 32 Crime, Law and Social Change 203, 206 and 208 (1999).
[139] T. OBOKATA, *supra* note 70 at 20.
[140] P. Van Duyne, *Organized Crime, Corruption and Power,* 26 Crime, Law and Social Change 201, 203 (1997).
[141] L. PAOLI & C. FIJNAUT, *supra* note 68 at 310.
[142] T. OBOKATA, *supra* note 70 at 20.
[143] A. SINN, *supra* note 88 at 30.
[144] J. SHEPTYCKI, *supra note* 63 at 49.

states.[145] The German federal criminal police, the Bundeskriminalamt, comments upon organized crime as "the planned commission of criminal offenses determined by the pursuit of profit and power."[146] Meanwhile, the Polish police define it as "activities of groups that have been set up for making money with crime (no matter whether it relates to violent or economic offenses), use of violence, blackmail, and corruption, and aim at introducing illegal revenues into the legitimate economy."[147]

Illegal markets cannot be absolutely separable from the changes in demand and supply determinants.[148] Given that they follow the rules of supply and demand, illegal markets, in fact, cannot enjoy state's legal protection as legitimate markets where each state protects the right of both buyers and sellers under its rules and regulations.[149] However, the consumers of illicit goods and services help to accelerate the increase of organized crime.[150] This first aspect differentiates organized crime from ordinary crime. Cressey considers the difference between illegal markets and legitimate markets more explicitly by arguing that legitimate markets offer revenue back to the public.[151] In contrast, illegal markets exploit their customers as victims to maximize their profits and do not accommodate their needs.[152] Moreover, customer demand encourages criminals to adjust their activities to the circumstances and illicit products.[153] The more that relevant national laws put pressure specifically on the availability of certain goods and services, the more difficult

[145] L. PAOLI & C. FIJNAUT, *supra* note 68 at 312.
[146] BUNDESKRIMINALAMT, *Organised Crime: 2008 National Situation Report*, 8 (2009).
[147] W. FILIPKOWSKI, *Organised Crime in Poland as the Field of Research and Its Contemporary Situation,* paper presented at the Research Conference on Organised Crime 2 (Frankfurt, 2008).
[148] T. OBOKATA, *supra* note 70 at 21.
[149] *Id.*
[150] *Id.*
[151] *Id.*
[152] D. CRESSEY, *supra* note 80 at 72.
[153] T. OBOKATA, *supra* note 70 at 21.

it is for criminals to seek to benefit from those goods and services in the illegal markets.[154] Schloenhardt pays considerable attention to the national legislation prohibiting particular goods and services that result in illegal markets by provoking an incentive for organized criminals to get involved.[155] More recently, it is important to note that new forms of property can be stolen, such as intellectual property. Under US patent law, the United States Supreme Court found in *Diamond v. Chakrabarty*[156] that "anything under the sun that is made by man,"[157] including a living, genetically engineered micro-organism, could be patentable.[158] This means that new forms of property such as genetically engineered bacteria are capable of being stolen.[159] Even movies and music are a kind of private property that can be pirated. Majid Yar observes that

> Globalization, socio-economic "development" and innovation in information technology help to establish the conditions for expanded production and consumption of 'pirate' audio-visual goods,' but the 'epidemic' is the 'product of shifting legal regimes, lobbying activities, rhetorical maneuvers, criminal justice agendas, and 'interested' or 'partial' processes of statistical inference.[160]

Law can be a double-edged sword, which is somewhat exemplified in the multilateral treaties on the protection of human rights, slavery, drug, and arms trafficking, and has contributed to the growth of illegal markets and organized crime.[161]

The second distinction is that organized criminals intend to use a monopoly to dominate certain illegal markets and maximize their profits.[162] However, many have disputed this notion

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[154] T. OBOKATA, *supra* note 70 at 21.
[155] A. SCHLOENHARDT,*supra* note 138 at 207.
[156] *Diamond v. Chakrabarty*, 447 US 303 (1980).
[157] *Id.* at 309.
[158]447 US 303 at 309.
[159]*Id.*.
[160] M. YAR, *The Global "Epidemic" of Movie "Piracy": Crime-wave or Social Construction?, Media, Culture and Society,* 2005, vol. 27, no.5, at 691.
[161] P. ARLACCHI, *The Dynamics of Illegal Markets, in* P. WILLIAMS & D VLASSIS EDS, *Combating Transnational Crime: Concepts, Activities and Responses* 7 (London, Frank Cass, 2001).
[162] A. SCHLOENHARDT, *supra* note 138 at 211.

because there is no supporting empirical evidence.[163] Given that most criminal groups cannot fully enjoy a monopoly over goods and services, this causes an impediment for criminal groups who wish to get involved in organized crime. For example, some groups have tried to exploit the global attention given to the COVID-19 pandemic[164] by selling counterfeit medicines and equipment, through cybercrimes involving fake antivirus and hacking other's computers, fraud, or even offering to collect currency "contaminated with the coronavirus."[165] However, these crimes are not committed by organized crime groups but by individuals who intentionally aim to exploit the situation to profit from others' pain.[166] These circumstances would be termed 'low-level' organized crime that virtually competes against the former organized criminal groups, which makes a monopoly impossible but is a way to expand towards large-scale organized crime.[167]

Another significant distinction from an economic perspective is that criminal groups exclusively take advantage of longer-term economic benefits because money laundering is the life blood of organized criminal activities.[168] If financial constraints occur to prevent criminal groups from thriving by preventing them from reinvesting in expanding criminal enterprises, then the criminal organization will gradually dissolve. A cost benefit analysis then reveals that organized crime is different from ordinary crimes because reinvestment and diversification of crime proceeds either circulate or nourish criminal groups (for the most part).[169] It is noticeable that organized crime is almost analogous to legitimate business. Both run organizations aiming to maximize

[163] Reuter, *Disorganized Crime: The Economics of the Visible Hand* xi (Cambridge, MIT Press, 1983); M. WOODIWISS, *Transnational Organized Crime: The Strange Career of an American Concepts, supra* note 77 at 23.
[164] JAY ALBANESE, *You are Organised Crime,* (Apr. 21, 2020) Available at: https://shoc.rusi.org/informer/you-are-organised-crime
[165] J. ALBANESE, *supra* note 164.
[166] *Id.*
[167] *Id.*
[168] T. OBOKATA, *supra* note 70 at 22.
[169] D. CRESSEY, *supra* note 80 at 72.

profits and feed their employees by providing goods and services for customers.[170] Although economic theories and models are equally applicable to legitimate business and organizational criminals, organized crime itself does not comply with each state's rules and regulations.[171]

Engaging in risk management is the main approach of organized criminal groups to maintain and maximize profit motive.[172] This happens at various levels by assessing the risk of losing profits.[173] For example, the employees of criminal organizations help prevent to prevent the enterprise from suppression by law enforcement authorities by posing a major threat or using a wide range of methods to constrain authority.[174] They will then receive the rewards, such as promotion to a higher status or better wage.[175] Another way to reduce the risk is to decentralize criminal organizations into smaller groups that are separable from the bosses.[176] By doing so, although the higher-level bosses and proceeds of crime may confront law enforcement authorities with legal action, the subordinates can avoid arrest and form a new organization.[177] Other risk management methods include interfering in a legal section/department by finding loopholes in criminal law and justice systems, money laundering, corruption, bribery, and intelligence gathering.[178] Therefore, law enforcement authorities should assess risk management as a tool to eradicate organized crimes.

Organized crime tends to thrive in states that struggle with political, economic, and social stability because they cannot provide effective legal and administrative frameworks for curbing

[170] T. OBOKATA, *supra* note 70 at 22.
[171] P. WILLIAMS, *supra* note 76 at 70-71.
[172] T. OBOKATA, *supra* note 70 at 22.
[173] *Id.*
[174] *Id.*
[175] A. SCHLOENHARDT, *supra* note 138 at 217.
[176] P. ARLACCHI, *supra* note 161 at 8.
[177] A. SCHLOENHARDT *supra* note 138 at 217.
[178] P. WILLIAMS & R. GODSON, *supra* note 87 at 336-38.

licit and illicit markets.[179] In particular, organized crime infiltrates into the licit economy of these states.[180] Most organized criminals launder criminal proceeds by reinvesting in licit enterprises, such as restaurants or international import/export business.[181] They also grow the national businesses, such as labor unions.[182] The relationship between licit economy and organized criminals helps to facilitate public authority through the corruption of politicians and civil servants.[183] The money laundering proceeds of crimes from criminal activities are gradually circulated in the legitimate economy.[184] For example, corruption in Italian legitimate enterprises, such as construction, helps organized criminal groups to flourish.[185] This makes it difficult for law enforcement authorities to tackle organized crime if they focus only on criminals and criminal groups are actors who facilitate organized crime when those actors commit such crimes at international or transnational level.

It is also important to note that crimes can be committed both internationally and transnationally. Due to further criminalization and prosecution, an understanding of the difference between international crimes and transnational crimes would be of considerable significance for bringing alleged offenders to the criminal justice system and avoid a conflict of state sovereignty to exercise its criminal jurisdiction, in which crimes occurs across, beyond, or through multiple nations. First, international crimes are crimes against the peace and global security, such as genocide, war crimes, and crimes against humanity that cause more significant harm to the

[179] T. OBOKATA, *supra* note 70 at 23.
[180] *Id.*
[181] L. PAOLI & C. FIJNAUT, *supra* note 68 at 319.
[182] D. CRESSEY, *supra* note 80 at 123.
[183] T. OBOKATA, *supra* note 70 at 23
[184] *Id.*
[185] L. PAOLI & C. FIJNAUT, *supra* note 68 at 320.

international community than others.[186] Most international crimes first developed through customary international law, and were then encompassed by conventional international law, including international criminal law, international human rights law, and international humanitarian law.[187] The basis of these three bodies of law is differentiated by Grant Niemann, who was appointed the first Senior Trial Attorney of the International Criminal Tribunal for the former Yugoslavia (ICTY) in the Hague.[188] He clarifies that all three still impinge upon state sovereignty and simultaneously manifest international consensus on state accountability to the international community, which relies on various degrees of acts committed so egregiously or unfairly.[189] International criminal law provides definitions and procedures for criminalizing acts committed internationally, with individuals and state liability.[190] Meanwhile, international human rights law serves as an international instrument for generally considering criminal and noncriminal acts, and generally holding state accountability.[191] International humanitarian law then applies during an armed conflict, whether international or non-international.[192] In particular, war crimes would differentiate between the playing field for combatants ("Hague law"), or Laws and Customs of War and the humanitarian treatment of civilians ("Geneva law"), which are commonly understood in terms of the Geneva Conventions.[193] In comparison, transnational crimes are offenses committed directly or indirectly affecting more than one country's interests.[194] For

[186] M. CHERIF BASSIOUNI, *Introduction to International Criminal Law: Second Revised Edition* 137 (Martinus Nijhoff Publishers, Leiden Boston, 2013).
[187] G. NIEMANN, *International criminal law and international crimes, in* PHILIP REICHEL & JAY ALBANESE, HANDBOOK OF TRANSNATIONAL CRIME AND JUSTICE 263-280 (SAGE PUB., 2nd ed. 2014).
[188] *Id.*
[189] G. NIEMANN, *supra* note 187 at 263-280.
[190] *Id.*
[191] *Id.*
[192] *Id.*
[193] *Id.*
[194] JAY S. ALBANESE, *supra* note 5, at 3.

example, when illegally moved drugs across states' borders, or when a company willfully damages the environment by illegally polluting a river in one country, which flows into and has significant adverse effects in other countries. Both examples are transnational crimes are distinguishable from when a criminal, for example, illegally sells drugs in their neighborhood or when a company willfully pollutes or contaminates only the ground of its motherland (such crimes are domestic).

Finally, we should understand legal pluralism because a comprehensive analysis of transnational organized crime from a multidisciplinary perspective always reflects well on promoting effective cooperation among communities.[195] Legal pluralism is a situation where "two or more legal systems coexist in the same social field."[196] Generally, Peer Zumbansen suggests that 'transnational law' paves the way to methodologies for studying how a plurality of national legal institutions transforms operationally into the transnational legal space.[197] By doing so, transnational criminal law makes the terms of 'international criminal law' and 'crimes of international concern' more comprehensible.[198] Transnational criminal law can be also recognized as "an area or field within transnational legal pluralism that only becomes fully visible if domestic legal systems are examined to identify their transnational features."[199] Consequently, any legal definition adopted at national, regional, and international levels must have the fluidity of including various criminal organizations and their activities because alleged criminals are members of multiple normative communities, including local, territorial, extraterritorial and non-territorial communities.[200] Therefore, a good understanding of transnational organized crime concepts from

[195] T. OBOKATA, *supra* note 70 at 24.
[196] N. BOISTER, *The concept and nature of transnational criminal law, IN* NEIL BOISTER & ROBERT J. CURRIE, *Routledge Handbook of Transnational Criminal Law,* 21 (Routledge, 2015).
[197] Z., PEER C.,*supra* note 7
[198] N. BOISTER, *, supra* note 196 at 21.
[199] *Id.* at 22.
[200] PAUL SCHIFF BERMAN, GLOBAL LEGAL PLURALISM: A JURISPRUDENCE OF LAW BEYOND BORDERS 11 (Cambridge U. Press, 1st ed. 2012).

an interdisciplinary perspective will support the need to establish both short-term and long-term goals to combat the activities of organized crime.

2.4 Categorizing Transnational Crimes

Many transnational crime scholars focus on understanding the dynamics of how organized transnational criminal activity operates with the times. They especially highlight its complexity in terms of the organized criminal groups' structure and the *modus operandi* behind typologies of transnational crimes.

The term transnational crime and its typologies have continually developed. From a criminological perspective, the term "transnational crime" appeared in the mid-1970s when United Nations leaders hesitantly identified types of crimes related to transcended national borders. The UN Crime Prevention and Criminal Justice Branch then issued a guideline for the discussion at the United Nations crime conference in 1974. Four years later, Gerhard Mueller—a prominent criminologist and chief of the UN Crime Prevention and Criminal Justice Branch—suggested that:

> It referred to a criminological term, with no claim to providing a juridical concept, and consisted simply of a list of five activities: 1) crime as business, organized crime, white collar crime, and corruption; 2) offenses involving works of art and other cultural property; 3) criminality associated with alcoholism and drug abuse; 4) violence of transnational and comparative international significance; and 5) criminality associated with migration and flight from natural disaster and hostilities.[201]

Interpol official contributed to an "early informal" definition of transnational crimes, which coupled them with crimes "whose resolution necessitates the cooperation between two or more

[201] P. REUTER & C. PETRIE EDS., *Transnational organized crime: Summary of a workshop,*7 (Washington, DC: National Academies Press, National Research Council, 1999).

countries."[202] In 1994, a leading authority asserted that "transnational crime is a crime undertaken by an organization based in one state but committed in several host countries, whose market conditions are favorable, and risk apprehension is low."[203] Andreas and Nadelmann also defined transnational crime as "those activities involving the crossing of national borders and violation of at least one country's criminal laws."[204] They further suggest that most criminal activities are "economically motivated and involve some form of smuggling."[205] To provide greater precision, in 1995 the United Nations defined transnational crime as "offenses whose inception, proportion and/or direct or indirect effects involve more than one country."[206] The United Nations launched a laundry list of 18 categories of transnational offenses. These activities include money laundering, terrorist activities, theft of art and cultural objects, theft of intellectual property, illicit arms trafficking, aircraft hijacking, maritime piracy, insurance fraud, computer crime, environmental crime, trafficking in persons, trade in human body parts, illegal drug trafficking, fraudulent bankruptcy, infiltration of legal business, and the corruption and bribery of public or party officials.[207]

It is worth noting that transnational crimes are usually classified by the harm that they cause. A wide range of harms threaten different private and public interests, including human rights, social interest and morality.[208] Jay Albanese subsequently suggests that "transnational

[202] A. BOSSARD, *Transnational crime and criminal law* 3 (Chicago, IL: Office of International Criminal Justice, 1990).
[203] P. WILLIAMS, *Transnational criminal organizations and international security* 36(1), 96-113 (Survival, 1994)
[204] P. ANDREAS & E. NADELMANN, *Policing the globe: Criminalization and crime control in international relations,* 255 (New York, NY: Oxford University Press, 2006).
[205] *Id.*
[206] A.CONF. 169/15/Add. 1, 4 April 1995.; U.N. Office on Drugs and Crime, *Global programme against transnational organized crime: Results of a pilot study of forty selected organized criminal groups in sixteen countries* 4 (Vienna Austria: Author, 2002).
[207] U.N. Office on Drugs and Crime, *Global programme against transnational organized crime supra* note 206.
[208] P. Williams & D. Vlassis, *Introduction and Overview, in* P Williams & D. Vlassis eds, *Combating Transnational Crime: Concepts, Activities and Responses* 1 (London, Porland :Frank Cass, 2001).

crimes can be grouped into three broad categories involving provision of illicit goods, illicit services, and infiltration of business or government affecting multiple countries."[209] The provision of illicit goods includes drug trafficking, stolen property, counterfeiting, while the provision of illicit services consists of human trafficking, cybercrime and fraud, commercial vices (e.g., sex and pornography), and the infiltration of business or government includes extortion and racketeering, money laundering and corruption.[210] It would help to organize the confusing array of transnational crime activities, which we already know or should have known. This transnational crime classification illustrates that most transnational crime activities center on organized crime activity rather than traditional, individual, and political perspectives.

2.5 Significance of the Convention

This section deals with legal definitions, a variety of relevant offenses of organized crime, jurisdictional issues, and the obligation of a party to UNTOC.

2.5.1 Legal Definitions of Transnational Organized Crime

You may already be familiar with domestic crimes such as theft, assault, or even murder. These crimes tend to be planned, committed, and concealed in a nation. Consequently, a single nation will exclusively exercise its jurisdiction over criminals (i.e., has the right to prosecute the case). In contrast, transnational crimes span from a single nation to multiple countries and they, therefore, raise many jurisdictional issues.

[209] JAY S. ALBANESE, *supra* note 5, at 3.
[210] *Id.*

During the negotiation of the UNTOC, the Conference adopted the Naples Political Declaration and Global Action Plan Against Organized Transnational Crime and called for a definition, or at least a description, of organized transnational crime. The Naples Declaration lists six characteristics of organized crime:

> (a) Group organization to commit crime; (b) hierarchical links of personal relations which permit leaders to control the group; (c) violence, intimidation, and corruption used to earn profits or control territories or markets; (d) laundering of illicit proceeds to further criminal activity and to infiltrate the legitimate economy; (e) the potential for expansion new activities beyond national borders; and (f) cooperation with other organized transnational groups.[211]

Thus, the definition of organized crime disappeared.

It should be noted that the UNTOC itself does not provide a definition of organized crime. In fact, the organization deliberately chooses not to provide and purposefully keeps the definition open in order "to allow for a broader applicability of the [treaty] to new types of crime that emerge constantly as global, regional and local conditions change over time."[212] Although the term 'transnational organized crime' as such is not defined, Article 2 of the UNTOC provides definitions of several terms appearing throughout the text. Consequently, organized crime is understood as a 'serious crime' committed by an 'organized criminal group.'

Article 2(a) of the Convention defines an 'organized criminal group' as:

> A structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.

[211] DAVID MCCLEAN, TRANSNATIONAL ORGANIZED CRIME: A COMMENTARY ON THE UN CONVENTION AND ITS PROTOCOLS 3-4 (Oxford U. Press, 2007).
[212] United Nations Office on Drugs and Crime, *Organized crime* (2014). Available at: https://www.unodc.org/unodc/en/organized-crime/index.html

The definition in Article 2(a) challenges the notion of how to understand organized crime is neither the type of crime committed, nor the type of criminal, but the process by which it is carried out, which causes an increasing social threat.[213] The EU has developed many elements of an organized group as analytical concepts.[214] However, Article 2(a) also requires the participation of at least three persons, which sets a very low size-threshold for what the states parties consider to be offering an increase in social harm.[215] The distinction is that criminal offenses are to be committed purposely to obtaining financial or material benefits. In contrast, the Joint Action definition was wide enough to include crimes committed without obtaining these benefits.[216]

Article 2(c) defines a 'structures group' as a group "not randomly formed for the immediate commission of an offence." 'Random' here may refer to anything from participation of at least three people who come across and decide to commit an offence to a more planned situation. This group also excludes, for example, groups that have formed in the course of a riot.[217] The phrase 'existing for a certain period of time' is key. During the drafting stage, this phrase was controversial and it was finally deleted from the draft presented at the Eighth Session of the Ad Hoc Committee.[218] Moreover, *travaux préparatories* intend to apply the term 'structured group' to both groups with hierarchical structures and non-hierarchical groups.[219] It should be taken into account that Article 2(c) stipulates that a structured group should not have a formally defined role

[213] WILLY BRUGGEMAN, *The Fight against organized crime: possibilities, problems and opportunities, with a special focus on the EU, in* Hans-Jörg Albrecht & CyrilleFijnaut eds, *Containment of Transnational Organised Crime: Comments on the UN Convention of December 2000.* at 67-68
[214] 29 December 1998 Joint Action of 21 December 1998 on making it a criminal offence to participate in EU has since adopted the definition in article 2(a)—*see* EU Council Framwork Decision 2008/841JHA of 24 October 2008 on the fight against organized crime OJ L 300 (2008).
[215] N. BOISTER, *, supra* note 10 at 131.
[216] The UNTOC also covers participation in criminal organization and this extends to other serious crimes.
[217] T. OBOKATA, *supra* note 70 at 26.
[218] A/AC.254/4/Rev.7 (3 February 2000), 3.
[219] Interpretative notes for the official records (*travaux préparatories*) of the negotiation of the United Nations Convention against Transnational Organized Crime, A/AC.254/37 (11 September 2000). Para 4.

for its members, continuity of membership or a developed structure.[220] This flexible definition also prevails over criminals based on networks.[221]

A 'serious crime,' as per Article 2(b), is defined as "conduct constituting an offense punishable by maximum deprivation of liberty of at least four years or a more serious penalty." After finishing an analytical study by the UN Secretariat for the Ad Hoc Committee, the four-year minimum was decided, showing that amount of criminal penalty ranging from one to five years, with an average of three years.[222] As a result, the serious crime term carries a maximum period of deprivation of liberty of at least four years or more in a particular party's national law. If an offense carries a maximum penalty of three years, then the UNTOC is not available; or if it carries a maximum penalty of five years, then the UNTOC is available.[223] The parties are then not responsible for enacting new penalties, they may leave their penalty scheme unchanged.[224] However, parties possibly incurred a difficulty in cooperating with the UNTOC regarding residual category of offenses if the offense in question has to meet the UNTOC criterion for 'serious' in both parties. This issue may happen when State A applies a five-year maximum penalty to trafficking in stolen cultural artefacts and State B only applies a three-year penalty. Is State A eligible for requesting cooperation on the basis of the UNTOC in the investigation of an alleged trafficker resident in State B? The express terms of Article 2(b) and the principle of reciprocity underpin all forms of cooperation, which suggests that State B is responsible for cooperation if the

[220] Art 2(c).
[221] T. OBOKATA, *supra* note 70 at 27.
[222] *See* also Analytical study on serious crime: report by the Secretariat, UN Doc. A/AC.254/22.
[223] N. BOISTER, , *supra* note 9 at 136.
[224] *Id.*

penalty is at least four years or more in both its law and State A's law. This approach has been followed in practice.[225]

In Article 6 of the UNTOC—criminalization of the laundering of proceeds of crime, one of the four criminal offenses prescribed in the UNTOC—it thus is essential to understand the term 'proceeds of crime.' Article 2(e) defines "proceeds of crime" as "any property derived from or obtained, directly or indirectly, through the commission of an offence." In addition, Criminalization of Corruption in Article 8 is also important to understand the term 'public official.' Article 8 (4) defines "public official" as "a public official or 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." The much fuller definition of 'public official' term is prescribed in the United Nations Against Corruption Convention (UNCAC)[226]:

> (i) 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, irrespective of that person's seniority; (ii) any other person who performs a public function, including for a public agency or public enterprise, or provides a public service, as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party; (iii) any other person defined as a "public official" in the domestic law of a State Party. However, for the purpose of some specific measures contained in chapter II of this Convention [which deals with preventive measures], "public official" may mean any person who performs a public function or provides a public service as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party.[227]

The scope of application is also provided through Article 3(1), which shall apply to the "prevention, investigation and prosecution of" two set of crimes: in terms of Article 3(1)(a), to the offenses established by Article 5 (participation in an organized criminal group), Article 6 (money

[225] *See Ortmann et al v United States* [2017] NZHC 189, at para 153.
[226] UNCAC Art 2(a).
[227] D. MCCLEAN, *supra* note 211 at 121.

laundering), Article 8 (corruption), and Article 23 (obstruction of justice) (discussed further below); and in terms of Article 3(1)(b), to other serious crime. In addition, this application requires that two general conditions in both cases must be satisfied; that is, the offenses in question must be transnational in nature and involve an 'organized criminal group.' Consequently, Article 34(2) makes it clear that parties are not obligated to criminalize these two conditions under the convention offenses because the domestic definitions would unnecessarily put pressure on imposing these elements to narrowly tailor to fit its definitions. However, if state parties concerning these offenses request international cooperation under the UNTOC, they have to focus on the involvement of an organized criminal group and the common elements of transnationality.

The condition of 'transnational' is prescribed broadly in Article 3(2), as follows:

> For the purpose of paragraph 1 of this Article, and offense is transnational in nature if:
>
> (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.

Sub-paragraphs (a), (b) and (d) are defined straightforwardly, while sub-paragraph (c) does provide that 'transnational crime' includes "an act committed within a state without any effect on other states if committed by a criminal group which operates abroad."[228] This expansion affects the notion of 'transnational' as applicable to criminal activities and actors.[229] Nevertheless, this may fall outside of the Convention if local groups committed crimes that do not operate beyond national borders. Furthermore, organized burglary (for example) committed by a gang is not

[228] T. OBOKATA, *supra* note 70 at 29.
[229] *Id.*

included in the Convention, regardless of how serious the crime is or how the gang fits into the definition of 'a criminal group' under the Convention.[230] Therefore, domestic crimes exclusively have jurisdiction within a state and do not need to request international cooperation.

The use of the terms 'international crime' and 'transnational crime' can spark curiosity because they are often used or broadcast by media and commentators to explain a conduct or activity that harms international perspectives. On the one hand, international crimes are crimes that violate international peace or international security under international law.[231] These offenses are directly governed and prohibited by international criminal law and are responsible for individual liabilities.[232] Under the Rome Statute of International Criminal Court (Rome Statute),[233] the only recent examples are war crimes, crimes of aggression, crimes against humanity and genocide.[234] These offenses are prohibited and violated customary international law[235], and constitute *jus cogens*.[236] Unlike 'transnational crime,' international crimes does not have multiple jurisdictions when crimes are committed in one state.[237] From the moral aspect, international crimes do harm human life and dignity, and thus displease human values.[238] Consequently, we can easily recognize international crimes as inherently wrong or evil, or *mala in se*.[239]

[230] T. OBOKATA, *supra* note 70 at 29.
[231] M. CHERIF BASSIOUNI,, *supra* note 186 at 137.
[232] EM WISE, *The Obligation to Extradite or Prosecute* 27 Israel Law Review 268, 269 (1993).
[233] A/CONF.183/9 (17 July 1998).
[234] Art 5.
[235] Customary international law is a source of international law stipulated under Art 38 of the Statute of the International Court of Justice and is generally binding on all states, unlike treaties which only bind those which ratify them, *See* also, JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 6-11 (Oxford U. Press, 8th ed. 2012).
[236] Under Art 53 of the Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331, *jus cogens* is 'a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted'.
[237] T. OBOKATA, *supra* note 70 at 30.
[238] W SCHABAS, *International Crime, in* D Armstrong ed, *Routledge Handbook of International Law* 269 (London, Routledge-Cavendish, 2008).
[239] *Id.*

Transnational organized crime (TOC) is not generally concerned about the international community. It disturbs interests of more than one state, but not all states collectively constitute the international community.[240] In other words, TOC is equally as serious as an international crime.[241] Transnational criminal law is a branch of international law that does not establish individual criminal responsibility, nor does it prohibit conduct.[242] Domestic criminal law is a tool for promoting indirect suppression of transnational criminal law by imposing obligations on states to enact legislation. Moreover, organized crime's prohibition is not part of customary international law.[243] Therefore, transnational organized crime may be fitted appropriately into *mala prohibita*[244] or such conducts are prohibited directly by law.

2.5.2 Offenses in the Convention against Organized Crime

In response to the offenses, the UNTOC's drafters pursued a double-pronged strategy of prevention.[245] First, it is strategy of combating the basic crimes that are proscribed in the Protocols and as serious crimes by the parties. Second, it is a strategy to deal with the entrepreneurial, logistical, and organizational crimes that are proscribed in the UNTOC itself, including participation in an organized criminal group, corruption, money laundering, and obstruction of justice. Therefore, the list of organizational crimes is examined in more detail in the following subsections.

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[240] A. Cassese, *International Criminal Law* 11 (Oxford U. Press, 2nd ed. 2007).
[241] T. OBOKATA, *supra* note 70 at 31.
[242] N. BOISTER,, *supra* note 9, at 1-9.
[243] *Id.*
[244] W SCHABAS, , *supra* note 238 at 269.
[245] M KILCHING, *Substantive Aspects of the UN Convention Against Transnational Organised Crime in* H-J ALBRECHT & C. FIJNAUT EDS, *The Containment of Transnational Organised Crime: Comments on the UN Convention of December 2000* 84, 86 (Freiburg im Breisgau: Iuscrim, 2000).

2.5.2.1 Participation in an Organized Crime Group (Article 5)

Article 5, paragraph 1 of the Convention requires State Parties to "adopt such legislative and other measures as may be necessary to establish as criminal offenses, when committed intentionally":

> (a) Either of both of the following as criminal offenses distinct from those involving the attempt or completion of the criminal activity:
> (i) Agreeing with one or more other persons to commit a serious crime for a purpose relating directly or indirectly to the obtaining of a financial or other material benefit and, where required by domestic law, involving an act undertaken by one of the participants in furtherance of the agreement or involving an organized criminal group;
> (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, takes and active part in:
> a. Criminal activities of the organized criminal group;
> b. Other activities of the organized criminal group in the knowledge that his or her participation will contribute to the achievement of the above described criminal aim;
> (b) Organizing, directing, aiding, abetting, facilitating or counseling the commission of serious crime involving an organized criminal group.[246]

The opening words of the chapeau in Article 5(1)(a) are important because it clarifies that a new substantive offense is to be created, involving participation in a criminal group. It is to be additional to ("distinct from") any other specific offense (or attempted offense) committed by one or more of the participants.

[246] Art 34(1) of the Convention requires States Parties to "take the necessary measures, including legislative and administrative measures, in accordance with fundamental principles of [their] domestic law, to ensure the implementation of [their] obligations under this Convention."

Art. 34(2) insists that "[t]he offences established in accordance with article 5, 6, 8, and 23 of this Convention shall be established in the domestic law of each State Party independently of the transnational nature or the involvement of an organized criminal group as described in article 3, paragraph 1, of this Convention, except to the extent that article 5 of this Convention would require the involvement of an organized criminal group." This is rather a remarkable de-coupling of the obligation of a Party from the "Transnational" basis of the Convention. Art. 34(3) permits a Party to adopt "more strict or serve measures than those provided for by this Convention for preventing and combating transnational organized crime."

The drafters had various national models, including conspiracy (the common law concept of both an inchoate offense and a form of participation in crime), criminal associations (recognized in many civilian criminal legal codes), the racketeering offenses (United States), and mafia-type associations (Italian Penal Code). In favor of coverage and compromise, the drafters settled for two options,[247] though states parties can opt for both options if they choose. An aggravated form of participation in the basic offenses is significant for requiring a party to criminalize either (i) the conspiracy option or (ii) the participation in the organized criminal group option (or both), as these offenses distinct from other existing completed and inchoate offenses involved in the criminal activity.

i. **The conspiracy model**

The first option, the conspiracy model,[248] is stated in Article 5(1)(a)(i), which reflects the common law's conspiracy offense. It requires that the accused must conspire to commit a serious crime which benefits them by conduct required through an agreement.[249] 'One or more persons' are required 'to commit a serious crime,' which is a crime penalized by four years or more deprivation of liberty.[250] The commission must be intentional (although agreement and intention can also be inferred)[251] even though a specific limited condition is required: one "relating directly or indirectly to the obtaining of a financial or other material benefit." In other words, as for *mens rea,* it appears to require that the parties to the agreement have knowledge of the object of the agreement (i.e., the commission of the crime, but not a serious crime), and of each other's

[247] F. CALDERONI, *A definition that does not work: the impact of the EU Framework Decision on the Fight against Organized Crime,* 49 Common Market Law Review, 1365, 1374 (2012).
[248] Roger S. Clark, *The United Nations Convention against Transnational Organized Crime,* 50 Wayne Law Review 161, 171 (2004).
[249] N. BOISTER, *supra* note 9, at 138.
[250] *Id.*
[251] Art. 5(2)

agreement to commit it, and that they should intend to agree to commit it, and intend to carry it out, but additionally have the purpose of material benefit.[252] Further possible conditions are also provided for the provision "where required by the domestic law" of the party either "involving an act undertaken by one of the participants in furtherance of the agreement, or involving an organized criminal group."[253] The first of these extra conditions would apply where some party's agreement is not enough for criminalization and their law also requires a step in the execution of the agreement.[254] Nevertheless, a requirement may be avoided by involvement of an organized criminal group.

A practical drawback also appears, even though the conspiracy model fits well with existing common law principles.[255] It is not necessary for all individuals involved to be a party to the same agreement.[256] They may simply know or be curious about its existence. They may also be a party to different agreements. This raises the possibility of multiple overlapping agreements rather than a single agreement, and the capability to highly complex and unwieldy prosecutions.[257] Likewise, they may not weigh their knowledge of the individual criminal activities, which the group promises.[258] Finally, the proof of an overt act may be insisted upon those states by making it difficult to reach those who play a significant role.[259]

[252] *See also* A. MALJEVIĆ„ *supra* note 22 140-141.
[253] N. BOISTER, , *supra* note 9, at 138.
[254] *Id.*
[255] A. SCHLOENHARDT, *Transnatinal Organised Crime in* N. Boister & R. Currie eds, *The Routledge Handbook of Transnational Criminal Law* 425 (Abingdon: Routledge, 2015).
[256] N. BOISTER, , *supra* note 9, at 139.
[257] *Id.*
[258] N. BOISTER, *supra* note 9, at 139.
[259] *Id.*

ii. The participation model

The second option, the 'associative offense' model,[260] is designed to be more congenial to civil law systems with which conspiracy has not been favored. It punishes those who knowingly associate themselves with and take an "active part" in an organized criminal group.[261] A perpetrator is involved in this sense if they must either be active in the group's criminal activities or active in its other activities with the appropriate knowledge, namely that the participation will contribute to the criminal aim's achievement.[262] It is more obvious that a perpetrator may contravene this standard without doing acts that make them complicit under traditional principles for a serious crime as defined in Article 2(b).[263] Consequently, the conduct may, in itself, be a "non-serious" crime or even lawful. Therefore, it is a common area of individual criminal responsibility, which overlaps both among these various phrases and between what is caught by sub-paragraph (a)'s variants (i) and (ii).[264]

iii. Secondary Participation

The extended net of liability is under Article 5(1)(b), which requires states parties to criminalize different forms of secondary participation in the "commission of a serious crime by an organized criminal group, namely: organizing, directing, aiding, abetting, facilitating and counseling." Unfortunately, this article does not expand further on the *mens rea* and *actus reus* of these participation or complicity forms. This liability would be prosecuted when the prosecutor

[260] FRANK VERBRUGGEN, *supra* note 22 at. 172.
[261] DAVID LUBAN ET AL., INTERNATIONAL AND TRANSNATIONAL CRIMINAL LAW 530 (Wolters Kluwer Law & Business, 2nd ed. 2014).
[262] D. LUBAN ET AL., *supra* note 261 at 530.
[263] A. MALJEVIĆ, *supra* note 22 154.
[264] The UNTOC 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." "The provision allows the prosecutions of suspects even if a single common criminal enterprise or single common agreement cannot be proven. 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.

possibly needs to show an intent that the particular crime occurs and that the accomplice made some, at least minimal, contribution towards its occurrence.[265]

2.5.2.2 Money Laundering (Article 6)

Many of the activities of organized criminal groups are directly aimed at the accumulation of prosperity by illegal means, such as trafficking in drugs, smuggling and fraud. To fulfil their needs with the financial or other material benefits of such activities, these groups have to conceal their funds from law enforcement authorities and prosecutions. Therefore, Article 6 of the UNTOC deals with the criminalization of the laundering of proceeds of crime. At a minimum, a party to the UNTOC is obligated to criminalize an array of money laundering of the proceeds of serious offenses (i.e., those carrying a four-or-more-year sentence of deprivation of liberty).[266] The novel approach taken in the UNTOC was to expand the range of predicate offenses. In terms of Article 6(2)(a), states parties agree to "seek to criminalize laundering of proceeds from the widest range of predicate offenses," while more specifically they agree to include as predicate offenses all 'serious crime' as defined in Article 2 of the UNTOC and the offenses established by Article 5, 8, and 23 of the UNTOC.[267]

As an exemplar of a programmatic provision, the obligations to criminalize money laundering favorably couple with a requirement in Article 7 of the UNTOC that states parties "institute a comprehensive domestic regulatory and supervisory regime for banks and non-bank

[265] The words "when committed intentionally" in the chapeau to Art. 5 para 1 must travel right through the paragraph, including the complicity provisions.
[266] N. BOISTER, , *supra* note 9, at 141.
[267] *Id.*

financial institutions, and (where appropriate) other bodies particularly susceptible to money laundering."[268]

2.5.2.3 Corruption (Article 8)

Under Article 8, parties are obliged to criminalize corruption. Organized criminal groups often use the means of corruption to facilitate their operations. Bribery and other corruption acts are often applied to create or exploit opportunities for criminal operations and prevent law enforcement agencies from bringing them to criminal justice systems for prosecution. On the one hand, corruption reduces risks, and simultaneously increases opportunities and profits, it also helps to avoid an arrest or interference from public officials. Article 8(1)(a) requires parties to criminalize 'active bribery', which is defined as "the promise, offering or giving to a public official, directly and indirectly, of an undue advantage, for the official himself, or herself, or another person or entity, in order to that the official act or refrain from acting in the exercise of his or her official duties."[269] In addition, Article 8(1)(b) requires parties to criminalize 'passive bribery', which is defined as "the solicitation or acceptance, by a public official" in the same circumstances for the same purpose.[270] However, Article 8(2) only recommends that 'transnational bribery' is "the making of bribes by individuals in one party and the taking of bribes by individuals in another—[which should] be criminalized, because transnational bribery was still lawful in many states at the time."[271] Article 8(3) requires parties to criminalize participation as an accomplice in

[268] D. LUBAN ET AL.,, *supra* note 261 at 531.
[269] N. BOISTER,, *supra* note 9, at 142.
[270] *Id.*
[271]. *Id.*

corruption. These provisions can be fairly rudimentary compared to what is described in the UN Convention against Corruption.[272]

2.5.2.4 Obstruction of Justice (Article 23)

Organized criminal groups expand their wealth, power, and influence by seeking to undermine or get away from criminal justice systems. The means of threat, coercion and violence are often used to prevent them from receiving justice; for example, by creating or presenting false evidence, giving false testimony, or by influencing or intimidating a witness. Article 23 is prescribed to suppress actions that try to neutralize states parities' law enforcement activities against organized crime.[273] Article 23(a) requires criminalization of "the use of physical force, threats or intimidation or the promise, offering or giving an undue advantage." The criminal must act intentionally but must also be accompanied by a special purpose, which is "to induce false testimony or to interfere in the giving of testimony or the production of evidence in proceeds related to offense covered by this Convention." From this point, the obstruction must be connected with the UNTOC offenses, including serious crimes.[274] Whether law enforcement officers could be held liable for this offense when they pressurize a prosecution witness in organized crime cases is arguable.[275] Moreover, Article 23(b) requires criminalization of the "use of physical force, threats or intimidation." However, this force must also be intentional and with special purpose, which is "to interfere with the exercise of official duties by a justice or law enforcement official in

[272] N. BOISTER,, *supra* note 9, at 142.
[273] *Id.*at 144.
[274] N. BOISTER,, *supra* note 10 at 144.
[275] F. Verbruggen, *supra* note 260 at 126-7.

relation to the commission of offenses covered by this Convention." Article 24 is supplementary to this provision by requiring states parties to provide for the protection of a witness.

2.5.2.5 Criminal Responsibility of Legal Persons

Some legal systems still find it difficult to envisage the corporate criminal responsibility of legal persons. For example, Article 10(1) obliges each state party "to adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in serious crimes involving an organized criminal group." Meanwhile, Article 10(2) describes the liability of legal persons that may be criminal, civil, or administrative. It is worth noting here that Article 10 does not lay down any substantive measures for how corporate liability should be eligible for criminal prosecution because this loophole is left to the particular legal systems.[276]

2.5.2.6 Penalties for the Convention's Offenses

The UNTOC makes little provision regarding punishment. Article 11(1) provides that the parties shall make the commission of its offenses "liable to sanctions that take into account the gravity of that offense." However, the detail is left to the states parties. The EU has also introduced a minimum-maximum penalty of between two and five years.[277] Article 11(4) focuses on being too generous with parole and Article 11(5) suggests a long statute of limitations.

[276]M KILCHING,, *supra* note 245 at 90.
[277] Art. 3 of the Framework Decision, 2008/841/JHA.

2.5.3 Jurisdiction over Transnational Crime

This section aims to explain where transnational criminal cases are prosecuted. Considering where to prosecute such crimes is difficult. To understand this problem, we need to find where and how to prosecute a domestic crime. In the case of a domestic crime, both the victim and the criminal have encountered each other in a single country, in which the crime simultaneously occurred. In this case, it is obvious that the country's courts have the right to decide the case. Consequently, this country will select its courts, which can decide the case in the domestic legal system. In contrast, prosecution of transnational crimes cases is harder than a domestic crime because the victim and perpetrator may be in different countries. Moreover, the place where the crime occurred may be somewhere else or it may even be in multiple nations. The challenging jurisdictional issues may pressure the government to find out how and where its criminal justice systems, such as law enforcement authorities, have the right, or jurisdiction, to prosecute a transnational crime case.

Prior to deciding which court may have jurisdiction over criminals, it is worth examining what jurisdiction actually is. In general, jurisdiction is a geographical territory, sovereignty, national, people, or issues over which a court can decide cases and issue orders. There are various ways in which a court may have jurisdiction over a criminal. For example, the court sometimes has jurisdiction over the territory in which the crime occurred, called territoriality jurisdiction.[278] The court may have the right to prosecute the kind of person who allegedly committed the crime, which is called personality jurisdiction.[279] The crime itself may be a type that the court automatically has jurisdiction over, which is called universal jurisdiction.[280] The different ways of

[278] N. BOISTER,*supra* note 9, at 251-57.
[279] *Id.* at 257-64.
[280] *Id.* at 268-70.

getting jurisdiction apply in matters of transnational crime. Each jurisdiction will be reviewed in the subsections that follow.

2.5.3.1 Territoriality Jurisdiction

Criminal jurisdiction is equivalent to national sovereignty. States require that the crime should occur and be committed within their territory prior to exercising their jurisdiction.[281] This is known as 'territoriality jurisdiction' and is based on where the harm is done, where the evidence is, and where the national interest is.[282] For example, if criminals plan to commit a bank robbery in one country, then rob the bank in another country, and finally launder the proceeds of crime in a third country, then all of those countries may have jurisdiction over such offense to be prosecuted. Furthermore, some countries, including Thailand, also have jurisdiction when the offence is committed in the state's vessel or airplane, irrespective of any state's vessel or airplane, shall be deemed as being committed within its territory.[283] These forms of jurisdiction have been a quasi-territoriality.[284] It requires that the offense be committed on board a vessel flying its flag or an aircraft registered under its laws when the offense is committed. Thus, all vessels and aircraft must be registered in a 'flag state,' which is required to exercise its jurisdiction.

Some countries also grant jurisdiction when a significant threat effect is felt within the country, even though no element of the crime occurred there.[285] Thailand's territorial jurisdiction statute roughly couples with this general international standard, which is referred to the forms of

[281] N. BOISTER,*supra* note 9., at 251.
[282] *Id.*
[283] Thai Penal Code Section 4 Paragraph 2: "The offence committed in any Thai vessel or airplane irrespective of any place of Thai vessel or airplane shall be deemed as being committed within the Kingdom."
[284] N. BOISTER, *supra* note 9, at 252.
[285] *Id.*, at 253.

qualified territoriality.[286] This territorial jurisdiction has been extrapolated by judicial construction, instead of legislative intervention.[287] Therefore, this principle is not an extraterritorial jurisdiction, but it is compatible with the territorial link's existence.[288] According to the Thai Penal Code Section 5 paragraph 1,[289] Thailand also has jurisdiction if any offence is even partially committed, or the consequence of the commission intended or occurred within the country (e.g., because of the perpetrators' intention to bring stolen goods into the country). However, Thailand would have jurisdiction over a bank robbery that occurred within the country's borders. If the bank robbery happened outside its borders, then Thailand may also have jurisdiction when the criminals intended to bring the stolen money or goods into Thailand. Under Section 6 of the Thai Penal Code,[290] Thailand's territorial jurisdiction statute further applies to both criminal 'principals,' who directly committed the crime, and to 'accessories,' who assist in committing crimes (e.g., by supporting or instigating), regardless of whether or not the crime occurred when they were abroad. Therefore, if a crime occurs within Thailand or has consequences to Thailand, then the Thai government can claim jurisdiction over those involved in the crime, either in the country or abroad.

[286] N. BOISTER, *supra* note 9, at 253.
[287] *Id.*
[288] *Id.*
[289] Thai Penal Code Section 5 Paragraph 1:" Whenever any offence is even partially committed within the Kingdom, or the consequence of the commission of which, as intended by the offender, occurs within the Kingdom, or by the nature of the commission of which, the consequence resulting therefrom should occur within the Kingdom, or it could be foreseen that the consequence would occur within the Kingdom, it shall be deemed that such offence is committed within the Kingdom."
[290] Thai Penal Code Section 6: "Any offence has been committed within the Kingdom, or has been deemed by this Code as being committed within the Kingdom, even though the act of a co-principal, a supporter or an instigator in the offence has been committed outside the Kingdom it shall be deemed that the principal, supporter or instigator has committed the offence within the Kingdom."

To prosecute transnational crime, the US concepts spell out the forms of qualified territoriality, which includes subjective territoriality and objective territoriality.[291] Subjective territoriality needs only that "some of the conduct elements of the offence occur in the territory." These forms refer to where the crime is committed within the state's territory and we are able to establish jurisdiction, even though the offence is committed abroad.[292] Even if there is no harm, there may be a state interest in suppressing the conduct because of its result or effect.[293] Objective territoriality will apply "where a transnational crime is initiated abroad and only completed in the state wishing to establish jurisdiction."[294] This is also known as 'effect jurisdiction,'[295] which exists when the effect of the criminal action is located in the state's territory. However, in the case of cybercrime, this has been questioned[296] because it will be effects jurisdiction, along with objective and subjective territoriality, which will raise issues between jurisdiction and cyberspace.[297] Thus, a harmful consequence of the crime is important if we wish to establish territorial jurisdiction.

2.5.3.2 Personality Jurisdiction

As discussed earlier, states often claim jurisdiction over a case based on where the crime was committed. In addition, countries may sometimes claim jurisdiction over a crime based on the people involved and their role in the crime, which is also called personality jurisdiction.[298]

[291] N. BOISTER, *supra* note 9, at 253.
[292] *Id.*
[293] *Id.*
[294] *Id.*
[295] D. LUBAN ET AL., *supra* note 261 at 167.
[296] M. HAYASHI, *The Information Revolution and Rules of Jurisdiction in Public International Law, in* M. DUNN ET AL, *The Resurgence of the State: Trends and Processes in Cyberspace Government* 74 (2007).
[297] N. BOISTER, , *supra* note 9, at 255.
[298] *Id.* at. 257.

First, some countries may exercise jurisdiction over crimes where one of their citizens is the perpetrator, which is known as nationality jurisdiction.[299] Meanwhile, other countries will claim jurisdiction over crimes where one of their citizens is the victim, which is called as passive personality jurisdiction.[300] And when offenses are committed outside a country's borders but threaten the state's sovereignty, security, integrity, or other important governmental function, then the country will claim jurisdiction over those offenses, which is called as protective jurisdiction.[301]Thailand subscribes to nationality jurisdiction. Under Section 8,[302] Thailand claims jurisdiction for most crimes committed by Thai citizens abroad.[303] Thailand also subscribes to

[299] N. BOISTER, , *supra* note 9, at 257-260.
[300] *Id.*at 260-261.
[301] *Id.*at. 262-264.
[302] Thai Penal Code Section 8: "Whoever commits an offence outside the Kingdom shall be punished in the Kingdom; provided that, and, provided further that the offence committed be any of the following namely:
(a) The offender be a Thai person, and there be a request for punishment by the Government of the country where the offence has occurred or by the injured person; or
(b) The offender be an alien, and the Thai Government or a Thai person be the injured person, and there be a request for punishment by the injured person
If such offence to be the offence specified as following shall be punished within the Kingdom namely:

1. Offences Relating to Cause Public Dangers as provided in Section 217, Section218, Section 221 to Section 223 excepting the case relating to the first paragraph of Section 220, and Section 224, Section 226, Section 228 to Section 232, Section 237, and Section 233 to Section 236 only when it is the case to be punished according to Section 238;
2. Offences Relating to Documents as provided in Section 264, Section 265, Section 266 (1) and (2), Section 268 excepting the case relating to Section 267 and Section 269; (2/1) Offence Relating to the Electronic Card according to be prescribed by Section 269/1 to Section 269/7.
3. Offences Relating to Sexuality as provided in Section 276, Section 280 and Section 285 only for the case relating to Section 276;
4. Offences Against Life as provided in Section 288 to Section 290;
5. Offences Against Body as provided in Section 295 to Section 298;
6. Offences of Abandonment of Children, Sick or Aged Persons as provided in Section 306 to Section 308;
7. Offences Against Liberty as provided in Section 309, Section 310, Section 312 to Section 315, and Section 317 to Section 320;
8. Offences of Theft and Snatching as provided in Section 334 to Section 336;
9. Offences of Extortion, Blackmail, Robbery and Gang-Robbery as provided in Section 337 to Section 340;
10. Offences of Cheating and Fraud as provided in Section 341 to Section 344, Section 346 and Section 347;
11. Offences of Criminal Misappropriation as provided in Section 352 to Section 354;
12. Offences of Receiving Stolen Property as provided in Section 357;
13. Offences of Mischief as provided in Section 358 to Section 360.

[303] Thai Penal Code Section 8(a).

passive personality jurisdiction over crimes committed against Thai citizens as victim or injured person.[304] Finally, Thailand does subscribe to a form of protective jurisdiction under Section 7.[305] This means that Thailand will claim authority over crimes that affect the internal or external security of the state.

These concepts should be illustrated with a few examples. Suppose that Pichai, a Thai citizen, is a member of a terrorist group outside Thailand and attacks other people abroad. In this case, a Thai domestic court may claim jurisdiction over Pichai, even if no one is injured inside the country (this is nationality jurisdiction). Similarly, even if Pichai does not have Thai citizenship, a Thai domestic court may still claim jurisdiction over him if his actions threaten the country's security (this is protective jurisdiction). Suppose that Pichai is a reasonable man living abroad and he is the victim of a serious crime, not the perpetrator (the person who commits the crime). In this case, a Thai court will claim jurisdiction over the individual who harmed him because Thailand uses passive personality jurisdiction.

2.5.3.3 Universal Jurisdiction

The principle of universal jurisdiction is a concept of common interest[306] and refers to jurisdiction on all states to decide certain crimes regardless of where the offence was committed,

[304] Thai Penal Code Section 8(b).
[305] Thai Penal Code Section 7: Whoever to commit the following offences outside the Kingdom shall be punished in the Kingdom, namely:
(1) Offences relating to the Security of the Kingdom as provided in Sections 107 to 129;
(1/1) The offence in respect of terrorization as prescribed by Section 135/1, Section 135/2, Section 135/3 and Section 135/4.
(2) Offences Relating to Counterfeiting and Alteration as provided in Section 240 to Section 249, Section 254, Section 256, Section 257 and Section 266 (3) and (4); (2 bis) Offences Relating to Sexuality as provided in Section 282 and Section 283;
(3) Offence Relating to Robbery as provided in Section 339, and Offence Relating to Gang-Robbery as provided in Section 340, which is committed on the high seas.

[306] T. OBOKATA, *supra* note 70 at 50.

who committed it, and where the alleged offender is located.[307] There are two reasons. Because these offences firstly harm humanity's shared moral sense or disturb the international order, and secondly because these offences occur outside an effective jurisdiction either on the high seas or in states unable or unwilling to prosecute.[308] The Harvard Research Group noted that the universal jurisdiction over piracy was justified due to the interest of all states in the safety of commerce.[309] This universal application to piracy owes more to its practical utility to some states' maritime powers than to a globally developing solidarity by desire.[310] Thus, weaker states have struggled with the application of universality with regards to Somalia's piracy.[311] In general, universal jurisdiction is not applied to transnational crimes, such as core international crimes, because the interests are served differently when considered such crimes to be transnational.[312] Consequently, in the *United States v. James-Robinson,*[313] the US District Court for Florida found that drug trafficking is not a crime that justifies the universal jurisdictional claim.[314] Therefore, transnational crimes are generally insufficient to shock human dignity enough to justify universal jurisdiction's reasonableness.

2.5.3.4 Concurrent Jurisdiction

The problems of overlapping national jurisdiction may arise when each national implementation of the jurisdiction principles in the UNTOC tries to claim jurisdiction over

[307] N. BOISTER, , *supra* note 9, at 268.
[308] *Id.*
[309] ED DICKINSON, *Codification of International Law: Part II: Jurisdiction with Respect to Crime,* 29 American Journal of International Law Supplement 435, 566 (1935).
[310] N. BOISTER, *supra* note 9, at 269.
[311] *Id.*; *See,* eg, the Kenyan case *In Re Hashi et al* [2009] eKlR (HCK).
[312] *Id.*
[313] *United States v James-Robinson* 515 F Supp 1340, 1344 (DC Fla 1981).
[314] N. BOISTER, *supra* note 9, at 269.

transnational crimes.[315] These problems are concurrent jurisdiction, which raises two aspects: Which state has precedence? And can more than one state prosecute for the same offense in violation of *ne bis in idem*?[316] A practical legal limitation occurs when one state has the individuals in its custody. Generally, the legal limitation is international comity. This cautions states against reliance on jurisdictional principles that might be interpreted as an invasion of another state's sovereignty or which conveys mistrust in another state's criminal justice system.[317] The Swiss Court, in *Adamov v Federal Office of Justice,*[318] noted that "there is no blanket permission to impose domestic criminal law extraterritorially, implied that the US was interfering in activities that were not its business" and further noted that "Russia had taken steps to prevent extradition to the US and had complained to Switzerland for even entertaining the US request."[319] However, it is generally considered to be more pragmatic to adopt the conflicts of law approach that prefers the state jurisdiction with a better center of gravity; that is, the state where the victims are, where the harm is and where the evidence is, and which has the capacity to and has made progress in investigation, and which has the better laws. One way to deal with domestic courts is to apply the doctrine of *forum non-conveniens* to determine if a court in another state has "a much stronger jurisdictional connection and greater practical capacity through access to witness and evidence to conduct a successful case."[320] Furthermore, the priority of a jurisdictional interest is a political as well as a legal problem; for example, which state's affluence is first priority is a matter of negotiation.[321] In particular, Article 15(5) of the UNTOC obliges parties in jurisdictional conflicts

[315] N. BOISTER, *supra* note 9 at 270.
[316] *Id.*
[317] *Id.* at 271.
[318] Appeal judgment, No 1A 288/2005; ILDC 339 (CH 2005), 22 December 2005.
[319] *Id.* at para 3.4.3
[320] N. BOISTER,*supra* note 9, at 271.
[321] *Id.* at 272.

to cooperate to resolve these conflicts. Therefore, the recognition of the criminal justice interests of other states should be the first priority to deal with concurrent jurisdiction.

2.5.3.5 Aut Dedere Aut Judicare

A state may exercise universal jurisdiction on the basis of the presence of foreign suspects committing crimes outside its territory. This means that the state in which the suspect is found has no territorial or nationality connections with the offences in question. The exercise of universal jurisdiction on this basis is reflected in the principle of *aut dedere aut judicare.*[322] This principle holds that if a state does not extradite an offender to a requesting state, then the non-extraditing state must exercise jurisdiction to prosecute them.[323]

The *aut dedere aut judicare* principle is recognized under Article 15 and 16 of the UNTOC and in other conventions. It is worth noting that the nationality of offenders is important to solve the conflict. Under Article 15(3), if a state does not extradite its nationals, then the state as such must establish criminal jurisdiction over them. In this event, the nationality principle will be exercised.[324] Furthermore, the use of 'shall' demonstrates that the principle has a stronger legal force.[325] Moreover, Article 15(4) provides that states 'may' establish criminal jurisdiction over other nationals, suggesting that prosecution is not mandatory.[326] Therefore, universal jurisdiction over foreign nationals is not mandatory, and this will inevitably limit its application over organized crime.

Again, it is also important to explore the jurisdiction over offences in the UNTOC, which addresses the issue of jurisdiction under Article 15. Both mandatory and non-mandatory provisions

[322] ED DICKINSON,, *supra* note 310 at 574.
[323] T. OBOKATA, *supra* note 70 at 51.
[324] *Id.* at 52.
[325] *Id.*
[326] *Id.*

will be explored here. The mandatory provisions are described in Article 15(1) of the UNTOC. Based on Article 15(1), states parties shall assert jurisdiction over the offences when they are committed: (a) in their territory (territory principle); (b) on board a ship flying their flag (flag principle) or on board an aircraft registered under their laws (flag principle). The non-mandatory provisions in Article 15(2) set forth a number of further bases for jurisdiction that states parties may wish to consider. The passive personality principle is located in Article 15(2)(a), which prescribes that "the offence is committed against one of their nationals or against a habitual or permanent stateless person resident in their territory." This provision may also extend to offences against nationals committed abroad. Moreover, the active personality principle prescribes in Article 15(2)(b) that "the offence is committed by one of their nationals or by a habitual resident in their territory." Further, the protection principle explains in Article 15(2)(c)(i) that "the offence relates to activities outside their territory of an organized criminal group aimed at the commission of a serious crime inside their territory." Article 15 (2)(c)(ii) also addresses the offence that "consists of participation in money laundering outside their territory aimed at the laundering of criminal proceeds in their territory."

2.5.3.6 Limitations to Jurisdiction

This section will introduce the limits of these forms of jurisdiction. In particular, the perpetrator's special status may sometimes limit jurisdiction. For example, most states recognize the concept that one cannot prosecute a foreign official, under sovereign immunity.[327] Most states also recognize the diplomatic immunity that shields diplomats and their families from most arrests and prosecutions.[328] Based on inter-governmental organizations, some states recognize this

[327] N. BOISTER, *supra* note 9, at 273-75.
[328] *Id.* at 275-77.

immunity for people who work and engage as peacekeepers in human trafficking for the UN.[329] Suppose that a minor offense is committed by a head of state or a diplomat while they are on official business (e.g., by not obeying parking regulations). In this case, this individual is immune from such prosecution.

2.5.4 Obligation of a Party to the Convention

The United Nations Conventions against Transnational Organized Crime (UNTOC) is a legally-binding instrument through which states parties undertake a series of measures against transnational organized crime. As treaty crimes, the rules of the 1969 Vienna Convention on the Law of Treaties (VCLT)[330] also apply at the time of its adoption.[331] Based on *pacta sunt servanda*,[332] it is a general principle of international law: "a treaty in force is binding upon the parties and must be performed by them in good faith." This means that a treaty is binding between the signatory state parties and does not "create either obligations or rights for a third state without its consent."[333] For example, if a crime is committed in a third country who is not a signatory state to the treaty, then the third country does not have the obligations or rights to perform directly. Meanwhile, in international economic relations, the most-favored nation (MFN) clause will expand and create states' rights of international trade to a third country. Therefore, a third country may show its consent to the parties of a treaty to create its obligations and rights to the parties.

[329] N. BOISTER, *supra* note 9, at 276.
[330] 22 MAY 1969, 1155 UNTS 331.
[331] J. CRAWFORD, *supra* note 235 at 367.
[332] VCLT, Art 26; ILC Final Report and Draft Article, ILC *YBK* 1966/II, 210-11; JAMES CRAWFORD, *Id.* at 377.
[333] VCLT, Art.34.

2.6 Conclusion

Globalization has led to considerable political and economic changes in most modern societies. This has placed pressure on national borders to reduce the barriers for facilitating and benefitting from the flow of goods, services, financial resources, and labor. It also creates opportunities for criminals to exploit countries by making their criminal activities more sophisticated. Many countries need to revise or even modernize their laws and regulations to suppress and prevent criminal activities. The United Nations Convention Against Transnational Organized Crime (UNTOC) 2000 is a tool for combating TOC. Although the UNTOC does not conceptualize transnational organized crime definition, states parties also endeavor to grasp the interplay of the concepts of an organized criminal group, serious crime, group structure, and transnational crime. The following distinction between international crime and transnational crime may arise. International crimes are crimes against peace and security, human dignity, while transnational crimes are "offences whose inception, perception and/or direct or indirect effects involved more than one country."[334] It also harms personal or public interests. A better understanding of transnational crime should begin with the concepts of these actors and the activities that they commit. The definition of transnational crime is thus still a matter of debate. It can be categorized roughly into two groups: as a set of actors—the corporate model, network model and the difference between criminal organization and hierarchical structure would apply; and as a set of activities—the notion of the enterprise theory, illegal market and profit, the economic perspective will be illustrated to apprehend when they form their illicit organizations. Criminal organizations aim to interfere with weak states whose political, economic, legal, or social

[334] JAY S. ALBANESE, *supra* note 5, at 3.

instabilities cause opportunities for expansion of their network. They often use risk management to evaluate how the criminal justice systems or law enforcement authorities can be exploited. Bribery is one means of corruption. When these groups have proceeds of crime, they lauder those proceeds into licit financial institution or they form licit businesses. Their activities can be classified from harm that they cause and can be grouped broadly into three categories: provision of illicit goods, provision of services, and infiltration of business or government.[335] Recognizing these activities may help, regardless of the criminal's nationality or the place where the crime occurred.

When transnational criminals are arrested, the Convention then prosecutes them by criminalization of participation in an organized criminal group, money laundering, corruption, obstruction of justice. It also defines serious crime as a [336]conduct constituting an offence that is punishable by maximum deprivation of liberty of at least four years or a more serious penalty.

Given that transnational crime is committed in more than one state, it causes multiple jurisdictional issues. Territory, personality, universality principles are fundamental to the prosecution of these crimes. Although Article 15 of the UNTOC justifies jurisdiction over a criminal, a conflict of jurisdiction may arise. Nevertheless, the government should weigh the common interest of claiming jurisdiction over alleged offenders when conflicting with other countries to prosecute them simultaneously. As a treaty crime, states parties have the obligations and rights to regulate their criminal justice system related to the UNTOC. Therefore, transnational crime can be combatted when countries effectively cooperate with each other.

[335] JAY S. ALBANESE, *supra* note 5, at 3.
[336] UNTOC Art. 2(b).

Chapter 3

Applicable International and Regional Conventions, Treaties, and Agreements for Transnational Organized Crime

3.1 Introduction

Transnational organized crime (TOC) is perhaps defined as organized crimes coordinated across national borders, involving criminal networks, or the illicit activities of individuals operating in multiple countries to plan and execute illegal business ventures.[1] Additionally, this crime poses a serious and growing threat to national and international security with dire consequences for public safety, public health, democratic institutions, and economic stability worldwide.[2] Now, criminal networks are rapidly expanding and diversifying their activities, thus resulting in the convergence of previously distinct threats that now pose explosive and destabilizing consequences.[3] As a result, a definition of TOC should be provided in order to avoid confusion regarding several possible directions to pursue. However, according to the United Nations Convention Against Transnational Organized Crime (UNTOC) or the Palermo Convention,[4] TOC is not specifically defined. Rather than that, UNTOC defines an 'organized criminal group' as "a structured group of three or more persons, existing for a period of time and

[1] YURIY A. VORONIN, *Measures to Control Transnational Organized Crime Summary,* (National Criminal Justice Reference Service, NCJRS, U.S. Department of Justice, Document No. NCJ 184773), available at: https://www.ojp.gov/pdffiles1/nij/grants/184773.pdf
[2] National Security Council, *Transnational Organized Crime: A Growing Threat to National and International Security,* (NSC), available at: https://obamawhitehouse.archives.gov/administration/eop/nsc/transnational-crime/threat
[3] *Id.*
[4] The United Nations Convention against Transnational Organized Crime, New York, opened for signature, adopted by the resolution A/RES/55/25 of Nov. 15, 2000, entered into force Sept. 29, 2003, 2225 UNTS 209 [hereafter the Palermo Convention, UNTOC]

acting in concert with the aim of committing one or more serious crimes or offenses established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit."[5] This term is broad in scope and encompasses offenses committed in multiple states, as well as those committed in one state but planned or controlled from another. Furthermore, this includes crimes committed in one state by groups operating in multiple states and crimes committed in one state that have a significant impact on another state. Thus, the implied definition of 'TOC' encompasses virtually all profit-motivated serious criminal activities with international implications necessitating states to consider the issue's global complexity and applicable international and regional instruments for dealing with its multifaceted effects.[6]

There are several areas of international law, treaties, international and regional conventions, and agreements applicable to combating TOC. At the international level, certain branches of international law, including the use of force, international humanitarian law (IHL), human rights, the law of the sea, and international criminal law establish rules and principles governing nations' relations and dealings with one another, as well as between states and individuals and international organizations.[7] These relationships are obligated to investigate, protect, prosecute, and cooperate with states and international organizations when threats of TOC have harmed states, individuals, or international organizations directly or indirectly. Additionally, the relevant Model Treaties and United Nations Core Conventions on TOC apply to illicit activities committed by members of organized criminal groups that are involved directly or indirectly in more serious crimes or offenses established in the Conventions, such as drug trafficking, human

[5] Article 2(a), the Palermo Convention, UNTOC, *supra* note 4
[6] United Nations Office on Drugs and Crime, *Transnational Organized Crime,* (UNODC), available at: https://www.unodc.org/ropan/en/organized-crime.html
[7] Legal Informational Institute, *International law,* (LII, Cornell Law School), available at: https://www.law.cornell.edu/wex/international_law#:~:text=International%20law%20consists%20of%20rules,and%20relations%20between%20international%20organizations.

trafficking, migrant and firearms smuggling, and corruption. Therefore, Model Treaties are critical in situations where bilateral or multilateral agreements between States Parties are not in place before the negotiating processes, thereby resulting in harmonization among States Parties, other countries, and regional bodies that collaborate to address TOC issues.

This chapter aims to address a series of applicable laws relating to TOC. First, branches of international law would be examined on how TOC is involved in international perspectives of the use of force, IHL, human rights, the law of the sea, and international criminal law. Second, the relevant Model Treaties and UN Core Conventions on TOC are discussed. The Model Treaties in this section include the Model Agreement on the Transfer of Foreign Prisoners,[8] Model Treaty on Extradition,[9] Model Treaty on Mutual Assistance in Criminal Matters,[10] and Model Treaty on the Transfer of Proceedings in Criminal Matters.[11] Moreover, the UN Core Conventions and Protocols in this section consists of: (1) the UN Drug Control Conventions, including the Single Convention on Narcotic Drugs (1961)[12], the Convention on Psychotropic Substances (1971)[13], and the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988)[14], (2) the

[8] Report of the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, U.N.Doc.A/CONF.121/22/Rev.1 at 53 (1986) [hereinafter Model Agreement on Prisoner Transfer].
[9] Report of the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, U.N.Doc.A/CONF.144/28 (1990) at 64, as adopted by G.A. res. 45/116, annex, 45 U.N. GAOR Supp. (No. 49A) at 211-15, U.N. Doc. A/45/49 (1990), and subsequently amened by G.A. res. 52/88 [hereinafter Model Treaty on Extradition]
[10] Report of the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, U.N.Doc.A/CONF.144/28 (1990) at 75, as adopted by G.A. res. 45/117, annex, 45 U.N. GAOR Supp. (No. 49A) at 215-19, U.N. Doc. A/45/49 (1990), and subsequently amended by G.A. res. 53/112 [hereinafter Model Treaty on Mutual Assistance in Criminal Matters]
[11] Report of the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, U.N.Doc.A/CONF.144/28 (1990) at 89, as adopted by G.A. res. 45/118, annex, 45 U.N. GAOR Supp. (No. 49) at 219-21, U.N. Doc. A/45/49 (1990) [hereinafter Model Treaty on Transfer of Proceedings in Criminal Matters].
[12] The Single Convention on Narcotic Drugs, New York, adopted March 30, 1961, entered into force Dec. 13, 1964, 520 UNTS. 151 [hereafter the Single Convention]
[13] Convention on Psychotropic Substances, Vienna, adopted Feb. 21, 1971, entered into force Aug. 16, 1976, 1019 UNTS. 175 [hereafter the Psychotropic Convention]
[14] The United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Vienna, adopted Dec. 20, 1988, entered into force Nov. 11, 1990, 1582 UNTS 95 [hereafter the Trafficking Convention]

United Nations Convention against Transnational Organized Crime[15] and the Protocols thereto, including the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, especially Women and Children[16], the Protocol against the Smuggling of Migrants by Land, Sea, and Air[17], and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components, and Ammunition[18], and (3) the United Nations Convention against Corruption.[19] The next section addresses the regional level, specifically the Association of Southeast Asian Nations (ASEAN), through its framework for combating TOC. The last section then concludes how TOC and those applicable laws are linked together.

3.2 Branches of International Law

This section addresses certain branches of international law provided for examining how TOC is involved in international perspectives of the use of force, IHL, human rights, the law of the sea, and international criminal law.

[15] The Palermo Convention, UNTOC, *supra* note 4
[16] The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, New York, adopted by General Assembly resolution A/RES/55/25 of Nov. 15, 2000, entered into force Dec. 25, 2003, 2237 UNTS 319; Doc. A/55/383 [hereafter the Trafficking in Persons Protocol]
[17] The Protocol against the Smuggling of Migrants by Land, Sea and Air, New York, adopted by General Assembly resolution A/RES/55/25 of Nov. 15, 2000, entered into force Jan. 28, 2004, 2241 UNTS 507; Doc. A/55/383 [hereafter the Smuggling of Migrants Protocol]
[18] The Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, New York, adopted by General Assembly resolution A/RES/55/255 of May 31, 2001, entered into force July 3, 2005, 2326 UNTS 208; Doc. A/55/383/Add.2 [hereafter the Firearms Protocol]
[19] The United Nations Convention against Corruption, New York, adopted by General Assembly resolution A/RES/58/4 of Oct. 31, 2003, entered into force Dec. 14, 2005, 2349 UNTS 41; Doc. A/58/422 [hereafter the Merida Convention, UNCAC]

3.2.1 The use of force

The prohibition on the use of force is one of the most important elements of international law.[20] Article 2(4) of the United Nations Charter (UNC) prohibits a member state from "the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the purposes of the United Nations (UN)".[21] Although Article 2(4) does not include 'armed' or comparable terms, most scholars believe it exclusively restricts the use of military force, barring nonmilitary means of coercion, such as economic sanctions, cyberattacks, and non-state actors[22] because it is directed solely at the states.[23] However, Article 51 of the UNC allows the use of force in self-defense in response to an armed attack.[24] This provision has been interpreted as incorporating the inherent right to self-defense under customary international law,[25] which requires self-defense to be necessary and proportionate to aggression.[26] There may be complications when Article 51 assumes the use of self-defense against organized criminal groups acting as non-state actors.

Regarding the use of force, TOC can be treated by international law as a means of self-defense against organized criminal groups. First, organized criminal groups must be considered

[20] JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 746-47 (Oxford U. Press, 8th ed. 2012)
[21] Article 2 paragraph 4 of the Charter of the United Nations, 26 June 1945, UNCIO XV, 355 (entered into force 24 October 1945).
[22] PIERRE HAUCK & SVEN PETERKE, *Organized Crime and gang violence in national and international law,* 427 (INT'L REV. Red cross, Vol 92 No. 878, June 2010) Available at: https://www.icrc.org/en/doc/assets/files/other/irrc-878-hauck-peterke.pdf
[23] *Id.* at 428.
[24] Article 51 of the Charter of the United Nations *supra* note 21
[25] *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. USA*), Judgment (Merits) [1986] ICJ Rep 14, pp. 14ff., para. 193.
[26] V. UPENIECE, *Conditions for the lawful exercise of the right of self-defence in international law,* SHS Web of Conferences (2018) 1-5, available at: chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.shs-conferences.org/articles/shsconf/pdf/2018/01/shsconf_shw2018_01008.pdf

for their status as *de facto* regimes to establish state responsibility.[27] It should be noted that *de facto* regimes are associated with an entity that exercises at least effective control over the territory of the state.[28] This effective control would also depend on a certain degree of both political and organizational capacity.[29] As a result, *de facto* regimes would be partially subject to international law because their primary focus would be on the state.[30] Terrorist groups would be considered de facto regimes in comparison with organized crime groups.[31] Moreover, organized criminal groups would not be politically initiated or motivated to control territory because they would seek criminal proceedings instead of gaining either recognition or statehood.[32] Therefore, it would be inappropriate to think of organized crime groups as de facto regimes because they would be far less politically motivated than terrorist groups.[33]

Furthermore, the state's legal responsibility should be proven through which criminal activity triggers the three tests.[34] The first test is the effective control test, which the International Court of Justice (ICJ) was primarily formulated to hold the state responsible for the actions of a group of individuals in the *Nicaragua* case.[35] This effective control principle aims to prove that the "state had effective control of the military or paramilitary operation in the course of which the alleged violations were committed."[36] As a result, the cases of most organized criminal groups

[27] JONTE VAN ESSEN, *De Facto Regimes in International Law,* 28 UTRECHT J. OF INT'L & EUR. L. (74) 31, 32 (Merko*urios* 2012). Available at: www.merkourios.org
[28] J. VAN ESSEN, *supra* note 27 at 32
[29] *Id.*
[30] *Id.*
[31] SVEN PETERKE, *Völkerrechtliche Selbstverteidigung gegen transnationales organisertes Verbrechen?,*24 Humanitäres Völkerrecht: Informationsschriften (4), 208 (2011).
[32] PIERRE THIELBÖRGER, *The International Law of the Use of Force and Transnational Organised Crime, in* PIERRE HAUCK & SVEN PETERKE, INTERNATIONAL LAW AND TRANSNATIONAL ORGANISED CRIME 369 (Oxford U. Press, 1st ed. 2016).
[33] *Id.*
[34] *Id.* at 369-71
[35] *Id.*
[36] *Nicaragua* case, *supra* note 25, para 115

were not satisfied with the effective control test because a state did not effectively control these groups, and they merely posed a difficulty to the domestic legal system of each state.[37]

The second test is the overall control, which is an alternative test set up by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) to support state responsibility for group action even more.[38] The ICTY disagreed with the 'effective control' approach[39] and argued in the *Tadić* case that "for the attribution to a state of acts of […] groups it sufficient to require that the group as a whole [is] under the overall control of the state."[40] However, overall control of the state covers the respective group by equipping, financially supporting, and coordinating or assisting the military activity planning.[41] As a result, the overall control test would not be relevant to establishing state responsibility if the state specifically imposed, requested, or directed toward the group's activities.[42] Since organized criminal groups frequently conflict with the domestic legal framework in which they conduct their criminal activities, the states are unable to completely control the situation.[43]

The third test is the safe haven doctrine,[44] which aims to fulfill and pursue an argument between the ICJ's *Nicaragua* judgment and the ICTY's *Tadić* ruling.[45] It shows that a state would be sufficiently liable for the group's activities when it harbors a group.[46] This test would prove

[37] P. THIELBÖRGER, *The International Law of the Use of Force and Transnational Organised Crime, supra* note 32 at 370.
[38] P. THIELBÖRGER *, supra* note 32 at 370.
[39] *Prosecutor v Duško Tadić,* Appeals Judgment, 38 ILM 1518 (1999), para 115ff. ('the Appeals Chamber, with respect, does not hold the *Nicaragua* test to be persuasive').
[40] *Id.* at para 120.
[41] *Id.* at para 131.
[42] *Id.* at para 122.
[43] P. THIELBÖRGER *, supra* note 32 at 370.
[44] SONJA CENIC, *State responsibility and self-defence in international law post 9/11: has the scope of Article 51 of the United Nations Charter been widened as a result of the US response to 9/11?,* 14 Australian INT'L J. L., 201, 208-16 (2007).
[45] P. THIELBÖRGER *, supra* note 32 at 371.
[46] *Id.*

that a state is responsible for a group's action, whether or not a state directly or indirectly supported that group's criminal activities at home or has even hosted the group on the state's territory.[47] However, this state practice is not widely accepted because it is such a new custom, and the ICJ would be unlikely to follow and repeatedly confirm this principle of creating state responsibility for groups that operate outside their territory.[48] This doctrine would also be unlikely to be supported by states because it tends to extend states' responsibility for international criminal activities.[49] As a result, none of the approaches used by international courts would associate the State's areas of responsibility with respect to the territory or jurisdiction from which the criminal activity originates.[50] Although the safe haven doctrine might be directly or indirectly relevant to many instances holding states responsible for organized criminal groups' activities stemming from their territory or jurisdiction, it has not recently created customary international law.[51]

Nonetheless, there is no state practice against Article 51 of the UNC because Article 51 treats armed attacks by non-state actors differently.[52] It grants the state a right to self-defense "if an armed attack occurs against a Member of the United Nations."[53] It should be noted that the term 'occurs' is neutrally used to provide the possible source of an armed attack,[54] while the Charter does not spell out or mention that the initiator of that armed attack should also be a member of the state.[55] Additionally, the 'inherent right of individual or collective self-defense'[56] is especially

[47] RÜDIGER WOLFRUM, *The attack of September 11, 2001, the wars against the Taliban and Iraq: is there a need to reconsider international law on the recourse to force and the rules in armed conflict?,* 7 Max Planck Yearbook of UN Law 1, 34 (2003).
[48] P. THIELBÖRGER *, supra* note 32 at 371.
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *Id.* at 374.
[53] Article 51 of the Charter of the United Nations *supra* note 21
[54] S. PETERKE, *supra* note 31 at 207
[55] P. THIELBÖRGER *, supra* note 32 at 372.
[56] Article 51 of the Charter of the United Nations *supra* note 21

referred to as the symbol of the existence of customary international law.[57] Then, a customary right to self-defense against attacks by non-state actors could be basically added.[58] The customary right to self-defense against non-state actors was presented before the establishment of the United Nations by the prominent examples of the *Caroline* case.[59] When the *Caroline* case was added in the *Nicaragua* judgment that "self-defense would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law."[60] Some scholars have also suggested that the ICJ has explicitly failed to position itself against an approach to broaden the addresses of Article 51 in the UNC regarding a right of self-defense against non-state actors.[61] Since the Caroline case, states have asserted their right to self-defense against non-state military.[62] This means that the physical damage to the attacked state is comparable regardless of whether it is attacked by another state or a non-state actor, such as a terrorist organized criminal group.[63] Thus, international law governing the use of force, particularly an open phrase in Article 51 of the UNC, could be used to explain or include armed attacks by non-state actors, such as organized criminal groups.

When combating transnational organized crimes (TOCs), it would not be easy for states to prosecute these crimes under international law. Although the prohibition on the use of force has typically been linked to states through the establishment of a legal relationship, it is insufficiently equipped to deal with the problems of non-state actors, such as organized criminal groups. However, an option to justify the use of force is self-defense under Article 51 of the UNC. The

[57] *Nicaragua* case, *supra* note 25, para 193
[58] P. THIELBÖRGER *, supra* note 32 at 372.
[59] J. CRAWFORD, *supra* note 20 at 750-51.
[60] *Nicaragua* case, *supra* note 25, para 176
[61] S. PETERKE, *supra* note 31 at 207
[62] CHRISTINE GRAY, *The use of force and the international legal order, in* MALCOM D. EVANS ED., *International Law,* 634 (Oxford, OUP, 4th ed. 2014).
[63] *Id.*

open wording of Article 51 of the UNC could be broadly construed to mean that an armed attack committed by organized criminal groups as non-state actors would be comparable to an armed attack by a state, and this would lead to the right to self-defense triggered by another state. Thus, constituting an armed attack must be established before an exceptional right to self-defense would be triggered.

3.2.2 International humanitarian law

International humanitarian law (IHL) or the law of armed conflict (LOAC) aims to ease human suffering in times of war.[64] This law consists of principles and rules that are specifically designed to protect civilians and fighters who do not or who no longer directly participate in hostilities, such as those who are wounded, shipwrecked, sick, or detained.[65] In addition, IHL demonstrates its humanizing effects by prohibiting and restraining certain forms of warfare.[66] However, there are the most significant documents, including the four 1949 Geneva Conventions (GC I-IV)[67], and the two 1977 Additional Protocols (AP I-II).[68] At that time, TOC was not yet seen as a threat to international peace and security.[69] Even during the negotiation process, the GCs expressed concern that criminal group violence could be misinterpreted as triggering non-

[64] GARY D. SOLIS, *The Law of Armed Conflict: International Humanitarian Law in War,* 22 (Cambridge, U. Press, 2nd ed.: 2016)
[65] SVEN PETERKE & JOACHIM WOLF, *International Humanitarian Law and Transnational Organised Crime, in International Law and Transnational Organised Crime,* 381 (PIERRE HAUCK & SVEN PETERKE (ed.), Oxford U. Press, 1st ed.: 2016)
[66] *Id.*
[67] Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forced in the Field, Aug. 12, 1949, 75 U.N.T.S. 31.; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85.; Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135.; Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287.
[68] Protocol Additional to the Geneva Conventions of August 12, 1949 and Relating to the Protection of Victims of International Armed Conflicts, Jun. 8, 1977, 1125 U.N.T.S. 3.; Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, Jun. 8, 1977, 1125 U.N.T.S. 609.
[69] S. PETERKE & J. WOLF, *supra* note 65 at 381

international armed conflict law applicability.[70] It should be noted that no attempt has been made since 1977 to modify or extend the existing concepts of armed conflict to address violence perpetrated by non-state actors more accurately.[71] As a result, there is no single norm in IHL that has explicitly referenced the ambiguous concept of TOC.

Regarding organized crime, the United Nations Convention Against Transnational Organized Crime (UNTOC) of 2000 and its three Additional Protocols aims to include holistic approaches to TOC.[72] These international instruments classify certain acts as particularly serious as participation in an organized criminal group.[73] The term 'organized criminal group' is defined as "a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offenses established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit."[74] Although this definition has been criticized for being too broad, it could also be argued as too narrow by excluding politically motivated organizations, particularly terrorist organizations, whose principal activities are governed by other international treaties.[75] Moreover, insurgents and guerilla fighters are not considered as organized criminal groups[76] although they might be motivated by the prospect of making profits, they do not always commit serious crimes. This is because such groups are perpetually changing in motivation and organization.[77] As a result, the UNTOC encourages a micro perspective obscuring that TOC is a part of today's conflict.[78]

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[70] JEAN S. PICTET, *The Geneva Conventions of 12 August 1949, Commentary,* Vol. I., Geneva, ICRC, 1952, at 49.
[71] S. PETERKE & J. WOLF, *supra* note 65 at 381
[72] The Palermo Convention, UNTOC, *supra note* 4 ; The Trafficking in Persons Protocol, *supra* note16; The Smuggling of Migrants Protocol, *supra* note17; The Firearms Protocol, *supra* note 18
[73] S. PETERKE & J. WOLF, *supra* note 65 at 382
[74] Article 2(a), the Palermo Convention, UNTOC, *supra* note 4
[75] DAVID MCCLEAN, *Transnational Organized Crime: A Commentary on the UN Convention and its Protocols,* 40 (Oxford U. Press: 2007)
[76] S. PETERKE & J. WOLF, *supra* note 65 at 382
[77] *Id.* at 383.
[78] *Id.*

As organized crime groups and their influence on world events are inextricably linked with 'narco-states' and global terrorism, the question of individual and group action concerning organized crime groups would raise the issue of its applicability under international humanitarian law.[79] Nevertheless, the main problem would be the knowledge of the definition of organized crime because it would seem that terrorism would be equal to organized crime, which could trigger a considerable misunderstanding. However, it is evident that organized crime exists wherever the state is not present[80] because regardless of the severity of the organized crime group (Cosa Nostra in Sicily, La Cosa Nostra in the United States, or a simple street gang), they all seek to extract a financial or material profit.[81] Organized criminal groups profit from the weakness of the state or failing states, such as African states where communities have been living in conflict or post-conflict situations or countries in economic transition that are particularly susceptible to drug and human smuggling.[82] Other countries, such as in Latin America, Africa, and Afghanistan, all have an established history of changing drugs and money for arms.[83] Moreover, the activities of organized crime in countries where there are armed conflicts, such as the Balkans, Afghanistan, and West Africa, hinder peacebuilding.[84]

[79] NORA SZELES, *The Relation between International Humanitarian Law and Organized Crime,* 8 INT'L L. Y.B. 163, 179-180 (2017-2018).
[80] JAY LIVINGSTON, *Crime and Criminology,* 265-67 Prentice Hall (1992); JAMES C. HACKLER, *Canadian Criminology,* 268 Prentice Hall (2000); RICK LINDEN, *Criminology,* 430-32 Harcout Canada Ltd. (2000); MICHAEL MALTZ, *Defining organized crime,* 26 (1994)
[81] N. SZELES, *supra* note 79 at 181.
[82] Report of the African Regional Preparatory Meeting for the Eleventh United Nations Congress on Crime Prevention and Criminal Justice, A/CONF.203/RPM.3 at 4
[83] Some researchers called this phenomenon 'narco-terrorism' which is not really exact. Then we can see organized crime definition is not equal with terrorism because the purpose of terrorism is not the same as organized crimes's. Evidently, the definition of terrorism does not yet exist in international level, perhaps this is the main reason why some researchers who are not expert from organized crime, can mix these two definitions.
[84] Dr. Winrich Kühne, director, said in the 7th International Berlin Workshop, December 11-13, 2003. Strengthening the Rule of Law in Kosovo and Bosnia and Herzegovina The Contribution of International Judges and Prosecutors by Almut Schröder, Analysis 2004-2005 available at: https://documents.pub/document/analyse-0405-20051104-the-contribution-of-international-judges-and-prosecutors.html?page=1

Until now, the UNTOC has defined the term 'organized criminal group' that should bring about a certain level of standardization in terms of offenses as they are codified in national laws, as a prerequisite of international cooperation.[85] As such, the definition has been clearly distinguished between organized criminal groups and terrorism, which have often been exchanged or used interchangeably despite their distinct significance.

Because of the extensive activities of organized crime groups,[86] they would reflect a failure within the realm of national legislation and not of international humanitarian law or even international law. Moreover, the phenomenon of street gang activity could lead to difficulty with the application of international humanitarian law in the cities. This would be due to the similarity between armed groups and street gangs that define themselves based on ethnic or clan affiliation.[87]

Instead, street gangs organize themselves as a militarized hierarchy with a ranking system that is formally organized, well-armed, and has a corporate structure, as well as an informal horizontal structure that could include decentralized local branches similar to an armed group.[88] In addition, numerous investigated groups have rules based on physical punishment, including death, as well as structural ties to the recruitment of leaders through the imprisonment of children.[89] They also identified insignia and symbols that would adhere to the Geneva Conventions' definition.

Simultaneously, the application of international humanitarian law has been defined by the Geneva Conventions and its protocols. To implement IHL, there must be either an international or

[85] N. SZELES, *supra* note 79 at 183.
[86] Some of the most important activities: money laundering, smuggling, corruption, drug-, human- and arms trafficking.
[87] Luke Dowdney, *Neither war not peace,* 33 (2005), available at: https://resourcecentre.savethechildren.net/pdf/5014.pdf/
[88] *Id.* at 34-35
[89] *Id.*

a non-international armed conflict. In the case of an international armed conflict, it should be between the High Contracting Parties, which organized crime groups are not, or the Parties recognized as such unilaterally.[90] Consequently, a conflict between rival gangs does not meet these rules in applying IHL. Hence, soldiers in youth gangs could only benefit from the protection of the Geneva Conventions if the implementation was applicable. As such, the soldiers of the youth gangs could only profit from the human rights and charity of the other gang.[91]

For instance, in the prisons of Colombia, Honduras, and El Salvador, organized criminal groups are so large and powerful that they challenge the state's legitimacy.[92] These gangs have ravaged cities for days and putting the countries at risk of social and political conflict. As the groups appear to be directly engaged in armed conflict against the state, it is reasonable to assume that the minimal provisions of Article 3 Common of the Geneva Conventions could be applied.[93] Moreover, if the definition of armed conflict in the Geneva Convention was determined, these gangs could take advantage of the minimal provisions of IHL.[94]

For Article 3 of the Geneva Convention to be applicable, a conflict must exist and be recognized as such by the relevant state. Before the intensity of the conflict would rise to the point where the state would recognize the existence of an armed conflict, the state must lose effective control over an area large enough to allow 'rebels' to sustainably conduct operations.[95] However, any act of violence committed by members of such a group would remain subject to domestic law

[90] International armed conflict, RULAC Geneva Academy, available at: https://www.rulac.org/classification/international-armed-conflict
[91] N. SZELES, *supra* note 79 at 185.
[92] Dudley, Steven S, *Drug trafficking organizations in Central America: transportistas, Mexican cartels and maras*. Woodrow Wilson International Center for Scholars, Mexico Institute (2010).
[93] N. SZELES, *supra* note 79 at 186.
[94] *Id.*
[95] *Id.*

and not IHL. Therefore, IHL would not apply to organized crime groups because the state would not recognize the existence of a non-international armed conflict.[96]

Moreover, organized crime groups frequently operate in conflict zones, particularly when interacting with terrorist and rebel groups.[97] This connection might frequently result in the conversion of weapons into drugs and would be considered as 'direct participation in hostilities.' As 'participation in hostilities', this would be a crucial component of IHL on several levels because this would take into account an individual's status as a combatant, a prisoner of war, or someone who has lost the protected status that would come with being a civilian.[98]

However, the commentary to Article 51(3) of Additional Protocol I suggests that a clear distinction should be made between 'direct participation in hostilities' and 'participation in the war effort.' Due to 'participation in the war effort,' it would be frequently necessary for varying degrees of the entire population. Without this distinction, efforts to reaffirm and advance IHL could be rendered meaningless. Evidently, in contemporary conflicts, numerous national activities would contribute directly or indirectly to the conduct of hostilities even if the morale of the population played a role in this context.[99]

In addition, the commentary to Article 43(2) of the Additional Protocol I states that direct participation in hostilities would require a "direct causal connection between the activity engaged in and the harm done to the enemy at the time and place of the activity."[100] Nevertheless, it would be desirable for parties to a conflict to exchange complete information on the composition of their

[96] N. SZELES, *supra* note 79 at 186.
[97] Then in Columbia, in Turkey, in Afghanistan.
[98] N. SZELES, *supra* note 79 at 187.
[99] Commentary of 1987 Protection of the civilian population, at 618, available at: https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=5E5142B6BA102B45C12563CD00434741
[100] Commentary of 1987 Armed forces, at 515, available at: https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/1a13044f3bbb5b8ec12563fb0066f226/0cdb7170225811a0c12563cd00433725

respective armed forces, even if this were limited to the communication of the laws and regulations they have had to adopt to comply with Article 84 of the Protocol.[101] According to the Commentary on Additional Protocol II, it states that "the notion of direct participation in hostilities implies a sufficient causal relationship between the act of participation and its immediate consequences."[102] Direct participation in hostilities would not relate to general, traditional, or criminal activities, indicating that if there was no effective connection between the activities engaged in and the harm caused, there would be no direct participation in the hostilities.[103]

Despite the similarities between organized crime groups and armed groups engaged in armed conflict in the context of IHL, IHL does not strictly apply to organized crime groups. Therefore, it must be thoroughly examined in what circumstances international law would be applicable, and if it is not applicable, attention would need to be placed on human rights and domestic criminal law.

3.2.3 Human rights

When the terms 'human rights' and 'transnational organized crime' are mentioned, the authority of the state and the status of a natural or legal person treat them differently.[104] Human rights laws often emphasize the state as the wrongdoer and the individual or organization as the victim.[105] On the other hand, criminal law frequently focuses on the state as a collective victim

[101] Commentary of 1987 Armed forces, *supra* note 100.
[102] JEAN FRANCOIS QUÉGUINER, *Direct participation in hostilities under international humanitarian law,* ICRC (June 2, 2003), available at: chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.icrc.org/en/doc/assets/files/other/2003-02-background-document-icrc.pdf
[103] N. SZELES, *supra* note 79 at 188.
[104] MATH NOORTMANN & DAWN SEDMAN, *Transnational Criminal Organisations and Human Rights, in International Law and Transnational Organised Crime,* 406 (PIERRE HAUCK & SVEN PETERKE (ed.), Oxford U. Press, 1st ed.: 2016)
[105] *Id.*

and the individual or organization as an offender.[106] It is worth noting that the legal regime governing human rights and TOC might be distinct, which would result in the role of the state in preventing TOC and associated human rights violations.[107]

In addition, human rights are a legal concept defined in such a way that states agree and are obligated to uphold and refrain from unduly interfering with certain fundamental entitlements and freedoms held by all individuals without discrimination.[108] The origin of these rights ultimately lies in international human rights laws. Simultaneously, 'transnational' in 'transnational organized crime' refers to a transnational crime. Consequently, public international law issues would inevitably emerge in the criminal response. Finally, 'transnational criminal law' would encompass the rules under which states would collaborate to combat crimes of mutual interest.[109]

As part of the international human rights system, the United Nations General Assembly drafted the Universal Declaration of Human Rights (UDHR) in 1948.[110] Although the UDHR is not a legally binding treaty, it does contain aspirational declarations of civil, political, economic, social, and cultural rights that laid the foundation for the subsequent development of international human rights law regimes.[111] Since then, multilateral human rights treaties drafted under the auspices of the United Nations that have been entered into force have been derived from the Declaration, which serves as the system's foundation.[112]

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[106] MATH NOORTMANN & DAWN SEDMAN, *supra* note 104.
[107] VARUN VM, *Human Rights-Based Approach to Combat Transnational Crime,* (eucrim: Oct. 9, 2020), available at: https://eucrim.eu/articles/human-rights-based-approach-combat-transnational-crime/
[108] United Nations, *Human Rights,* (UN), available at: https://www.un.org/en/global-issues/human-rights
[109] NEIL BOISTER, *An Introduction to Transnational Criminal Law,* 3-5 (Oxford U. Press 2nd ed.: 2018)
[110] PHILIP ALSTON & RYAN GOODMAN, *International Human Rights: The Successor to International Human Rights in Context: Law, Political and Morals,*139-45 (Oxford U. Press: 2013); ROBERT CURRIE & SARAH DOUGLAS, *Human Rights and Transnational Organized Crime,* Forthcoming in F. Allum & S. Gilmore, eds., Routledge Handbook of Transnational Organized Crime (Routledge, May 26, 2021) at 2; *Universal Declaration of Human Rights,* GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71.
[111] *Id.*
[112] *Id.*

After overcoming the initial state resistance, the two treaties that, along with the UDHR, constitute the 'international bill of rights' were adopted in 1966.[113] The International Covenant on Civil and Political Rights (ICCPR)[114] and the International Covenant on Economic, Social, and Cultural Rights (ICESCR)[115] are two of the most important. In addition, many additional treaties and soft law instruments have been put in place to protect human rights, such as the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)[116] and the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment (UNCAT).[117] These instruments are based on the fact that international law has a legitimate role in protecting human rights. By ratifying these instruments, State Parties agreed to abide by international law and hold them accountable if they failed to do so.[118]

Furthermore, regional human rights treaty systems have since been developed, including the European Convention on Human Rights (ECHR) (1950), the American Convention on Human Rights (AmCHR) (1969), the African Charter on Human and Peoples' Rights (ACHPR), and the Arab Charter on Human and Peoples' Rights (ArCHR) (2004).[119] After that, the ASEAN Charter was adopted in 2007, which made it the first international organization with a formal legal personality that upholds democracy and human rights through legally binding obligations.[120] Within the framework of the post-Charter transformation of ASEAN, it established the ASEAN

[113] R. CURRIE & S. DOUGLAS, *Human Rights and Transnational Organized Crime, supra* note 110 at 2
[114] International Covenant on Civil and Political Rights, Dec. 16, 1969, 999 U.N.T.S. 171. [hereafter "ICCPR"]
[115] International Covenant of Economic, Social and Cultural Rights, Dec. 16, 1969, 993 U.N.T.S. 3. [hereafter " ICESCR"]
[116] Convention on the Elimination of All Forms of Racial Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereafter "CEDAW"]
[117] Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereafter "UNCAT"]
[118] The International (UN) Human Rights System, Georgetown Law Library, available at: https://guides.ll.georgetown.edu/c.php?g=273364&p=1824722#Brief%20Overview
[119] R. CURRIE & S. DOUGLAS, *supra* note 110 at 2
[120] ALISON DUXBURY & TAN HSIEN-LI, *Can ASEAN take Human Rights Seriously?,* available at: https://cil.nus.edu.sg/wp-content/uploads/2016/08/SD_ES-Duxbury-and-Tan-ASEAN-HR.pdf

Intergovernmental Commission on Human Rights (AICHR) in 2009.[121] Although creating the AICHR and adopting the ASEAN Declaration of Human Rights (AHRD) in 2012 constituted significant progress, several concerns still remain about ASEAN's commitment to human rights.[122] These concerns include that AICHR primarily comprises State officials with no relevant human rights experience, its operations have been opaque and unaccountable, and there appears to be a lack of political will to strengthen regional mechanisms.[123] Therefore, expectations for the AICHR are low, and a recent authoritative review described the system as 'nascent rather than well established.'[124]

International human rights law is also supplementary to transnational criminal law because it enables states to take a holistic approach through the effective prevention and application of criminal justice and human rights standards.[125] Furthermore, international human rights law could fill the gaps left by the UNTOC Convention and its Protocols by using regional instruments that would aim to respect victims' human rights.[126] International human rights law thus plays an essential role in complementing the obligations of state governments to investigate, prosecute, and punish offenders, prevent criminal activity, and protect victims as required by law.[127]

[121] A. DUXBURY & T. HSIEN-LI, *supra* note 120
[122] *Id.*
[123] A. DUXBURY & T. HSIEN-LI, *supra* note 120
[124] MUNTARBHORN, V., *The South-East Asia System for Human Right Protection, in* Sheeran & Rodley, Routledge Handbook on International Human Righta Law (2013)
[125] UNODC, *UNODC and the Promotion and Protection of Human Rights: Position Paper,* (UNODC: 2012) at 4-5, available at: https://www.unodc.org/documents/justice-and-prison-reform/UNODC_Human_rights_position_paper_2012.pdf
[126] OBOKATA, T., *Combating Transnational Organised Crime through International Human Rights Law,* INT'L HUM. RTS. L. REV. 8(1), 3 (2019)
[127] OBOKATA, T., *Trafficking of Human Beings as a Human Rights Violation: Obligations and Accountability of States, in* Obokata, T. (ed) *Trafficking of Human Beings from a Human Rights Perspective: Towards a Holistic Approach,* (Leiden, Martinus Nijhoff Pub.: 2006) at 147-72

States must, for instance, protect victims of serious crimes and effectively address serious human rights violations.[128] Under transnational criminal law instruments, states are also required to investigate and prosecute human rights violations and serious crimes committed by private actors within their borders.[129] Moreover, states must conduct effective criminal investigations within a reasonable timeframe[130] for victims of serious crimes.[131] Since organized criminal groups are regarded as non-state actors, these enforcement requirements would apply to organized crime perpetrators as well.[132] Significantly, human trafficking is considered a serious violation of human rights due to its intersection with three branches of international law: transnational criminal law, international human rights law, and international criminal law.[133]

Human trafficking illustrates the tension between states' obligations to prevent gross violations of human rights and their efforts to combat TOC. The three main duties of states are investigation, prosecution, and victim protection and prevention. However, states are also liable for violations of these obligations if they fail to effectively implement a fundamental human rights obligation. Consequently, these obligations are primarily derived from specific repression conventions, regional agreements, and other human rights instruments.[134]

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[128] United Nations, *Commission on Crime Prevention and Criminal Justice, Report on the twenty-seventh session,* UNESCOR, 2018, Supp No. 10, UN Doc E/CN. 15/2018/15. [CCPJ Report], available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/V18/038/10/PDF/V1803810.pdf?OpenElement

[129] These obligations have been re-affirmed in various international instruments, including the 2005 resolution, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UNGA Res 60/147, Dec/05, available at: https://www.ohchr.org/en/professionalinterest/pages/remedyandreparation.aspx; [Res 60/147], art III, paras 4 and 5, which recites that states must cooperate with others in the pursuit of international justice.

[130] *Case of Trufin v Romania (Merit and Just Satisfaction)* (2009), ECtHR App No. 3990/04.

[131] *Velasquez-Rodriguez v Honduras* (1988) IACrtHR (Ser. C) No. 4., available at: https://www.refworld.org/cases,IACRTHR,40279a9e4.html

[132] *Manuel Garcia Franco v Ecuador* (1997) Case 10.258, Inter-Am CHR No. 1/97., available at: http://www.worldcourts.com/iacmhr/eng/decisions/1997.03.12_Garcia_Franco_v_Ecuador.pdf

[133] OBOKATA, T., *supra* note 127 at 165-6

[134] CURRIE, R. J. & RIKHOF, J., *International & Transnational Criminal Law*. (Toronto: Irwin Pub.,3rd ed.: 2020) at 387

International human rights law has the potential to close the loopholes in the criminal justice system created by the Palermo Convention and its Protocols, as well as regional instruments. In the case of TOC, particularly human trafficking, international human rights law is critical in supplementing state government obligations to investigate, prosecute, and punish offenders, prevent criminal activity, and protect victims when states fail to comply with their obligations. The government must respect fundamental human rights and grant certain procedural rights to the accused during an organized crime investigation, arrest, trial, and sentencing. States must also encourage this victim-centered approach when claiming the duty to protect others, such as victims, in the fight against crime or human trafficking. However, human trafficking is a pervasive issue that requires States Parties to collaborate to determine whether human trafficking would continue to be human rights-based victimology or whether concern for protecting the accused's procedural rights would increase proportionately. Therefore, a human rights-based approach would be essential for states to carry out their obligations to promote and protect the rights of the accused and victims of organized crime.

3.2.4 Law of the sea

TOC has facilitated many of the most serious threats to international peace and security and has created a "permissive environment for civil conflict."[135] Due to ongoing globalization,

[135] United Nations, *A more secure world: our shared responsibility: Report of the High-level Panel on Threats, Challenges and Change,* (UN: 2004), UN Doc. A/59/565, Dec. 2, 2004, at para 23 available at: http://providus.lv/article_files/931/original/HLP_report_en.pdf?1326375616

TOCs have also rapidly evolved their activities.[136] The United States then started to recognize the importance of international cooperation in effectively addressing and preventing these threats.[137]

Although there is no specific definition of "transnational organized crime," the UNTOC Convention defines an "organized criminal group" under Article 2(a).[138] Furthermore, these organized criminal groups could commit crimes that would be transnational in nature.[139] However, crimes committed by organized criminal groups would not be restricted to a few specific types of offenses, but also encompass a wide range of offenses. For instance, these crimes would include drug trafficking, smuggling of migrants, and human trafficking, which would be recognized as typical manifestations of criminal activity.[140]

These crimes would also exploit supply chains for their financial and material benefits. For example, supply chain vulnerabilities were exposed in 2021, when the temporary closure of the Suez Canal triggered a domino effect of global supply chain disruptions due to the COVID-19 pandemic,[141] which resulted in increased counterfeiting and trafficking.[142] Therefore, measures to

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[136] JAMES J.F. FOREST, *Globalization and Transnational Crime,* (E-International Relations: Sep 16, 2020), available at: https://www.e-ir.info/2020/09/16/globalization-and-transnational-crime/#:~:text=Globalization%2C%20generally%20described%20as%20the,services%20provided%20by%20criminal%20organizations.

[137] Naples Political Declaration and Global Action Plan against Organized Transnational Crime, UN Doc. A/RES/49/159 of 23 December 1994, available at: https://digitallibrary.un.org/record/172274?ln=en#:~:text=Approves%20the%20Naples%20Political%20Declaration, relevant%20intergovernmental%20and%20non%2Dgovernmental

[138] Article 2(a) of the UNTOC defines an "organized criminal group" as "a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offenses […] to obtain, directly or indirectly, a financial or other material benefit."

[139] Article 3(2) UNTOC stipulating that an offense is transnational in nature , if' (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.'

[140] FBI, *Transnational Organized Crime,* available at: https://www.fbi.gov/investigate/organized-crime

[141] NEIL MURPHY, *The three lessons we learnt from the Suez Canal nightmare,* (Supply Chain: Jul. 17, 2021), available at: https://supplychaindigital.com/logistics/three-lessons-we-learnt-suez-canal-nightmare

[142] MELISSA D. BERRY, *Covid-19 pandemic exposes supply chain vulnerabilities that increase counterfeiting & trafficking,* (THOMSON REUTERS: Apr. 27, 2021), available at: https://www.thomsonreuters.com/en-us/posts/international-trade-and-supply-chain/pandemic-exposes-supply-chain-vulnerabilities/; Claire Meyer, *Criminals Eye Stalled Supply Chains for Weak Links,* (ASIS: Oct. 1, 2020), available at:

prevent the transportation of illegal goods, weapons, or people would be essential to fight these crimes effectively.[143] The international law of the sea also plays an important role in recognizing the importance of maritime transport as a mode of transportation in the era of globalization.[144]

The law of the sea is one of several branches of public international law that regulates the territorial jurisdictions of coastal states and their rights and obligations regarding the use and conservation of the ocean environment and natural resources.[145] The United Nations Convention on the Law of the Sea (UNCLOS)[146] is frequently associated with the law of the sea. It is generally accepted to divide the sea into several maritime zones. These include the following zones:

1. Internal waters are defined as those on the landward side of the baseline.[147]
2. The territorial sea is measured from the baseline and has a maximum breadth of 12 nautical miles (nm).[148]
3. The contiguous zone is measured from the baseline and has a maximum breadth of 24 nm.[149]
4. The exclusive economic zone (EEZ) is measured from the baseline and has a maximum breadth of 200 nautical miles (nm).[150]

https://www.asisonline.org/security-management-magazine/articles/2020/10/criminals-eye-stalled-supply-chains-for-weak-links/

[143] Article 9(1)(b), the Trafficking in Persons Protocol, *supra* note 16

[144] United Nations, *The globalization of crime: A transnational organized crime threat assessment,* Executive Summary, at 1-18, available at: https://www.unodc.org/documents/data-and-analysis/tocta/Executive_summary.pdf

[145] PORTER. HOAGLAND, J. ET AL, *Law of the Sea,* 6 Encyclopedia of Ocean Sciences (ELSEVIER, 3rd ed.: 2019) at 526-37.

[146] United Nations Convention on the Law of the Sea, Montego Bay, Dec. 10, 1982, entered into force Nov. 16, 1994, 1833 U.N.T.S. 3 [hereafter "UNCLOS"]

[147] *Cf.* Article 8(1), the UNCLOS, *supra* note 146

[148] *Cf.* Article 3, the UNCLOS

[149] *Cf.* Article 33(2), the UNCLOS

[150] *Cf.* Article 57, the UNCLOS, Note that the concept of the continental shelf is not mentioned here due to the fact that it only covers certain areas of the seabed and the subsoil thereof and thus is not relevant in the context of transnational organized crime.

Therefore, maritime areas not included in internal waters, the territorial sea, the contiguous area, or the EEZ would be considered part of the high seas' regime.[151] All these areas would have distinct rights and responsibilities for states, coastal or otherwise. As the distance from the coast increases, the competence and authority of coastal states would decrease while the rights of using states would increase.[152] Nevertheless, the coastal State retains its sovereignty over its internal waters, including ports and territorial seas,[153] and it would also have jurisdiction over vessels flying its flag on the high seas.[154] In general, international law of the sea (in particular UNCLOS) only sometimes provides a direct response as to whether they govern particular conduct. On the contrary, there are many instances where a specific act is lawful in one part of the ocean but is forbidden in another.

It is important to note that interdiction operations are an exercise of jurisdiction because it is generally accepted that the term "jurisdiction" may have many different meanings in international law.[155] For example, a jurisdiction could refer to the power of an international court or tribunal to investigate and decide a particular case.[156] In human rights law, however, the term "jurisdiction" refers to a situation in which a state exercises a certain degree of control over individuals or territory through its officials.[157] According to international law, jurisdiction generally is a conceptual term for the ability of a state to govern its citizens and property through

[151] *Cf.* Article 86, the UNCLOS *supra* note 146
[152] ALEXANDER PROELSS & TOBIAS HOFMANN, *Law of the Sea and Transnational Organised Crime, in International Law and Transnational Organised Crime,* 424 (PIERRE HAUCK & SVEN PETERKE (ed.), Oxford U. Press, 1st ed.: 2016)
[153] *See* Article 2(1), the UNCLOS
[154] *Cf.* Article 92(1), the UNCLOS
[155] ROBERT JENNINGS, *The limits of state jurisdiction,* 32 NORDIC J. INT'L L. 209, 212 (1962)
[156] CHRISTOPHER STAKER, *Jurisdiction, in* Malcolm Evans (ed.), *International Law,* 309-310(Oxford U. Press, 4th ed.: 2004)
[157] MARKO MILANOVIC, *From compromise to principle: clarifying the concept of state jurisdiction in human rights treaties,* 8 HUM. RTS. L. REV. 411, 417 (2008)

its laws.[158] There are two types of jurisdictions: legislative jurisdiction (which has the authority to prescribe) and executive jurisdiction (which has the authority to enforce).[159]

However, in cases of transnational organized crime at sea, a state could exercise its competence over the vessels in question in three ways. These are as follows: (1) A coastal state has jurisdiction over a ship that flies its flag, which is referred to as flag-state jurisdiction, (2) a coastal state has jurisdiction over a foreign ship within one of its maritime zones, and (3) a state has jurisdiction over a ship, whether or not it is flying its flag, that is located within another state's maritime zone. Accordingly, Article 94(1) of UNCLOS states that a state would have the right and obligation to "effectively exercise its jurisdiction and control over ships flying its flag in administrative, technical and social matters"[160] and that all laws and regulations of the flag state would be (in principle) applicable to its ships.

Another point to consider is that crimes, increasingly sophisticated, endangering human life on land, regional economic growth, and world security, are committed on the high seas.[161] As high seas, they are considered international waters and contentious. Moreover, Article 89 of the

[158] Robert Jennings & Arthur Watts, *Oppenheim's International Law,* (Oxford U. Press, 9th ed.: 1992) at 456ff; J. CRAWFORD, *supra* note 20 at 456

[159] J. CRAWFORD, *supra* note 20 at 456

[160] *See also* Article 94(2)(b) UNCLOS, *supra* note 466, according to which every state shall 'assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning the ship'. Note that in its recent Advisory Opinion of 2 April 2015 rendered upon the request of the Sub-regional Fisheries Commission, available at: https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/advisory_opinion_published/2015_21-advop-E.pdf;, the International Tribunal for the Law of the Sea (ITLOS) followed from Art. 94 UNCLOS by way of dynamic interpretation that 'as far as fishing activities are concerned, the flag State, in fulfilment of its responsibility to exercise effective jurisdiction and control in administrative matters, must adopt the necessary administrative measures to ensure that fishing vessels flying its flag are not involved in activities which will undermine the flag State's responsibilities under the Convention in respect of the conservation and management of marine living resources. If such violations nevertheless occur and are reported by other States, the flag State is obliged to investigate and, if appropriate, take any action necessary to remedy the situation.' *See* Advisory Opinion, at para. 119.

[161] United Nations, *High Seas Crime Becoming More Sophisticated, Endangering Lives, International Security, Speakers Tell Security Council,* 8457TH Meeting (AM), SC/13691 (Feb. 5, 2019), available at: https://www.un.org/press/en/2019/sc13691.doc.htm

UNCLOS prescribes that "no state may validly purport to subject any part of the high seas to its sovereignty." Concerning the high seas, states are prohibited from encroaching on this space with their laws and regulations.[162] Nevertheless, the high seas regime has historically been dominated by the principles of freedom of navigation and exclusive flag-state jurisdiction.[163] Hence, the principle of freedom of navigation would guarantee to all landlocked or coastal states the right of unrestricted access to the high seas by vessels flying their flag.[164] Simultaneously, the exclusive flag-state jurisdiction would establish that only the state whose flag a ship flies would have the authority to exercise (prescriptive and enforcement) jurisdiction over that ship on the high seas.[165] In the *M/V Saiga* case, the International Tribunal for the Law of the Sea (ITLOS) stated that the ship, everything on board, and anyone involved or interested in its operations were all treated as if they were a single entity connected to the flag state, while the nationalities of these individuals were irrelevant.[166]

As with all principles, neither the freedom of navigation nor the exclusive jurisdiction of the flag state would be absolute. Article 92(1) of the UNCLOS assumes that "ships shall sail under the flag of only one state and, except in exceptional cases expressly provided for in international treaties or this Convention, shall be subject to its exclusive jurisdiction on the high seas." Specifically, Article 110 of the UNCLOS applies to this situation.[167] Consequently, Article 110 of

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[162] A. PROELSS & T. HOFMANN, *supra* note 152 at 434
[163] *Id.*
[164] *Cf.* Article 90, the UNCLOS, *supra* note 146
[165] This is not a violation of the general principles regarding the exercise of jurisdiction set out above. In the Lotus case, the PCIJ explicitly recognized that a state may exercise enforcement jurisdiction outside its territory in cases where either a conventional or a customary rule confers such a competence on that state. See Lotus Judgment, The Case of *the SS Lotus (France v Turkey)*, Judgment of 7 September 1927, Ser. A, No. 10, at 18-19
[166] *The M/ V 'Saiga' (No. 2) (St. Vincent and the Grenadines v Guinea)*, Judgment of 1 July 1999, ITLOS Rep. 1999, 10 at para. 106.
[167] Article 110 of the UNCLOS expresses that

> "(1) Except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity in

UNCLOS permits warships and other government vessels to board ships suspected of piracy or the slave trade.[168] Consequently, it would remain possible that a ship was searched without permission from the flag state following the boarding.[169] Therefore, there have been some examples of crimes committed on the high seas that should be considered, including piracy, the slave trade, human trafficking, drug trafficking, and the transport of weapons of mass destruction (WMD).

Firstly, piracy is the only (possibly transnational, but not necessarily) organized crime regulated under UNCLOS. In addition, States have been expressly authorized to seize ships and aircraft on the high seas, seize goods and detain those on board.[170] This is because the EEZ would be subject to the high seas regime[171] as far as third parties territorial status and navigation rights would be concerned.[172] Although piracy in its manifestation could be regarded as the prototype of TOC, the legal requirements governing its repression still remain obscure.[173] Due to not providing a comprehensive regulation of piracy repression under the UNCLOS, piracy could be covered by the UNTOC Convention[174] and influenced by international organizations, such as the UN resolutions and recommendations. In particular, a special recommendation should be made to

> accordance with articles 95 and 96, is not justified in boarding it unless there is reasonable ground for suspecting that: (a) the ship is engaged in piracy; (b) the ship is engaged in the slave trade; . . .
>
> (2) In the cases provided for in paragraph 1, the warship may proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration."

[168] *Cf.* Article 111(5), the UNCLOS, *supra* note 146
[169] A. PROELSS & T. HOFMANN, *supra* note 152 at 435
[170] *Cf.* Article 105, the UNCLOS
[171] Article 58(1), the UNCLOS, For a detailed assessment of the legal status of the EEZ see Alexander Proelss, 'The law on the Exclusive Economic Zone in perspective: legal status and resolution of user conflicts revisited', (2012) 26 Ocean Yearbook, 87–112.
[172] *Cf.* Article 105 and 110, the UNCLOS
[173] A. PROELSS & T. HOFMANN, *supra* note 152 at 436
[174] RICARDO GOSALBO-BONO & SONJA BOELAERT, *The European Union's comprehensive approach to combating piracy at sea: legal aspects*, *in* PANOS KOUTRAKOS & ACHILLES SKORDAS (eds), *The Law and Practice of Piracy at Sea*, (Oxford, Hart Publishing, 2014) at 81

reconcile the repression of piracy with an obligation to treat alleged pirates under international human rights law.[175] It should also be noted that the law applicable to the repression of piracy has allegedly undergone a paradigm shift and is frequently deducted from the UN Security Council's actions concerning the situation on the coast of Somalia.[176] However, it has been thus argued that there is no evidence that the Security Council intended to expand the scope of the powers of the States participating in antipiracy operations beyond what had already been recognized under the UNCLOS Convention and general international law.[177]

Second, crimes committed on the high seas could arise when a warship that crossed a foreign vessel on the high seas could board the vessel if there were "reasonable grounds for suspecting that... the ship is engaged in the slave trade."[178] Unlike piracy, the UNCLOS does not define the terms 'slavery' or 'slave trade.' As a consequence, these definitions should be interpreted under the 1926 Slavery Convention[179] within Article 1.[180] Slavery and slave trading are uncommon, if not non-existent, nowadays, and thus the relevant right to non-flag states to interdict suspected vessels on the high seas would be hardly practical.[181] Furthermore, human trafficking, often referred to as a modern form of slavery, could be integrated into the proceedings codified in Article 110(1)(b) of UNCLOS that would be controversial.[182] Mainly, grave forms of human

[175] A. PROELSS & T. HOFMANN, *supra* note 152 at 436
[176] *Id.*
[177] *Id.*
[178] *Cf.* Article 110(1)(b), the UNCLOS, *supra* note 146
[179] Slavery Convention of 25 September 1926, entry into force March 9, 1927, League of Nations, 60 U.N.T.S. 254, available at: https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.13_slavery%20conv.pdf
[180] Slavery Convention Article 1 defines 'slavery' and the 'slave trade' as follows: "(1) Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised; (2) The slave trade includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves."
[181] A. PROELSS & T. HOFMANN, *supra* note 152 at 437
[182] *Id.* at 438

trafficking could be considered slavery.[183] However, it should be noted that neither UNCLOS nor customary international law would give states the power to confiscate or arrest a ship engaged in the slave trade.[184] Consequently, states intending to arrest suspected slave traders would need to seek the consent of the flag state.

After that, the right to interdict under UNCLOS would apply to human trafficking or migrant smuggling because any other international agreement would grant states that were not signatories the right to intervene.[185] If the right to intervene was limited to States Parties to the agreement, it would be perfectly compatible with Article 110(1) of the UNCLOS, which contains an express reservation against acts of interference arising from treaty granted powers.[186] However, the essential treaties address human trafficking and migrant smuggling, including the UNTOC Protocols on Trafficking in Persons[187] and Smuggling of Migrants[188] and the United Nations Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others.[189] None of these agreements confer specific intervention rights on non-flag states. Without the consent of the flag state, for example, the Smuggling of Migrants Protocol, which is dedicated to the Smuggling of Migrants by Sea, would prohibit non-flag states from interdicting and boarding vessels that would be suspected of human trafficking or migrant smuggling.[190] In

[183] A. PROELSS & T. HOFMANN, *supra* note 152 at 438
[184] *Id.*
[185] *Id.*
[186] *Id.*
[187] The Trafficking in Persons Protocol, *supra* note 16
[188] The Smuggling of Migrants Protocol, *supra* note 17
[189] United Nations Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others of 21 March 1950, 96 UNTS 271.
[190] The general duty to cooperate with non-flag-state enforcement contained in Article 8(2): "[a] State Party that has reasonable grounds to suspect that a vessel exercising freedom of navigation in accordance with international law and flying the flag or displaying the marks of registry of another State Party is engaged in the smuggling of migrants by sea may so notify the flag State, request confirmation of registry and, if confirmed, request authorization from the flag State to take appropriate measures with regard to that vessel. The flag State may authorize the requesting State, inter alia: (a) To board the vessel; (b) To search the vessel; and (c) If evidence is found that the vessel is engaged in the smuggling of migrants by sea, to take appropriate measures with respect to the vessel and persons and cargo on board, as authorized by the flag State."

addition, other safeguards in favor of the flag state are prescribed in Article 8(5) of the Smuggling of Migrants Protocol. This protocol states that "a State Party shall take no additional measures without the express authorization of the flag state, except those necessary to relieve imminent danger to the lives of persons or those which derive from relevant bilateral or multilateral agreements." Apart from bilateral agreements, international law would not provide autonomous rights for non-flag states to interdict ships suspected of human trafficking or migrant smuggling.[191]

In addition, drug cartels have increasingly used the oceans to transport drugs to other countries since the 1980s. Several bilateral and multilateral agreements have been concluded to eradicate and combat drug trafficking.[192] Especially for interdiction on the high seas or in the EEZ, those agreements are based on UNCLOS Article 108(1).[193] They are also classified into three categories.[194]

The first category of agreements that could be the most important multilateral treaty in this field is the Trafficking Convention.[195] Article 17 of the Trafficking Convention specifies the precise circumstances under which a state could interdict a foreign-flagged vessel. This closely parallels what was later accepted as Article 8 of the Smuggling of Migrants Protocol.[196] According

[191] A. PROELSS & T. HOFMANN, *supra* note 152 at 439

[192] Probably the first agreement in this regard was the Convention between the United Kingdom and the United States of America Respecting the Regulation of the Liquor Traffic of 23 January 1924, UKTS No. 22 [1924]. This treaty was the result of a dispute between the USA and the UK regarding the lawfulness of US measures taken against ships that were suspected of smuggling rum, but that were situated in international waters. While the USA claimed to protect its national interests, the UK regarded these activities as being in clear violation of international law. By concluding the treaty, the UK agreed not to protest against the boarding of ships flying the British flag outside the territorial waters of the USA where these ships were suspected of being engaged in liquor smuggling. Cf. DOUGLAS GUILFOYLE, *Shipping Interdiction and the Law of the Sea,* 81 (Cambridge U. Press: 2009)

[193] UNCLOS Article 108(1) states that "all States shall cooperate in the suppression of illicit traffic in narcotic drugs and psychotropic substances conducted by ships on the high seas in violation of international conventions."

[194] A. PROELSS & T. HOFMANN, *supra* note 152 at 439 states that three categories are: "(1) treaties that insist on the need to request the previous consent of the flag state if interdiction is intended; (2) treaties that contain the permission to interdict the ship of the other party on the high seas without previous authorization; and (3) hybrid treaties that on one hand require previous authorization by the flag state but also contain provisions stipulating that consent is presumed to have been given after a certain period of time on the other."

[195] The Tracking Convention, *supra* note 14

[196] The Smuggling of Migrants Protocol, Article 8, *supra* note 17; A. PROELSS & T. HOFMANN,*supra* note 152 at 440

to paragraph 3 of the Smuggling of Migrants Protocol, it could be interpreted that whenever a state had reasonable grounds to believe that a ship was involved in illicit drug trafficking, it would need to seek consent from the flag state before interdicting the ship.[197] However, Article 17(7) of the Trafficking Convention would also require the flag state to "respond expeditiously to a request." A breach of this procedural obligation would result in the flag state's international responsibility.[198] Hence, it could be argued that this breach could only be presumed in cases of clearly abusive behavior. Then, it would appear to be challenging to justify an interdiction operation conducted without the flag state's permission as a countermeasure under Article 49 of the Articles of States' Responsibility for Internationally Wrongful Acts.[199] One might reasonably raise whether the condition outlined in paragraph 1 of this provision would be satisfied in non-flag state enforcement situations.[200] Article 17(1) of the Trafficking Convention imposes a duty to cooperate "to the fullest extent possible," implying that the flag state's response to a request would not be entirely up to the flag state's discretion. In contrast, the requested state could be obliged not to unduly refuse the requested permissions and authorizations.[201]

Another example of the second category of treaties is the Treaty to Combat Illicit Drug Trafficking at Sea.[202] Unlike the Trafficking Convention, Article 5(2) of this Treaty recognizes the right of one party to interdict a ship flying the other party's flag in international waters.[203] As a

[197] The Smuggling of Migrants Protocol, Article 8, *supra* note 17; A. PROELSS & T. HOFMANN,*supra* note 152 at 440
[198] *Id.*
[199] UN Doc. A/RES/56/83 of 28 January 2002, Annex, Responsibility of States for Internationally Wrongful Acts, Art. 20
[200] A. PROELSS & T. HOFMANN, *supra* note 152 at 439
[201] *Id.*
[202] 23 March 1990, 1776 U.N.T.S. 242.
[203] Article 5(2)(1) reads '[s] hould there be reasonable grounds to suspect that offenses covered by article 2 are being committed, each Party recognizes the other's right to intervene as its agent in waters outside its own territorial limits, in respect of ships displaying the flag of the other State.'

result, several bilateral treaties between the United States and several states in the Caribbean and South America represent the third category of agreements.[204] They specify that the prohibition of a vessel flying another party's flag on the high seas requires the consent of that state. Therefore, at some point, the consent of the flag state would be presumed.[205]

Since 9/11, the US government has declared the problem of transporting WMD by sea because it has increasingly been involved in a 'war on terror.'[206] Simultaneously, the UNCLOS did not address human trafficking as expected. Therefore, the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention) should intervene in the first place.[207] The multilateral agreement would provide a legal framework for maritime crimes other than piracy.[208] This Convention was revised through a protocol (SUA Protocol 2005)[209] to cover various crimes. Many of those crimes also have potential transboundary implications; for example, (1) ship seizure and destruction, (2) destruction or serious damage to maritime navigational facilities, and (3) measures that could jeopardize navigational safety.[210] The SUA Protocol 2005 also covers the transport of biological and chemical weapons and any explosive, radioactive material, or biological, chemical, or nuclear weapon discharged from a ship in a

[204] A. PROELSS & T. HOFMANN, *supra* note 152 at 439
[205] *See, e.g.* Article 7(3)(d) of the Agreement between the Government of the United States of America and the Government of the Republic of Guatemala Concerning Cooperation to Suppress Illicit Traffic in Narcotic Substances and by Sea and Air of 19 June 2003, available at: https://2001-2009.state.gov/documents/organization/96914.pdf : 'if there is no response … within two (2) hours …, the requesting Party will be deemed to have been authorized to board the suspect vessel … 'For further examples see D. GUILFOYLE, *supra* note 192 at 89– 94; ROBIN GEIB & CHRISTIAN TAMS, *Non- flag states as guardians of the maritime order*, *in* HENRIK RINGBOM (ED.), *Jurisdiction Over Ships*, Leiden/ Boston, Brill: 2015) at.39– 40
[206] A. PROELSS & T. HOFMANN, *supra* note 152 at 441
[207] Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation of 10 March 1988, 1678 U.N.T.S. 221.
[208] A. PROELSS & T. HOFMANN, *supra* note 152 at 441
[209] IMO Doc. LEG/ CONF.15/ 21, Protocol of 14 October 2005 to the Convention for the Suppression of Unlawful Acts of Violence against the Safety of Maritime Navigation (SUA Convention). The Protocol (and thus the revised SUA Convention) entered into force on 28 July 2010
[210] *Id.*

manner that would cause or would be likely to cause death, serious injury, or damage. As a result, the transport of WMD through the oceans would be revealed.[211]

As with piracy, it is debatable whether the UN Security Council has assumed the role of a global legislator in the antiterrorist counter-proliferation at sea, thereby giving substance to the UNCLOS and the revised SUA Convention in this area. Additionally, the proliferation of nuclear, chemical, and biological weapons[212] and their delivery systems would be explicitly condemned by Resolution 1540 (2004) as a threat to international peace and security. However, this Resolution does not require flag states to allow other states to board and search ships flying their flag. According to paragraph 10 of the Resolution,[213] non-flag states could only take actions that would be "in accordance with their national legal authorities and legislation and are consistent with international law." Based on some interpretations, flag states would need to refrain from supporting non-state actors developing or attempting to acquire, possess, transport, or use nuclear, chemical, or biological weapons and their means of delivery.[214] From a methodological standpoint, it should be noted that a duty to abstain from doing something would be qualitatively distinct from an obligation to tolerate interference with flag state jurisdiction, which would be intrinsically linked to a state's sovereignty.[215]

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[211] Note that, so far as its geographical scope is concerned, the revised SUA Convention is applicable whenever a 'ship is navigating or is scheduled to navigate into, through or from waters beyond the outer limit of the territorial sea of a single State, or the lateral limits of its territorial sea with adjacent States' (Artitcle 4(1)).
[212] UN Doc. S/RES/1540 (2004) of 28 April 2004.
[213] *Id.* at para 10.
[214] A. PROELSS & T. HOFMANN, *supra* note 152 at 442
[215] *See* also Resolution 1874, UN Doc. S/RES/1540 (2009) of 12 June 2009, by which the Security Council reacted to a nuclear test conducted by the Democratic People's Republic of Korea, prescribing that 'if the flag State does not consent to inspection on the high seas, … the flag State shall direct the vessel to proceed to an appropriate and convenient port for the required inspection by the local authorities pursuant to paragraph 1'. Even in this instance the UN Security Council thus refrained from imposing a duty on the flag state to tolerate inspection of its vessels by third states on the high seas. In 2013, it then decided that 'if any vessel has refused to allow an inspection after such an inspection has been authorized by the vessel's flag State, or if any DPRK-flagged vessel has refused to be inspected pursuant to paragraph 12 of resolution 1874 (2009), all States shall deny such a vessel entry to their ports, unless entry is required for the purpose of an inspection, in the case of emergency or in the case of return to its port of origination …,' UN Doc. S/RES/2094 (2013) of 7 March 2013 at para. 17.

Moreover, Resolution 1540 needed to be implemented in a way that required flag states to grant permission to board presumed vessels flying their flag.[216] As a result, contrary to legal literature, it could be argued that flag states would need to effectively control their ships (and if this duty was not carried out, they would be in breach of Resolution 1540). However, this obligation would not imply tolerating control by another state.[217]

Due to the critical nature of maritime transport and shipping as international modes of transportation, the international law of the sea and the TOC are inseparable. This fact emphasizes the importance of determining which state would have jurisdiction over vessels suspected of piracy, human trafficking, drug trafficking, or WMD transport. Furthermore, there would be a clear distinction between the high seas and the EEZ. Consequently, the international law of the sea would encourage the establishment of a legal framework for combating TOC at sea.

3.2.5 International criminal law

The theory of international criminal law distinguishes conceptually between international crimes and TOC.[218] Due to differences in international crime and TOC, direct and indirect enforcement mechanisms could continue.[219] International organized crimes, or core crimes (which include genocide, crimes against humanity, war crimes, and aggression), would be within the jurisdiction of international criminal tribunals and the International Criminal Court (ICC).[220] On the other hand, the TOCs would be the responsibility of national jurisdictions, which would seek

[216] A. PROELSS & T. HOFMANN, *supra* note 152 at 442.
[217] *Id.*
[218] HARMEN VAN DER WILT, *Expanding Criminal Responsibility in Transnational and International Organized Crime,* 4 GROJIL (1) 1,1 (2016)
[219] *Id.*
[220] CHRISTINE SCHWÖBEL-PATEL, *The Core Crimes of International Criminal Law, in* Kevin Jon Heller et al (eds), *The Oxford Handbook of International Criminal Law* (Oxford U. Press: 2018)

to combat them through the conclusion of suppression conventions and international cooperation based on the *aut dedere, aut judicare* principle.[221]

The term "organized crime" is often used arbitrarily and very ambiguous[222] in its application to all types of offenses committed by transnational elements.[223] Furthermore, the term[224] could refer to a variety of more sophisticated or even professional criminal activities embedded within a complex illicit market.[225] For example, arms, drugs, and human trafficking are often associated with a range of "enabling activities," including the threat of violence, corruption, and money laundering.[226] Some could feel that the former would be the most critical aspect of organized crime,[227] while others could think that the latter would be the most important.[228] Hence, the term 'organized criminality' could be more appropriate.[229] However, the criminality of an indicator-based approach could pose a problem because violence against people, for instance,

[221] Amnesty International, *International Law Commission: The Obligation to Extradite or Prosecute (Aut Dedere Aut Judicare),* (2009) at 9-11, available at: https://www.amnesty.org/fr/wp-content/uploads/2021/07/ior400012009en.pdf

[222] MICHAEL WOODIWISS & DICK HOBBS, *Organized evil and the Atlantic Alliance: moral panics and the rhetoric of organized crime policing in America and Britain*, *in* 49 BRIT. J. CRIM. (2009) at 106– 28.

[223] Article 3(2) UNTOC stipulating that an offense is transnational in nature , if' (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.'

[224] Article 2(a), the Palermo Convention, UNTOC, *supra* note 4; An 'organized criminal groups', meaning that "a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offenses established in accordance of this Convention, in order to obtain, directly or indirectly, a financial or other material benefit."

[225] EDWIN H. SUTHERLAND, *The Professional Thief,* (Chicago, U. Chicago Press: 1937); *further*, MARY MCINTOSH, *The Organisation of Crime*, (London, Macmillan: 197) at 9.

[226] ALAN WRIGHT, *Organised Crime*, (Portland, Oregon, Willan Pub.: 2006) at 49.

[227] *See* JAN VAN DIJK, *Mafia markers: assessing organized crime and its impact on societies*, *in Trends in Organized Crime*, Vol. 10, (Heidelberg, Springer: 2007) at 40; ALLAN CASTLE, *Transnational organized crime and international security*,(Institute of International Relations, University of British Columbia, Working Paper No. 19: 1997), at 2; STEFAN MAIR, *The world of privatized violence*, *in* ALFRED PFALLER AND MARIKA LERCH (EDS), *Challenges of Globalization: New Trends in International Politics and Society*, (New Brunswick, Transaction Pub.: 2005) at 54.

[228] EDGARDO BUSCAGLIA & JAN VAN DIJK, *Controlling organized crime and corruption in the public sector', in Forum on Crime and Society*, (Vol. 3, Nos 1 and 2, Vienna, UN: 2003) at 6; DONALD CRESSY, *The Theft of the Nation*, (New York, Harper and Row: 1969) at 1.

[229] PIERRE HAUCK, *Transnational Organised Crime and International Criminal Law, in International Law and Transnational Organised Crime,* 450 (PIERRE HAUCK & SVEN PETERKE (ed.), Oxford U. Press, 1st ed.: 2016)

could be a helpful tool and a defining feature of some illegal activities, but it was not always so.[230] One could discover that "a simple listing of crimes does not tell us much about organized crime."[231] Rather than treating organized crime as distinct from other forms of criminal activity, this approach would reduce the unassailable scope that any definition of organized crime would need to have.[232]

Organized crime could also refer to criminal organizations, such as the Colombian and Mexican drug cartels, the Japanese yakuza, the Chinese triads, or the Italian and American mafia.[233] Illegal markets are as diverse and complex as those supplying them.[234] Although international crime does not rely on illicit markets to sustain its activities to perpetuate its profitable business, TOC and international crime share the trait of being committed by or through organizations and thus are collective crimes.[235] Additionally, when summarizing the definitional elements of international organized crime, Carrie-Lyn Donigan Guymon emphasized the hierarchical, rigid, or compartmentalized organizational structure that "uses international discipline and thereby protect the leadership [. . .] from detection or implication in the commission of crimes."[236] This would be a salient feature that TOC would have in common with core crimes, which are frequently referred to as 'system criminality.'[237] However, it would be possible to focus

[230] R. THOMAS NAYLOR, *Violence and illegal economic activity: a deconstruction*, *in Crime, Law & Social Change*, (Vol. 52, Heidelberg, Springer: 2009) at 231– 42; H. RICHARD FRIMAN,, *Drug markets and the selective use of violence*, *in Crime, Law & Social Change,* (Vol. 52, Heidelberg, Springer: 2009) at 285– 95.
[231] P. HAUCK & S. PETERKE, *supra* note 22 at 409.
[232] *Id.*
[233] Whether the Italian mafias can be classified as organised crime is controversial. Against that classification *see* DOUGLAS MEAGHER,*Organised Crime: Papers presented by Mr Douglas Meagher*, (QC, to the 53rd ANZAAS Congress, Perth, Western Australia, 16–20 May 1983, Canberra, Australian Government Publishing Service: 1983) at 3.
[234] P. HAUCK, *supra* note 229 at 450
[235] H. VAN DER WILT, *supra* note 218 at 2
[236] GUYMON, CLD, *International Legal Mechanisms for Combating Transnational Organized Crime: The Need for a Multilateral Convention,* 18 BERKELEY J INT'L L. 53, 56 (2000)
[237] NOLLKAEMPER, A, *Introduction, in* MOLLKAEMPER, A & VAN DER WILT, H, (eds), *System Criminality in International Law* (Cambridge U. Press, Cambridge: 2009) at 1. 'The term system criminality refers to the phenomenon that international crimes—notably crimes against humanity, genocide and war crimes—are often caused by collective entities in which the individual authors of these acts are embedded.'

on whether the ICC could expand its competencies in this area if some states could not master TOC because they lacked the appropriate personnel, technical approach, or other resources in their criminal justice systems.

In exceptional circumstances, the ICC and other national and international tribunals could apply international criminal law to the conduct of organized criminal groups. Therefore, it would be interesting to note that there is now a method for international criminal law to prosecute organized crime.[238] Despite the continued competence of the ICTY during the Yugoslav wars of the 1990s, the international community has taken steps to restore and extend the international judicial authority in nation states after transitional periods.[239] For instance, the Court of Bosnia and Herzegovina was created in 2002 and is responsible for both war crimes and organized crime.[240] Moreover, some internationalized or 'hybrid' criminal tribunals have subject matter jurisdiction over international crimes and national offenses originating in the state involved in the tribunal's formation.[241] To illustrate this, the Special Court for Sierra Leone has jurisdiction over crimes against humanity and war crimes in non-international armed conflicts. It also has jurisdiction over "crimes under Sierra Leonean law."[242] These new mechanisms unequivocally demonstrate the close connection between international criminal law and establishing new judicial authorities to combat organized crime.[243] In particular, violence committed by private gangs or other organized groups would be criminalized by national jurisdiction but would be primarily triggered by international criminal law.[244]

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[238] P. HAUCK & S. PETERKE, *supra* note 22 at 435.
[239] *Id.*
[240] For further details, *see* Human Rights Watch, *Looking for Justice: The War Crimes Chamber in Bosnia and Herzegovina,* (HRW: Feb. 7, 2006) available at: https://www.hrw.org/report/2006/02/07/looking-justice/war-crimes-chamber-bosnia-and-herzegovina
[241] H. VAN DER WILT, *supra* note 218 at 7
[242] United Nations, *Statute of the Special Court of Sierra Leone,* U.N. Doc. S/2002/246 (2002), Article 5
[243] P. HAUCK & S. PETERKE, *supra* note 22 at 435.
[244] *Id.*

It would be important to note that combating organized crime within the framework of a new generation of international criminal law[245] would also entail establishing the necessary judicial authority and competence at the national level. In contrast, the prerequisites for criminalizing gang violence or organized criminal conduct would be considered under public international law.[246] As a result, due consideration would need to be given to a framework of normative boundaries established by IHL, peace and armed conflict law, human rights protection, and the rule of law.[247]

The fight against organized crime and gang violence would thus be complicated and dynamic. While national legislators have addressed this issue in various ways, the fight against organized crime, gangs, and gang violence is increasingly an international issue. This focuses on the transnational aspects of organized crime and expresses the desire for states to cooperate more effectively and harmonize national laws. In exceptional cases, organized crime and gang violence could be addressed under international human rights law and international criminal law. Therefore, criminal organizations would be transformed into state organizations with similar powers and structures.

[245] Freely adapted from CLAUS. KRESS, *Völkerstrafrecht der dritten Generation gegen transnationale Gewalt Privater?, in* GERD HANKEL (ED.), *Die Macht und das Recht: Beitra¨ge zum Vo¨lkerrecht und Vo¨lkerstrafrecht zu Beginn des 21.*(Jahrhunderts, Hamburger Edition, Hamburg:2008 at 323ff., who speaks of an 'international criminal law of the third generation'; for further details, see KAI AMBOS, *International criminal law at the crossroads: from ad hoc imposition to treaty-based universal jurisdiction*, *in* CARSTEN STAHN & LARISSA VAN DEN HERIK (EDS), *Future Perspectives on International Criminal Justice*, (TMC Asser Press/ Cambridge University Press, The Hague: 2010) at 161–177.

[246] P. HAUCK, *supra* note 229 at 456

[247] *See* Claus Kress, *supra* note 245 at 411

3.3 The Relevant Model Treaties and UN Core Conventions on Transnational Organized Crime

3.3.1 The Model Treaties

This section focuses on a collective of model treaties on international criminal cooperation. These treaties received approval from the Seventh and Eighth United Nations Congresses on the Prevention of Crime and the Treatment of Offenders in 1985 and 1990, respectively.[248] The model treaties include the Model Agreement on the Transfer of Foreign Prisoners,[249] the Model Treaty on Extradition,[250] the Model Treaty on Mutual Assistance in Criminal Matters,[251] and the Model Treaty on the Transfer of Proceedings in Criminal Matters.[252]

3.3.1.1 The Model Agreement on the Transfer of Foreign Prisoners

The Model Agreement on the Transfer of Foreign Prisoners is one of the forms of international cooperation in criminal matters. This agreement deals with the transfer of persons

[248] The United Nations Congresses, held by the United Nations every five years beginning in 1955, bring together specialists in penal law and administration, both governmental and non-governmental, from most countries of the world to share common experiences and to formulate standards. The tradition of holding Congresses of this nature goes back to the 1870s; *See generally,* B. ALPER & J. BOREN, Crime: INTERNATIONAL AGENDA (1972); L. RADZINOWICZ, *International Collaboration in Criminal Science in* THE MODERN APPROACH TO CRIMINAL LAW 467 (L. Radzinowicz & J. Turner eds. 1945); Clark, *The Eighth UN Congress on the Prevention of Crime and Treatment of Offenders,* 1 CRIM. L.F. 513 (1990).

[249] Report of the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, U.N.Doc.A/CONF.121/22/Rev.1 at 53 (1986) [hereinafter Model Agreement on Prisoner Transfer], *supra* note 8

[250] Report of the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, U.N.Doc.A/CONF.121/22/Rev.1 at 53 (1986) [hereinafter Model Agreement on Prisoner Transfer], *supra* note9

[251] Report of the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, U.N.Doc.A/CONF.144/28 (1990) at 75, as adopted by G.A. res. 45/117, annex, 45 U.N. GAOR Supp. (No. 49A) at 215-19, U.N. Doc. A/45/49 (1990), and subsequently amended by G.A. res. 53/112 [hereinafter Model Treaty on Mutual Assistance in Criminal Matters], *supra* note 10

[252] Report of the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, U.N.Doc.A/CONF.144/28 (1990) at 89, as adopted by G.A. res. 45/118, annex, 45 U.N. GAOR Supp. (No. 49) at 219-21, U.N. Doc. A/45/49 (1990) [hereinafter Model Treaty on Transfer of Proceedings in Criminal Matters], *supra* note 11

currently serving sentences in other states by sending them back to their state of nationality or residence to carry out a sentence. Transferring foreign prisoners differs from deporting offenders because offenders who have served their entire sentence are no longer criminally prosecuted. Between countries, the transfer of a convicted person is usually done through bilateral or multilateral arrangements. However, countries should be concerned about the conditions under which transferred prisoners serve their sentences. This inclusion of provisions of prison conditions in transfer agreements thus demonstrates this concern.

The transfer of prisoners begins with a set of general principles that would promote social resettlement through mutual respect for national sovereignty and jurisdiction.[253] A transfer request could arise either from the sentencing or the administering State.[254] The initiative to be transferred could also be expressed by the prisoner and close relatives to either State that has an interest in the transfer. However, the State in question should inform the prisoner of how the competent authorities would carry out this transfer.[255]

A transfer would significantly depend on the consent of the prisoner and the agreement of both the sentencing and the administering state.[256] The prisoner would also need to acknowledge the possibility and legal consequences of the transfer because the prisoner could be prosecuted for other offenses committed before his/her transfer.[257] However, the administering state should

[253] Model Prisoner Transfer Agreement, *supra* note 8, at 54 para 1.
[254] *Id.* at para 4.
[255] Model Prisoner Transfer Agreement, *supra* note 8, at 54 para 4.
[256] Model Prisoner Transfer Agreement. at para 5. As the Secretary General explains in his note, at paras 4-5:

> [T]he requirement that prisoners must consent to the transfer ensures that transfers are not used as a method of expelling prisoners, or as a means of disguised extradition. Moreover, since prison conditions vary considerably from country to country, and the prisoner may have very personal reasons for not wishing to be transferred, it seems preferable to base the proposed model agreement on the consent requirement.
>
> The issue has been joined on whether "consent" is "freely" given or refused when it takes place in the face of intolerable prison conditions. *See* ABRAMOVSKY, *A Critical Evaluation of the American Transfer of Penal Sanctions Policy,* WISC. L. REV., Jan-Feb 25 (1980).

[257] Model Prisoner Transfer Agreement, *supra* note 8, at 55 para 6.

ensure that the prisoner could verify free consent if they could not regard his/her will freely,[258] so their legal representative would need to be competent to enable the transfer.[259]

Under a general rule, at the time of the transfer request, the prisoner must have served at least six months of his/her sentence. Additionally, a transfer should be granted without delay[260] in cases of indeterminate sentences.[261] Moreover, a double jeopardy provision would prohibit a transferred individual from being tried again in the administering state for the same act upon which the sentence to be carried out was based.[262] Nonetheless, the consent of the prisoner or his/her legal representative would be required, as the transfer procedure and legal consequences would need to directly follow the prisoner's decision.

As procedural regulations, they guarantee the prisoner that a procedural transfer would achieve the objectives. When a transfer would be initiated, the competent authorities of the administering state must (a) continue the enforcement of the sentence immediately or through a court or administrative order, or (b) convert the sentence, thereby substituting for the sanction imposed in the sentencing state a sanction prescribed by the law of the administering state for a related offense.[263] However, the costs would have yet to be accounted for in a final regulation. Therefore, all costs incurred due to a transfer and related transportation should be borne by the administering state unless the sentencing and administering states agreed otherwise.[264]

[258] Model Prisoner Transfer Agreement, *supra* note 8, at 55 at para 7.
[259] *Id.* at para 9.
[260] *Id.* at para 12.
[261] *Id.* at para 11.
[262] *Id.* at para 13. Principles of double jeopardy are quite undeveloped at the international level. This and other models represent tentative efforts to move in the direction of exploring the matter further. For some tentative efforts to raise the issue, *see* International Law Commission, *Fifth Report on the Draft Code of Offences Against the Peace and Security of Mankind,* U.N. Doc. A/CN.4/404 (1987), at 5-6, 12 (Doudou Thiam, Special Rapporteur.)
[263] Model Prisoner Transfer Agreement, *supra* note 8, at 55 para 14.
[264] *Id.* at para 20. Presumably, other costs – notably the cost of imprisonment in the administering state – lie where they fall.

When a sentence is converted, the administering state would have the right to change the sanctions or the duration of the punishment under its national law by considering the sentence pronounced in the sentencing state. However, a sanction involving the deprivation of liberty should not be converted to a pecuniary sanction [265] because the factual findings would bind the administering state to the extent that they would emerge from the sentencing state's judgment. As a result, the state that imposed the sentence would retain the exclusive power to review the sentence.[266] In cases of enforcement and pardon, the first states should guide the sentence's enforcement[267] as the administering state's law and then confirm that both the sentencing and the administering state could grant a pardon and amnesty.[268] Additionally, it would be important to note that the period of custody already served by the convicted person in either state would be fully deducted from the final sentence.[269]

As a result, the non-discriminatory treatment of foreign prisoners should be considered because they must be notified of their right to contact their embassy/consular authorities or receive any other pertinent information. The prisoner's consent would also be meaningful because they could be visited and corresponded with by their family and community agencies. However, the means to effectively help foreign prisoners should provide information and contact in their own language.[270]

[265] Model Prisoner Transfer Agreement, *supra* note 8, at 55 para 16.
[266] *Id.* at para 17. Few states are likely to agree to treaties that permit the administering state's courts to review the original decision on the merits. *See generally,* Vagts, *A Reply to 'A Critical Evaluation of the Mexican-American Transfer of Penal Sanctions Treaty',* 64 IOWA L. REV. 325 (1979).
[267] *Id.* at para 21.
[268] *Id.* at para 22..
[269] Model Prisoner Transfer Agreement, *supra* note 8, at 55 para 18.
[270] Report of the Seventh United Nations Congress, *supra* note 8 at 8, (Note by the Secretariat).

3.3.1.2 The Model Treaty on Extradition

Extradition is governed by treaties, bilateral or multilateral agreements, or domestic laws. It describes how to extradite someone to another state to face criminal charges or serve a sentence. Effective extradition laws and processes help fight transnational crimes when the culprit flees to another state. However, treaties such as the United Nations Convention Against Transnational Organized Crime and its additional protocols on human trafficking and migrant smuggling and the United Nations Convention Against Corruption contain provisions that states parties might employ instead of an extradition treaty.

According to the terms of the extradition treaty, the parties would agree to extradite each other upon request. By doing so, a person who could be wanted in the requesting state for prosecution, imposition, or execution of a sentence for an extraditable offense.[271] As states who would be parties to extradition treaties have various systems and legal frameworks, the difficulties of the procedure would need to be addressed by incorporating both mandatory[272] and optional[273] grounds for refusal. Thus, legal differences could be resolved substantively by using many universally accepted extradition principles.

First, the Model Extradition Treaty defines the most widely accepted *double/dual criminality* principle.[274] This principle requires extraditable offenses, which are punishable under both the requesting and requested state's laws.[275] This also prescribes the imposition of a minimum penalty, which would be defined as "imprisonment or deprivation of liberty for a 'maximum'

[271] Model Treaty on Extradition, *supra* 9 at. Art. 1
[272] *Id.* at Art. 3
[273] *Id.* at Art. 4
[274] *Id.* at Art. 2 para 1; United Nations, *Revised manuals on the Model Treaty on Extradition and the Model Treaty on Mutual Assistance in Criminal Matters,* E/CN.15/2004/CRP.11 (May 11, 2004), Part One, at n.15.
[275] *Id.*

period of at least [one/two] year(s), or 'a more severe penalty'".[276] The word "maximum" refers to the length of imprisonment which could be admissible because the laws of certain states would impose minimum and maximum periods,[277] while the term 'a more severe penalty' would refer to offenses that would carry a higher maximum, a life sentence, or the death penalty.[278] However, applying this minimum penalty standard would be to ensure that the treaty would apply to all serious offenses. Thus, the Model Treaty suggested that extradition would be granted if a period of at least four or six months remained to be served when the person wanted would be returned for the enforcement of a sentence in the requesting state.[279]

Second, extradition would be refused if the offenses for which extradition were sought were deemed political offenses by the requested State.[280] For example, extradition for a non-violent, pure political offense, such as prohibited criminal slander of the head of state by a political opponent or prohibited political activity, could involve the requested state in the domestic politics of the requesting state.[281] Regarding the principle of non-extradition of nationals, many States refuse to accept any obligation to render their own citizens. Simultaneously, some countries have constitutional provisions that prohibit the extradition of their nationals.[282] Regardless of the general principle, public international law would require the state to prosecute (*aut dedere aut judicare*)[283] persons who commit serious international crimes that would constitute an absolute

[276] Model Treaty on Extradition, *supra* 9 at. Art. 2 para 1.
[277] *Revised manuals, supra* note 274 Part One, at n.16
[278] *Id.*
[279] Model Treaty on Extradition, *supra* note 9, Article 2 para 1.
[280] *Id.* at Article 3(a). Extradition shall not be granted in any of the following circumstances: (a) If the offense for which extradition is requested is regarded by the requested State as an offense of a political nature. . .
[281] *Revised manuals, supra* note 274, Part One, at n. 41.
[282] IVAN A. SHEARER, *Non-Extradition of Nationals: A Review and Proposal,* ADEL. L. REV. 273, 287-91 (1966).
[283] NEIL BOISTER, *An Introduction to Transnational Criminal Law,* (Oxford U. Press 2nd ed.: 2018) at 369-70; Tom Obokata, *Transnational Organised Crime in International Law,* (Hart Pub.: 2010) at 59.

obligation on the part of those parties to extradite.[284] Then, this obligation would be predicated on the extraterritorial nature of international crimes and would reflect the international community's attempt to ensure that the perpetrators would be prosecuted by either the perpetrator's national authorities or by another state, thus indicating a willingness to prosecute the case by requesting extradition.

However, the political offense provision would still be exempt from a political nature. This would refer to "any offense in respect of which the parties have assumed an obligation, pursuant to any multilateral convention, to take prosecutorial action where they do not extradite, or any other offense that the parties have agreed is not an offense of a political character for the purpose of extradition."[285] This sentence would ensure that those who have committed acts defined as criminal offenses in international treaties could not circumvent extradition by claiming the political offense exception.[286] It should also be noted that the extradition exception for political offenses has been the most controversial aspect of the process because political offenses symbolize the ideas of political tolerance and free speech, which would make the government reluctant to seek extradition for such offenses.[287] Under a treaty or national law, however, the national communities have traditionally agreed to refuse extradition for purely non-violent political offenses without undue complaint.[288] As a result, parties to certain Conventions, such as the Genocide Convention

[284] ROGER S. CLARK, *Crime: The UN Agenda on International Cooperation in the Criminal Process,* 15 Nova L. Rev. 475, 486 (1991).
[285] Model Treaty on Extradition, *supra* note 9, Article 3(a) The second sentence of subparagraph (a) was added in the 1997 revision.
[286] *Revised manuals, supra* note 274, Part One, at n.43; *See, e.g.,* the Convention on the Prevention and Punishment of the Crime of Genocide, G.A. res. 260 (111) A, Article 7; the Inter-American Convention against Terrorism (2002) Article 11; the Terrorist Financing Convention, Article 14; the Terrorist Bombing Convention, Article 11).
[287] *Revised manuals, supra* note 274, Part One, at n.43
[288] *Id.*; *See, e.g.,* the Convention on the Prevention and Punishment of the Crime of Genocide, G.A. res. 260 (111) A, Article 7; the Inter-American Convention against Terrorism (2002) Article 11; the Terrorist Financing Convention, Article 14; the Terrorist Bombing Convention, Article 11).

and the Apartheid Conventions, do not have to treat the offenses contained therein as political offenses.[289]

As the non-discrimination clause, the requested states are not obligated to extradite if they have substantial grounds to believe that the extradition request was made to prosecute or punish a person based on prejudice for any of the reasons.[290] This exception is based on the principle of non-refoulement, which allows a party to refuse extradition if it determines that the extradition request is discriminatory in its purpose or if the subject of the request may be prejudiced due to one of the enumerated discriminatory grounds.[291] Moreover, it would be refused if the person seeking extradition had been or could be tortured or had been or could be subjected to cruel, inhuman, or degrading treatment or punishment in the requesting state or if that person had not received or would not receive the minimum guarantees in criminal proceedings as imposed in the ICCPR.[292] It should be noted that this would include human rights exceptions to extradition and consider some of the ICCPR's basic requirements. However, this exemption would not apply to the death penalty, which would be addressed separately in Article 4(d).[293] In addition, a military offense that is not a criminal offense under ordinary criminal law[294] would also be refused if a final judgment had been rendered against the person in the requested state for the offense for which

[289] Modern practice in the international crime area seeks, as has been noted above, to deal with the "safe haven" problem in two over-lapping ways. Sometimes it encourages prosecution through extradition by denying political offender status to activities such as some varieties of terrorism; sometimes it permits a denial of extradition on a ground such as political offender status, but nonetheless compels prosecution in the state denying extradition. The nod in the nod in the model treaty goes towards extradition rather than prosecution.
[290] Model Treaty on Extradition, *supra* note 9, Article 3(b) that includes gender, race, religion, nationality, ethnic origin, political opinion, sex, or status, or that the person's position.
[291] *Revised manuals, supra* note 274, Part One, at n. 47-48. This ground for refusal of extradition is included in numerous international instruments such as the 1988 Drug Convention (Article 6, paragraph 6), the Palermo Convention (Article 16, paragraph 14), the Merida Convention (Article 44, paragraph 15) and the recent counter terrorism conventions.
[292] Model Treaty on Extradition, *supra* note 9, Article 3(f).
[293] *Revised manuals, supra* note 274, Part One, at n.57
[294] Model Treaty on Extradition, *supra* note 9, Article 3(c)

extradition is sought;[295] or if the person whose extradition is sought had become immune from prosecution or punishment for any reason, including lapse of time or amnesty.[296] Finally, extradition would be refused if: (1) the requesting state's judgment had been rendered in absentia, (2) the convicted person did not receive sufficient notice of the trial or an opportunity to arrange for their defense, and (3) they did not have or would not have the opportunity to have the case retried in their presence.[297] Therefore, the three conditions would have to be met as mandatory grounds for refusal of extradition.[298]

Extradition could also be refused if the person sought was a national of the requested state.[299] Historically, when extradition is refused based on the accused's nationality, the prosecution could proceed in the country of nationality according to domestic law. Until recently, however, treaties rarely mandated this. Nonetheless, extradition could provide a solution in cases where extradition would be declined due to nationality. The requested state would then refer the case to its authorized authorities for disciplinary action.[300]

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[295] Model Treaty on Extradition, *supra* note 9, Art. 3(d).
[296] *Id.* at Art. 3(e).
[297] Model Treaty on Extradition, *supra* note 9, at Art. 3(g).
[298] *Revised manuals, supra* note 274, Part One, at n. 59.
[299] Model Treaty on Extradition, *supra* note 9, Article 4(a); *see* NADELMAN, *The Role of the United States in the International Enforcement of Criminal Law,* 31 HARV. INT'L L.J. 37, 67 (1990) notes that:

> "Most civil law countries, as well as some common law countries, regard the nonextradition of their citizens as an important principle deeply ingrained in their legal traditions. They justify the principle on various grounds, including the state's obligation to protect its citizens, lack of confidence in the fairness of foreign judicial proceedings, the many disadvantages a defendant confronts in trying to defend himself in a foreign state before a strange legal system, as well as the additional disadvantages posed by imprisonment in a foreign jail where family and friends may be distant, and the chances of rehabilitation are significantly diminished."

[300] Model Treaty on Extradition, *supra* note 9, Article 4(a)

> Functionally, this provision in the model extradition treaty would work the same way as a request for the transfer of proceedings to the state on nationality. *See* discussion of the Model Treaty on Transfer of Proceedings. Note, for example, the discussion by NADELMAN, at 70, of relatively unsuccessful efforts by the United States authorities to galvanize Mexican prosecutors into action. (Article 9 of the Mexico-U.S. treaty has a mild prosecution requirement. Where a national is not extradited "the requested Party shall submit the case to its competent authorities for the purpose of prosecution, provided that Party has jurisdiction over the offense." Extradition Laws and Treaties, United States, No. 590.19, at Art. 9(2) (I. Kavass & A. Sprudzs comp. 1979) As a civil law country,

In addition, extradition could be refused under several circumstances other than nationality. According to the *ne bis in idem* or *double jeopardy* principle,[301] the competent authorities of the requested state would have decided not to initiate or terminate the proceedings against the person for the same offense. In particular, extradition, which would be the same offense, would be requested[302] because of a final determination that the guilt had not been proven. Extradition would then be precluded by the application of the *ne bis in idem*, also found in Article 3(d),[303] where a prosecution for the same offense would be pending in the requested state.[304] Again, this could be refused if the offense was punishable by death under the requesting state's law unless that state provided assurances sufficient to the requested state that the death penalty would not be imposed or, if imposed, would not be carried out.[305] The state could be able to apply the same restriction to a life sentence or an indeterminate sentence.[306]

Finally, the Model Treaty on Extradition contains provisions relating to the standard mechanism.[307] This reaffirms the *specialty* rule codified in numerous bilateral and regional treaties and extradition regimes. Due to the *specialty* principle, an extradited person should not be prosecuted, sentenced, detained, re-extradited to a third state, or subjected to any other restriction of personal liberty in the territory of the requesting state for any offense committed before surrender other than the offense for which extradition was granted or any other offense for which

Mexico is more likely than the United States to have nationality-based legislation in place in a particular instance but may not necessarily use it.

[301] Model Treaty on Extradition, *supra* note 9, Article 4(b)
[302] *Revised manuals, supra* note 274, Part One, at n. 78.
[303] Model Treaty on Extradition, *supra* note 9, Article 4(b); *Revised manuals, supra* note 274, Part One, at n. 78.
[304] Model Treaty on Extradition, *supra* note 9, Article 4(c)
[305] *Id.* at Article 4(d)
[306] *Revised manuals, supra* note 274, Part One, at n. 81.
[307] Model Treaty on Extradition, *supra* note 9, Article 5 on channels of communication and required documents; Art. 7 on certification and authentication; Art. 9 on provisional arrest; Art. 11 on surrender of the person; and Art. 13 on surrender of property found in the requested state that has been acquired as a result of the offense or that may be required as evidence.

the requested state consents.[308] *Specialty* also protects against prosecutions for political offenses and violations of other substantive rules of extradition law, such as *dual criminality* and the *ne bis idem* principle, in the requesting state.[309] Thus, these principles are designed to protect the rights of the suspects and defendants.

Therefore, the Model reiterates the current non-solution of how to deal with multiple requests for the same person stating that a party "shall, at its discretion, determine to which of those states the person is to be extradited."[310] For example, in the case of terrorism, multiple jurisdictions may be asserted over the same incident, but no clear priority would be assigned. However, the issue could also arise when the accused is wanted for multiple offenses. In such instances, the general international law would not provide direction and force states to negotiate. The draft recognizes this approach stating that if no agreement is reached, the state possessing the accused possesses the ultimate authority.[311]

3.3.1.3 The Model Treaty on Mutual Assistance in Criminal Matters

Mutual assistance is assistance from one state to another in maintaining the judicial document and collecting evidence for criminal purposes. Due to the cross-border nature of the crime, mutual assistance is an effective and valuable tool to address these issues through the

[308] Model Treaty on Extradition, *supra* note 9. Art. 5, 7, 9, 11, 13.
[309] *Id.* at Art. 14.
[310] Model Treaty on Extradition, *supra* note 9, Article 16.
[311] Some attention was given to this problem at the Eighth United Nations Congress in the context of the struggle against terrorism, although the only recommendation that emerged was that "[j]urisdictional priorities should be established giving territoriality that first priority." *Report of the Eighth United Nations Congress, supra* note 9, at 190, para 7 (Resolution on terrorist criminal activities); *See Commonwealth Scheme for the Rendition of Fugitive Offenders,* as amended in, 16 COMMONWEALTH LAW BULL. 1036 (1990), para 13, provides some help in some cases (it seems more help in cases of requests for different offenses arising out of distinct events rather than requests in respect of the same incident). It requires the requested state to consider all the circumstances, including (a) the relative seriousness of the offenses, (b) the relative dates on which the requests were made, and (c) the citizenship or other national status of the fugitive and his ordinary residence. The recent Australia treaties echo this language. *See, e.g.,* Art. 9 of the treaty with the Netherlands in Aust. Stat. Rules 1988, No. 293. Simply granting priority to the territorial state does not catch the full range of considerations in respect of multiple extradition requests relating to the same incident, either in respect of international crimes or in respect of ordinary crimes

parties' efforts through mutual assistance treaties. This is because criminal investigations and procedures are based on evidence, which is increasingly located beyond national borders in the criminal context.[312] Moreover, mutual assistance is generally governed by bilateral or multilateral assistance treaties that define the scope, limitations, and procedures for such assistance although legislation is sufficient in many cases.[313] Concerning the Treaties, national laws often complement them not only in the form of a code of criminal procedure, but also as a separate law.[314] Mutual assistance could then be provided informally through bilateral cooperation and the exchange of information between police services or judicial authorities in different states.[315]

The Model Treaty on Mutual Assistance in Criminal Matters is designed to serve as a tool that states could use to negotiate bilateral instruments.[316] Like the Model Treaty on Extradition, the Model Treaty on Mutual Assistance in Criminal Matters has the primary objective of mutually assisting the parties to the treaty. This is because it provides the broadest possible measure of mutual assistance in the investigations or judicial proceedings relating to offenses whose punishments fall within the jurisdiction of the requesting state's judicial authorities at the same time as the request for assistance.[317] Many types of mutual assistance covered by the Model Treaty[318] would have to reflect the parties' needs.[319] Consequently, a mutual assistance treaty

[312] *Revised manuals, supra* note 274, Part Two, at n.1
[313] Chapter 14: Mutual Legal Assistance and Extradition, Part 1: Mutual Legal Assistance, General Commentary, at 427, available at: https://www.usip.org/sites/default/files/MC2/MC2-21-Ch14.pdf
[314] *Id.*
[315] Chapter 14: Mutual Legal Assistance and Extradition, Part 1, *supra* note 313
[316] *Revised manuals, supra* note 274, Part Two, at n.2
[317] Model Treaty on Mutual Assistance in Criminal Matters, *supra* note 10, at Art. 1, para 1
[318] Model Treaty on Mutual Assistance in Criminal Matters, *supra* note 10, at Art. 1, at para 2 states that "(a) taking of evidence or statements from persons; (b) assisting in the availability of detained persons or others to give evidence or assist in investigations; (c) effecting service of judicial documents; (d) executing searches and seizures; (e) examining objects and sites; (f) providing information and evidentiary items; (g) providing originals or certified copies of relevant documents and records, including bank, financial, corporate or business records."
[319] *Revised manuals, supra* note 274, Part Two, at n.19

would be advantageous when it would be used in conjunction with other treaty relationships that would address the related aspects of the general problem of cooperation.[320]

States must designate the competent authorities to process the applications,[321] and the application form and processing methods are described.[322] However, a request for mutual assistance could be refused if the requested state "is of the opinion that the request, if granted, would prejudice its sovereignty, security, public order or other essential public interests."[323] A political offense or a violation of human rights could also be the refusal grounds for assistance, which would be similar to the grounds for refusal under the Model Treaty on Extradition.[324]

According to technological advancements, the Model Treaty may need to be updated and insufficient to assist the parties in determining the extent to which mutual assistance could be measured. However, there are many examples of technical assistance tools and adopting model provisions on electronic evidence with transnational features. For example, the United Nations Office on Drugs and Crime (UNODC) developed the Model Treaty on Mutual Assistance in Criminal Matters by incorporating cutting-edge provisions that states could use to create their own

[320] ROGER S. CLARK, *supra* note 284, at 491.
[321] Model Treaty on Mutual Assistance in Criminal Matters, *supra* note 10, at Art. 3.
[322] *Id.* at. Art. 5
[323] Model Treaty on Mutual Assistance in Criminal Matters, *supra* note 10 at. Art. 4, para 1(a).
[324] *Id.* at Art. 4, paras 1(b), (c); *see also* Model Extradition Treaty, *supra* note 9; *Revised manuals, supra* note 274, Part Two, at 87

Footnote to title: Article 4, paragraph 1: provides an illustrative list of the grounds for refusal:

> Some countries may wish to delete or modify some of the provisions or include other grounds for refusal, such as those related to the nature of the offense (e.g. fiscal), the nature of the applicable penalty (e.g. capital punishment), requirements of shared concepts (e.g. double jurisdiction, no lapse of time) or specific kinds of assistance (e.g. interception of telecommunications, performing deoxyribonucleic—acid (DNA) tests). Countries may wish, where feasible, to render assistance, even if the act on which the request is based is not an offense in the requested State (absence of dual criminality). Countries may also consider restricting the requirement of dual criminality to certain types of assistance, such as search and seizure.

bilateral agreement.[325] UNODC then developed the Model[326] to assist in the drafting of the national law.

In addition, the United Nations[327] requests that extradition and mutual legal assistance laws be enacted, reviewed, and updated.[328] Many national laws must be considered because international human rights law makes them mandatory. In 2021, the Conference of the Parties (COP)[329] to the Organized Crime Convention (UNTOC) and the Global Initiative updated the 2007 UNDOC Model Law on Mutual Assistance and the Office's 2012 Manual on Extradition and Mutual Legal Assistance in response to Security Council resolution 2322 (2016). This resolution contains updated provisions and documents regarding the use of specialized investigative techniques and electronic evidence collection. Nonetheless, the final provisions must be ready for implementation by 2022.[330]

After examining the Model Treaty on Mutual Assistance, it has become clear to the parties to the treaty that combating organized crime could be achieved by either directly or indirectly including those significant provisions that would apply to recent trends in transnational circumstances.

[325] Model Treaty on Mutual Assistance in Criminal Matters, *supra* note 10.
[326] United Nations Office on Drugs and Crime, *Model Law on Mutual Legal Assistance in Criminal Matters.,* (UNODC, Vienna: 2007).
[327] United Nations Security Council, on *Adopted by the Security Council at its 7831st meeting, on 12 December 2016*, S/RES/2322 (2016) (Dec. 12, 2016) at 13 (b)
[328] *Id.*
[329] Resolution 10/4, *Celebrating the twentieth anniversary of the adoption of the United Nations Convention against Transnational Organized Crime and promoting its effective implementation,* The Conference of the Parties to the United Nations Convention against Transnational Organized Crime, at 15(d)
[330] *Id.*

3.3.1.4 The Model Treaty on the Transfer of Proceedings in Criminal Matters

Transferring criminal proceedings across jurisdictions could increase the likelihood of successful prosecution because this would be an essential tool to facilitate the administration of justice and, in some cases, would be the only way to prosecute. As this treaty is adopted,[331] the General Assembly would provide a framework for states interested in negotiating and concluding bilateral or multilateral treaties to enhance cooperation in crime prevention and criminal justice.[332] This treaty process would be applied when a person is suspected of having committed an offense under the law of a state party to the treaty. Then, that state may, if the interests of the proper administration of justice so require, request another state that is a party to the treaty to take proceedings in respect of this offense.[333]

To apply the treaty, the parties to the treaty should adopt the necessary legislative measures to ensure that a request for proceedings from the requesting state would be eligible to exercise the necessary jurisdiction of the requested state over the offense if the requesting state lacked the jurisdiction under its own law.[334] This type of jurisdiction is referred to as the 'vicarious administration of justice', particularly in European usage.[335] The vicarious administration of justice is based on the postulate *aut dedere aut judicare*, which West German criminal law would apply to crimes committed by foreign nationals who were apprehended on German territory returning to their state of nationality but who were not extradited because an extradition request

[331] Model Treaty on Transfer of Proceedings in Criminal Matters, *supra* note 11
[332] Resolutions adopted on the reports of the Third Committee 45/118*,* at 219
[333] Model Treaty on Transfer of Proceedings in Criminal Matters, *supra* note 11, Art. 1, para 1
[334] *Id.* at para 2
[335] *See* J. MEYER, *The Vicarious Administration of Justice: An Overlooked Basis of Jurisdiction,* 31 HARV. INT'L L. J. 108 (1990).

was never made, was refused, or was infeasible.[336] However, the treaty was not intended to be limited to such instances - it was also intended to cover situations in which the requested state would be unable to effect the extradition of a third-country national.[337] Then, it would be somewhat challenging to exercise jurisdiction over what nationals of common law countries do abroad because that concept would not altogether be unprecedented.[338]

As with other models, parties would need to establish communication channels,[339] submit the required documents,[340] and follow the various formalities.[341] *Dual criminality* is also a necessary principle.[342] The different grounds for refusal would include: "(a) the suspected person is not a national of or ordinarily resident in the requested State; (b) the act is an offense under military law, which is not also an offense under ordinary criminal law; (c) the offense is a connection with taxes, duties, customs or exchange; (d) the offense is regarded by the requested state as being of a political nature."[343] However, the suspected person would have the right to express or state their interest in the transfer of proceedings,[344] whereas the factors to be considered in determining whether or not to give effect to those views would not be articulated. Both the requesting state and the requested state must ensure that the transfer of proceedings would not impede the victims' rights, particularly their right to restitution or compensation.[345] The *ne bis in*

[336] J. MEYER, *supra* note 335 at 115.
[337] ROGER S. CLARK, *supra* note 284, at 494.
[338] For example, New Zealand's exercise of jurisdiction over diplomates who commit offenses abroad but who are immune from local jurisdiction at the place of commission. Crimes Act (New Zealand) 1961, Section 8A, as substituted by Section 14(1) of the External Relations Act. 1988. A number of British Commonwealth countries (anomalously) exercise jurisdiction over bigamy committed abroad by nationals but not over more serious offenses such as murder. *See, e.g., R. v. Lander*, [1919] N.Z.L.R. 305 (C.A.) (the "constitutionality" of such legislation, if not its wisdom, was conceded by the 1930s).
[339] Model Treaty on Transfer of Proceedings in Criminal Matters, *supra* note 11, Art. 2
[340] *Id.* at Art. 3
[341] *Id.* at Art. 3-5
[342] *Id.* at Art. 6
[343] *Id.* at Art. 7
[344] *Id.* at Art. 8
[345] *Id.* at Art. 9

idem principle would also protect the right of the suspect to avoid further prosecution for the same offense.[346] Then, a framework for dealing with multiple prosecution possibilities would also be suggested by language stating that when criminal proceedings against the same suspected person were pending in two or more states for the same offense, the states concerned should consult each other to decide which state should pursue the procedure alone.[347] A subsequent agreement would have the effect of an application to transfer proceedings.[348]

In conclusion, these models examined various critical mechanisms to encourage international cooperation in the case of transnational organized crime. For example, strengthening cross-border cooperation would be essential for effective responses to transnational implications. Mutual legal assistance, extradition, international cooperation for the transfer of criminal proceedings, and the transfer of sentenced persons were all included in the Model Treaties. Furthermore, the Model Treaty aimed to raise global awareness of the importance of criminal justice commitments. International agreements for cooperation between the parties should also be established because TOC requires a global response. Although these agreements would not be self-enforcing, they would aid in conducting cross-border investigations, prosecuting criminals, and obtaining information from other countries. As a result of the adoption of those Model Treaties, a useful framework could assist in negotiating and concluding bilateral or multilateral treaties between treaty parties to improve cooperation in crime prevention and criminal justice.

[346] Model Treaty on Transfer of Proceedings in Criminal Matters, *supra* note 11, at Art.10.
[347] *Id.* at Art. 13
[348] *Id.*

3.3.2 UN Core Conventions and Protocols

Following a review of the relevant Model Treaties in the preceding section, this section would highlight the United Nations Core Conventions on Transnational Organized Crime. These Conventions and Protocols (which will be described below) are: (1) the UN Drug Control Conventions, including the Single Convention on Narcotic Drugs (1961)[349], the Convention on Psychotropic Substances (1971)[350], and the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988)[351], (2) the United Nations Convention against Transnational Organized Crime[352] and the Protocols thereto, including the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, especially Women and Children[353], the Protocol against the Smuggling of Migrants by Land, Sea, and Air[354], and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components, and Ammunition[355], and (3) the United Nations Convention against Corruption.[356]

[349] The Single Convention on Narcotic Drugs, New York, adopted March 30, 1961, entered into force Dec. 13, 1964, 520 UNTS. 151 [hereafter the Single Convention], *supra* note 12
[350] Convention on Psychotropic Substances, Vienna, adopted Feb. 21, 1971, entered into force Aug. 16, 1976, 1019 UNTS. 175 [hereafter the Psychotropic Convention], *supra* note 13
[351] The United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Vienna, adopted Dec. 20, 1988, entered into force Nov. 11, 1990, 1582 UNTS 95 [hereafter the Trafficking Convention], *supra* note 14
[352] The United Nations Convention against Transnational Organized Crime, New York, opened for signature, adopted by the resolution A/RES/55/25 of Nov. 15, 2000, entered into force Sept. 29, 2003, 2225 UNTS 209 [hereafter the Palermo Convention/ UNTOC], *supra* note 4
[353] The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, New York, adopted by General Assembly resolution A/RES/55/25 of Nov. 15, 2000, entered into force Dec. 25, 2003, 2237 UNTS 319; Doc. A/55/383 [hereafter the Trafficking in Persons Protocol], *supra* note 16
[354] The Protocol against the Smuggling of Migrants by Land, Sea and Air, New York, adopted by General Assembly resolution A/RES/55/25 of Nov. 15, 2000, entered into force Jan. 28, 2004, 2241 UNTS 507; Doc. A/55/383 [hereafter the Smuggling of Migrants Protocol], *supra* note 17
[355] The Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, New York, adopted by General Assembly resolution A/RES/55/255 of May 31, 2001, entered into force July 3, 2005, 2326 UNTS 208; Doc. A/55/383/Add.2 [hereafter the Firearms Protocol], *supra* note 18
[356] The United Nations Convention against Corruption, New York, adopted by General Assembly resolution A/RES/58/4 of Oct. 31, 2003, entered into force Dec. 14, 2005, 2349 UNTS 41; Doc. A/58/422 [hereafter the Merida Convention, UNCAC], *supra* note 19

3.3.2.1 The UN Drug Control Conventions of 1961, 1971, and 1988

Illicit drugs are the most infamous of all the products that are trafficked by organized crime.[357] Even though drug trafficking has received much attention over the years, the news about it is often predictable. Law enforcement agencies often make headlines by announcing one of the largest drug seizures or one of the weirdest ways to smuggle drugs in history.[358] The news on drug trafficking have also included the arrests of several suspects, the seizures of large sums of money, and the importance of the operation to combat these issues.[359] These scenarios have occurred several times at various locations involving multiple types of illegal drugs and numerous offenders due to the seizure of the proceeds of crime from criminal groups. As a result, many people are interested in the impact of efforts to tackle the illicit drug supply, distribution, offenders, and the majority of enthusiastic buyers.[360]

According to the nature and scope of organized crime in the illicit drug industry, they have expanded rapidly due to the violation of international law by the presence of psychoactive substances that have been frequently transported across international borders since the 1960s.[361] The international drug prohibition system is composed of three major drug control conventions that were adopted in 1960, 1971, and 1988.[362] Although the drug trade has been around a lot longer

[357] Sharing Electronic Resources and Laws on Crime (SHERLOC), Newsletter, Issue No. 12 (Sept. 2019), available at: https://sherloc.unodc.org/cld/uploads/pdf/Newsletters/SHERLOC_Newsletter_-_Issue_No_12_September_2019.pdf
[358] Rory Reynolds, *15 of the World's most brazen and bizarre smuggling attempts,* (The National: Oct. 25, 2020), available at: https://www.thenationalnews.com/uae/transport/15-of-the-world-s-most-brazen-and-bizarre-smuggling-attempts-1.1099167; Tori B. Powell, *$2.9 million worth of meth disguised as onions seized at California border,* (CBS NEWS: Feb. 26, 2022), available at: https://www.cbsnews.com/news/meth-onions-seized-california-border/
[359] *Id.*
[360] JAY S. ALBANESE, *Transnational Crime and the 21st Century: Criminal Enterprise, Corruption, and Opportunity,* 11 (Oxford U. Press: 2011)
[361] *Id.* at 12
[362] RICHARD VOGLER & SHAHRZAD FOULADVAND, *The Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988 and the Global War on Drugs, in International Law and Transnational Organised Crime,* 107 (PIERRE HAUCK & SVEN PETERKE (ed.), Oxford U. Press, 1st ed.: 2016); BERNARD LEROY, *Drug trafficking, in Routledge Handbook of Transnational Criminal Law,*231 (NEIL BOISTER & ROBERT J. CURRIE (ed.), Routledge Taylor & Francis Group 1st ed.: 2015); *Id.*

than this, the drugs themselves were not considered to be legal or illegal until the early twentieth century.[363] Then, Herschinger defined drugs as having an "ambivalent materiality", thus implying that they can be both curative and destructive because of their therapeutic and addictive characteristics.[364] In addition, the action of the drugs could affect the brain's systems associated with reward and pleasure.[365] In contrast, the abuse of drugs by a small minority has engrossed in resources.[366] The researchers examined the origin, nature, and extent of these three conventions, which were negotiated under the auspices of the United Nations.[367]

The purpose of these three treaties was to regulate the distribution of drugs by regulating the production and use of the most dangerous drugs.[368] The United Nations Single Convention on Narcotic Drugs (the Single Convention) was approved in 1961.[369] It aimed to ensure a sufficient supply of drugs for medical and scientific purposes while preventing diversion to the illicit market.[370] The Single Convention consolidated all previous multilateral treaties and attempted to streamline the control by establishing a new International Narcotic Control Board (INCB) and expanding drug control to include cultivating the plants used as raw materials for narcotic drugs.[371] This Convention regulated over 116 narcotic drugs (including the production, distribution, and use of opium, heroin, cocaine, cannabis, and related substances) by classifying them into four groups, or schedules, with varying degrees of control imposed on the various substances and

[363] RICHARD VOGLER & SHAHRZAD FOULADVAND, *supra* note 362; BERNARD LEROY, *supra* note 362; JAY S. ALBANESE, *supra* note 360 at 12.
[364] EVA HERSCHINGER, *The drug dispositive:* ambivalent materiality and the addiction of the global drug prohibition regime, 46 SEC. DIALOGUE (2) 183-201 (2015)
[365] R. VOGLER & S. FOULADVAND, *supra* note 362 at 107; CLINT PEINHARDT & TODD SANDLER, *Transnational Cooperation: An Issue-Based Approach,* 196 (Oxford U. Press: 2015)
[366] *Id.*
[367] JAY S. ALBANESE, *supra* note 360 at 12.
[368] *Id.*
[369] The Single Convention, *supra* note 12.
[370] B. LEROY, *supra* note 362 at 231; JAY S. ALBANESE, *supra* note 360 at 12.
[371] *Id.*

compounds.[372] It also banned smoking and eating opium, chewing coca leaves, smoking cannabis resin, and using cannabis for non-medical purposes.[373]

After the adoption of the Single Convention in 1961, the administration of President Richard Nixon declared a program of "war on drugs" in 1969. It introduced a new drug prohibition model that militarized the fight against drug trafficking organizations.[374] This new pattern was the primary factor in combining the domestically established public security problem with an international dimension of the problem associated with the production and transit of illegal drugs.[375] Furthermore, Paley argued that the term "war on drugs" is a misnomer "because war is defined as an armed conflict between at least two groups, not a group, and a substance."[376] As such, this was not a war with a traditional clash of armed forces from different sovereign states. On the other hand, it was a hybrid conflict that involved local and cross-territorial armed groups engaged in one of the most lucrative enterprises in the world.[377] Although the US declaration of the war on drugs considered drugs as enemies, this declaration caused the world to divide into two arbitrary categories of countries between producers and consumers.[378] Subsequently, Nixon then reinforced prohibitionist stereotypes, such as anti-immigrant prejudice with the belief that psychoactive substances inevitably corrupted moral and physical health, and that their marketing and use caused public safety issues (e.g., gang violence and anti-social behavior).[379] Consequently,

[372] B. LEROY, *supra* note 362 at 231; JAY S. ALBANESE, *supra* note 360 at 12.
[373] *Id.*
[374] BEATRIZ CAIUBY ET AL, *Chapter 1 Introduction: Drugs and Politics in the Americas: A Laboratory for Analysis, in Drug Policies and the Politics of Drugs in the Americas,* 3 (BEATRIZ CAIUBY ET AL. (ed.), Springer: 2016)
[375] BEATRIZ CAIUBY ET AL, *Chapter 1 Introduction: Drugs and Politics in the Americas, supra* note 374
[376] PALEY, D., *Drug war capitalism,* 39 (AK Press, Oakland, CA: 2014)
[377] *Id.*
[378] THIAGO RODRIGUES & BEATRIZ CAIUBY LABATE, *Chapter 2 Prohibition and the War on Drugs in the Americas: An Analytical Approach, in Drug Policies and the Politics of Drugs in the Americas* 23 (BEATRIZ CAIUBY ET AL. (ed.), Springer: 2016)
[379] *Id.*

external sources of psychoactive substances spread and placed the US as a victim of external aggression, which justified the US in taking defensive measures to protect its national security.[380]

Since the war on drugs began in 1971, the United Nations Convention on Psychotropic Substances (the Psychotropic Convention) was adopted in 1971[381] to address the growing abuse of hallucinogens, benzodiazepines, over prescription of sedatives, LSD, amphetamines, and barbiturates, as well as the increased diversion of new synthetic medicines to illicit markets.[382] Unlike the Single Convention, which prohibited the manufacture of narcotic drugs in developing countries,[383] the Psychotropic Convention prohibited the manufacture of synthetic drugs in industrialized countries.[384] This included compromises on the scheduling criteria, procedures, and control scope with a new focus on public health and social issues.[385] It was also more dependent on adequate regulation of the pharmaceutical industry and the integrity of public health systems to implement it than on enforcement.[386]

The 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (the Trafficking Convention)[387] was enacted in response to a movement away from the control of precursor chemicals used in the manufacture of illicit drugs because previous international legal instruments could not address this situation.[388] Its objectives were to harmonize the definition and scope of drug offenses globally and to improve and strengthen international cooperation and coordination among state authorities.[389] This also provided states with practical legal tools to

[380] THIAGO RODRIGUES & BEATRIZ CAIUBY LABATE, *supra* note 378.
[381] The Psychotropic Convention, *supra* note 13.
[382] B. LEROY, *supra* note 362 at 231; JAY S. ALBANESE, *supra* note 360 at 12.
[383] R. VOGLER & S. FOULADVAND,*supra* note 362, at 116-17; B. LEROY, *supra* note 362 at 231
[384] *Id.*
[385] *Id.*
[386] *Id.*
[387] The Trafficking Convention, *supra* note 14.
[388] JAY S. ALBANESE, *supra* note 360 at 12-13.
[389] *Id.*

interdict international trafficking.[390] This Convention significantly criminalized money laundering and illicit trafficking of precursors and essential chemicals as drug trafficking activities. Additionally, it called on countries to incorporate such criminal offenses into their national laws.[391] Therefore, international cooperation between law enforcement and judicial authorities was sought under this Convention.

According to the United Nations Drug Control Conventions, international consensus, and cooperation in the fight against illicit trafficking provide the parties with global support. By doing so, those parties would then agree to classify narcotic drugs, psychotropic substances, and their precursors. In addition, they would criminalize illicit trafficking, promote international cooperation, and provide treatment or rehabilitation as an alternative to conviction and punishment for possession and trafficking offenses. As a result, parties to these three conventions would need to take action to assist each other.

First, parties to the three conventions would need to classify and distinguish between licit and illicit drugs.[392] the parties would need to exercise strict control over the narcotics, psychotropic substances, and precursors listed in the schedules.[393] They should also classify each controlled substance and chemical under their domestic law to ensure the Conventions' minimum application.[394] All substances would need to be classified according to the conventions and considered as follows: (1) prohibited drugs, such as heroin, cocaine, LSD, and cannabis were not used in medicine or scientific experimentation, (2) dangerous drugs, such as morphine and amphetamines were used in medicine, (3) less dangerous drugs, such as benzodiazepines, were

[390] B. LEROY, *supra* note 362 at 232
[391] JAY S. ALBANESE, *supra* note 360 at 12-13; B. LEROY, *supra* note 362 at 232
[392] B. LEROY, *supra* note 362 at 235
[393] The Single Convention, Articles 2 and 4; the Psychotropic Convention, Article 2; the Trafficking Convention, Article 12
[394] *Id.*

frequently used in medicine, and (4) chemical precursors used to process illicit drugs would be controlled.[395] However, all activities related to the first category of drugs should be prohibited.[396] While the production or manufacture of, trade in, use in the industry, and supply to individuals of drugs in the second category would need to be strictly regulated and controlled, drugs in the third category and their precursors would need to be subject to a more flexible regulatory system and control.[397] In the case of the licit use of drugs for medical and scientific purposes,[398] the parties would need to regulate licit activities involving controlled drugs and chemicals by enacting specific provisions governing the cultivation, production, manufacture,[399] wholesale distribution, wholesale trade, and international trade,[400] as well as the industrial use of plants, substances, and preparations of hazardous drugs and dangerous drugs used in medicine.[401] Consequently, the parties would need to restrict stockpiling and manufacturing, apply special provisions to international trade, regulate opium, coca, and cannabis cultivation,[402] and dispense drugs to individuals only through duly authorized persons and on medical prescription.[403]

Second, parties would need to treat criminal offenses as an international breach of the Single Convention's and Psychotropic Convention's provisions.[404] They would impose appropriate penalties for serious offenses, particularly imprisonment or other forms of deprivation of liberty.[405] At the end of the 1980s, the international community was required to effectively

[395] B. LEROY, *supra* note 362 at 235
[396] *Id.*
[397] B. LEROY, *supra* note 362 at 236.
[398] The Single Convention, Articles 2 and 4; the Psychotropic Convention, Articles 5 and 7.
[399] The Single Convention, Articles 4, 21, 21 bis, 24, 25, 27, 29, 30; the Psychotropic Convention, Articles 2, 3, 7, 8; the Trafficking Convention, Article 12.
[400] The Single Convention, Articles 4, 21, 23, 24, 25, 31, 32; the Psychotropic Convention, Articles 2, 3, 4, 7, 8, 12, 13,14; the Trafficking Convention, Article 12.
[401] B. LEROY, *supra* note 362 at 236
[402] *Id.*
[403] *Id.*
[404] *Id.*
[405] The Single Convention, Article 36; the Psychotropic Convention, Article 22.

strengthen the international legal framework by developing new and innovative approaches to combating drug trafficking,[406] ensuring the harmonization of drug-related offense definitions to prosecute drug offenses on universally recognized grounds,[407] and enhancing international cooperation on drug matters.[408] Because the Trafficking Convention was adopted to combat illicit trafficking, this required the parties to combat narcotic drug trafficking in all its manifestations,[409] including production and manufacture, international trafficking, and the organization, promotion, or financing of drug trafficking.[410] Additionally, the Trafficking Convention defines the offense of drug money laundering,[411] which is typically divided into three stages: placement, layering, and integration.[412] Property, as defined by the Trafficking Convention, includes all assets, whether corporeal or incorporeal, movable or immovable, tangible or intangible, legal documents or instruments evidencing title to, or interests in, such assets.[413] In addition to the penalties prescribed by the Trafficking Convention, the parties must domestically enact the offenses and consider their gravity by recommending the imposition of imprisonment, other forms of deprivation of liberty, pecuniary sanctions, and confiscation.[414] Subsequently, eight aggravating factors would be required for the Parties to enact legislation,[415] including the involvement of an organized criminal group, the use of violence, the fact that the offender holds a public office relevant to the offense, the victimization or exploitation of minors, and the fact that the offense is committed in a penal institution or a social service facility, or in locations frequented by schoolchildren and students for

[406] B. LEROY, *supra* note 362 at 237
[407] *Id.*
[408] *Id.*
[409] The Trafficking Convention, Article 3(1)(a)
[410] Article 3(1)(a)(v)
[411] B. LEROY, *supra* note 362 at 238
[412] The Trafficking Convention, Articles 3(1)(b)(i) and (ii) and 3(1)(c)(i).
[413] Article 1(q)
[414] Article 3(4)(a)
[415] Article 3(5)

educational, sports, or social activities.[416] When foreign convictions are involved, the parties would also need to establish recidivism.[417] Due to the international nature of these offenses, the Party in whose territory an offender is located must either extradite him/her or establish jurisdiction over him/her to prosecute him/her in its own courts.[418] Additional measures may include treatment, education, aftercare, rehabilitation, and social reintegration.[419] In the case of juvenile delinquency, the parties could apply those additional measures by considering them as the principal measures, and as an alternative to conviction and punishment. If the offender is a drug abuser, then further measures, such as treatment or aftercare, could be provided.[420] As a result, prosecuting those criminal offenses that constitute a violation of the three international conventions would require the parties to promote practical international cooperation in drug matters.

Due to the nature of drug offenses, efforts to bring offenders to justice and prosecute them would require the parties to collaborate internationally. In this sense, the most critical factors would be for the parties to cooperate in criminal investigations to assist one another in addressing (for example) drug money through asset seizure or freezing, fugitives through arrest or extradition, and the relevant evidence through mutual legal assistance because they would be located in foreign countries. To combat drug money, the Trafficking Convention has established measures that enable the tracing, freezing, seizure, and ultimate confiscation of the proceeds of drug-related crime and provisions that override bank secrecy laws.[421] Whether or not proceeds have been transformed or converted into other property, intermingled proceeds would need to demonstrate

[416] B. LEROY, *supra* note 362 at 237
[417] *Id.*
[418] The Trafficking Convention, Article 4(2)
[419] B. LEROY, *supra* note 362 at 237
[420] The Trafficking Convention, Article 3(4)
[421] The Trafficking Convention, Article 5; BERNARD LEROY, *supra* note 362 at 238

their legitimate sources unless such property was confiscated, without prejudice to any seizure or freezing powers, up to the assessed value of those proceeds.[422]

In the case of drug offenses, the Trafficking Convention serves as a treaty of mutual legal assistance and extradition between all parties.[423] The principle of the Model Treaties on Extradition[424] and Mutual Assistance in Criminal Matters,[425] however, should be considered by all parties when applying to the Conventions. For instance, when negotiating extradition provisions, the parties should ensure that the drug offenses defined in the Trafficking Convention[426] would be punishable as extraditable offenses, thus implying that they require the principle of double criminality.[427] In particular, when it comes to the criminalization of money laundering under the Trafficking Convention,[428] this contains specific provisions addressing the fiscal offense exception by stating that[429] the crimes covered by the convention should not be considered fiscal offenses for which the parties could deny cooperation. Furthermore, the Convention's grounds for refusal of extradition were also included; for example, prejudice against race, religion, nationality, or ethnic origin.[430] Finally, the optional grounds for refusal would apply in determining when the requested state should provide extraterritorial jurisdiction for extradition in cases where its jurisdiction had been extended under such convention.[431] This principle would avail the requested state sufficient protection against excessive claims of extraterritoriality.[432]

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[422] The Trafficking Convention, Article 5 (6) (a) and (b)
[423] The Trafficking Convention, Article 6; *See also* the Single Convention, Article 36; the Psychotropic Convention, Article 22.
[424] Model Treaty on Extradition, *supra* note 9
[425] Model Treaty on Mutual Assistance in Criminal Matters, *supra* note 10
[426] The Trafficking Convention, Article 6
[427] *Revised manuals, supra* note 274 Part One, at n. 16
[428] The Trafficking Convention, Article 3 (1)(b) and (c)(i) and (iv); *Revised manuals, supra* note 274 Part One, at n. 23
[429] The Trafficking Convention, Article 3 (10); *Revised manuals, supra* note 274 Part One, at n. 23
[430] The Trafficking Convention, Article 6 (6); *Revised manuals, supra* note 274 Part One, at n. 48
[431] The Trafficking Convention, Article 4(1)(b); *Revised manuals, supra* note 274 Part One, at n. 87
[432] *Revised manuals, supra* note 274 Part One, at n. 87

Regarding mutual legal assistance, the states would also be required to provide the broadest possible mutual legal assistance, which could be refused if it was based on bank secrecy. The content of mutual legal assistance requests would require information for the execution of the requests, and this could be expanded or reduced as needed to meet the parties' needs.[433] The case of confiscation, for example, has two alternative mechanisms for enforcing the order of a foreign court in the requested State or bringing its own confiscation proceedings within its jurisdiction, thereby relying on evidence and other material provided by the requesting state.[434] However, other forms of cooperation and training would also be provided by the Trafficking Convention.[435] Therefore, governments would be required to share information on criminals' identities and activities, form teams of investigators made up of officials from several countries when necessary, and follow international guidelines for the use of controlled delivery[436] to identify and prosecute traffickers. Finally, the Trafficking Convention[437] empowers law enforcement agencies to act on the high seas when a vessel is exercising international law-compliant freedom of navigation. Law enforcement authorities could board and search vessels with the flag state's authorization and take appropriate action if evidence of trafficking was discovered.

These three main drug control conventions would be crucial because they would be binding on the countries that ratified them.[438] The states would be required to criminalize drug possession, purchase, or cultivation for illicit personal consumption. In appropriate cases of a minor nature, treatment or rehabilitation could be provided as an alternative to conviction and punishment for

[433] The Trafficking Convention, Article 7 (10); *Revised manuals, supra* note 274 Part Two, at n. 106
[434] The Trafficking Convention, Article 5 (4)(a); *Revised manuals, supra* note 274 Part Two, at n. 201
[435] The Trafficking Convention, Article 9
[436] The Trafficking Convention, Article 11
[437] Article 17
[438] JAY S. ALBANESE, *supra* note 360 at 12

possession and trafficking offenses.[439] However, there is a controversial issue regarding whether possession in the Single Convention[440] is defined as a possession for supply or sale, or whether possession should constitute an offense regardless of whether it is for personal or commercial purposes.[441] The drafters of the Trafficking Convention intended to address the ambiguity by prohibiting and criminalizing the use of drugs for non-medical purposes in its provision.[442] The purpose of the *chapeau* to such a provision was not to exempt certain Parties from their obligation to criminalize simply because their constitution contains a provision granting citizens the right to do whatever they pleased with themselves.[443] Once an offense had been established, the prosecutor and the court could impose a penalty, mitigate the offense, or provide an alternative treatment.[444] In addition, parties could impose punitive sanctions or therapeutic measures; they could also impose compulsory treatment in addition to or instead of punishment.[445] Parties would then be required to take all practicable measures to prevent drug abuse and to facilitate the early identification, treatment, education, aftercare, rehabilitation, and social reintegration of drug addicts.[446]

Illicit drug trafficking needs international cooperation and consensus to regulate the public and private sectors rigorously.[447] International drug control conventions prioritize developing the

[439] The Single Convention, Article 2, 4, 36; the Psychotropic Convention, Article 3, 5, 22; the Trafficking Convention, Article 3(2)
[440] The Single Convention, Article 36
[441] B. LEROY, *supra* note 362 at 240
[442] The Trafficking Convention, Article 3(2) provides: "Subject to its constitutional principles and the basic concepts of its legal system, each Party shall adopt such measures as may be necessary to establish as a criminal offense under its domestic law, when committed intentionally, the possession, purchase or cultivation of narcotic drugs or psychotropic substances for personal consumption contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention."
[443] *See eg.,* KRZYSZTOF. KRAWJESKI, *How Flexible are the United Nations Drug Conventions?,* 10 INT'L J. DRUG POL'Y 329, 329, 335 (1999).
[444] B. LEROY, *supra* note 362 at 240
[445] *Id.*
[446] The Single Convention, Article 33, 36 and 38; the Psychotropic Convention, Article 20 and 22; the Trafficking Convention, Article 3
[447] B. LEROY, *supra* note 362 at 233-35

institutional infrastructure for international and national drug control.[448] First, on a global scale, the United Nations established the Commission on Narcotic Drugs (CND) in 1946 as the primary policymaking body on drug-related issues within the United Nations system.[449] While the CND is one of the United Nations' mechanisms for considering all matters about the conventions' objectives, it also has the authority to decide on its control status upon recommendation by the International Narcotics Control Board (INCB) or the World Health Organization (WHO).[450] Second, states may need to establish domestic institutions that would facilitate international-ministerial coordination on drug control and control licit drugs[451] and their precursor chemicals.[452] On the other hand, illegal drug trafficking would need to be addressed by effectively coordinating the activities of law enforcement agencies and facilitating international cooperation.[453] In addition, the United Nations Office on Drugs and Crime (UNODC) assists Member States in the fight against illegal drugs, organized crime, and terrorism.[454] As a result, each country would need to take steps to assist the CND in meeting annually to assess the global drug situation and monitor the implementation of relevant international cooperation.

3.3.2.2 The UN Convention against Transnational Organized Crime 2000

The United Nations Convention against Transnational Organized Crime (UNTOC) has been described as "one of the most important developments in international criminal law."[455] Its

[448] B. LEROY, *supra* note 362 at 233-35
[449] JAY S. ALBANESE, *supra* note 360 at 13; B. LEROY, *supra* note 362 at 233; The legal basis of its functioning including the Single Convention, Article 8; the Psychotropic Convention, Article 17; and the Trafficking Convention, Article 21.
[450] B. LEROY, *supra* note 362 at 233-35
[451] The Single Convention, Article 17; the Psychotropic Convention, Article 6
[452] The Trafficking Convention, Article 12
[453] B. LEROY, *supra* note 362 at 235
[454] *Id.* at 234.
[455] GERHARD KEMP, *The United Nations Convention against Transnational Organized Crime: A Milestone in* International Criminal Law, 14 S. AFR. J. CRIM. JUST. 152, 152, 166 (2001)

objectives are harmonizing different national legal systems and establishing standards for effectively combating TOC through domestic legislation.[456] While some countries do not have provisions against organized crime, the UNTOC Convention encourages them to adopt comprehensive measures and guides on approaching their legislative powers and policy implications.[457] As a result of the ratification of the Palermo Convention, these measures also aim to improve the standards and coordination of national legislative, administrative, and enforcement measures relating to TOC. They also aim to ensure that a more efficient and effective global effort is made to provide for the international community's prevention and suppression of those threats.[458]

The UNTOC Convention is legally binding meaning that states who ratify it agree to be bound by its provisions. States Parties to the UNTOC are then required to criminalize four major offenses: participation in an organized criminal group, laundering of criminal proceeds, corruption, and obstruction of justice under their domestic laws.[459]

First, Article 5 of the Convention seeks to criminalize "participation in an organized criminal group".[460] This article is the result of a negotiation in which various legal systems have been brought together to form a functional synthesis.[461] Article 5 paragraph 1(a)(i) is predicated on the concept of conspiracy, which is prevalent in common law countries.[462] Simultaneously, Article 5 paragraph 1(a)(ii) is more compatible with civil law systems because it penalizes those who knowingly associate with and take an "active part" in an organized criminal group.[463]

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[456] ANDREAS SCHLOENHARDT, *Transnational organized crime, in Routledge Handbook of Transnational Criminal Law,* 410 (NEIL BOISTER & ROBERT J. CURRIE (ed.), Routledge Taylor & Francis Group 1st ed.: 2015)
[457] *Id.*
[458] A. SCHLOENHARDT, *supra* note 456 at 410
[459] DAVID LUBAN ET AL., *International and Transnational Criminal Law,* 527 (Wolters Kluwer: 2014)
[460] Article 5, the Palermo Convention, UNTOC, *supra* note 4
[461] D. LUBAN ET AL., *supra* note 459 at 529
[462] D. MCCLEAN, *supra* note 75 at 62.
[463] *Id.* at 63

Second, Article 6 criminalizes laundering proceeds of crime or money laundering, which has originally been addressed in the Trafficking Convention or the 1988 Drug Convention but was later limited to drug-related offenses.[464] According to Article 6 paragraph 2 (c), the predicate offenses must include "offenses committed both within and outside the jurisdiction of the State Party in question".[465] Regarding the double jeopardy or merger issues that exist in some legal systems, Article 6 paragraph 2(e) states that "if required by fundamental principles of the domestic law of a State Party, it may be provided that the [laundering offenses] do not apply to the persons who committed the predicate offense."[466] A State Party must criminalize "participation in, association with or conspiracy to commit, attempts to commit and aiding and abetting, facilitating and counseling the commission of any of the offenses established in accordance with this article"[467] according to "the basic concepts of its legal system".[468] However, the obligation to criminalize money laundering requires States Parties to "consider establishing a financial intelligence unit to serve as a national center for the collection, analysis, and dissemination of information relating to potential money laundering".[469]

Thirdly, Article 8 defines the offense of corruption. The parties must criminalize both the promise, offering, or giving of an undue advantage to a public official,[470] and the solicitation or

[464] Article 3 paragraph 1(b) of the Trafficking Convention, *supra* note 14, describing money laundering *as:"the conversion or transfer of property, knowing that such property is derived from any offense(s), for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in such offense(s) to evade the legal consequences of his actions.";United Nations Office on Drugs and Crime, Money Laundering, available at: https://www.unodc.org/unodc/en/money-laundering/overview.html;Money laundering is a process that typically follows three stages to finally release laundered funds into the legal financial system. The three stages of Money laundering, including Placement (i.e. moving the funds from direct association with the crime); Layering (i.e. disguising the trail to foil pursuit); and Integration (i.e. making the money available to the criminal from what seen to be legitimate sources)*
[465] Article 6 paragraph 2(c), the Palermo Convention, UNTOC, *supra* note 4
[466] Article 6 paragraph 2(e)
[467] Article 6 paragraph 1(b)(ii)
[468] Article 6 paragraph 1(b)
[469] Article 7 paragraph 1(b)
[470] Article 2(a), the Merida Convention, UNCAC, *supra* note 19: "Public official" shall mean: (i) any person holding a legislative, executive, administrative or judicial office of a State Party, whether appointed or elected, whether

acceptance by such an official "of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties".[471] Nonetheless, "participation as an accomplice"[472] in corruption is to be criminalized. States Parties must enact legislative, administrative, and prosecutorial measures to promote integrity and prevent, detect, and punish official corruption.[473]

Finally, under Article 23, States Parties are required to criminalize obstruction of justice. This Article is directed specifically at preserving the integrity of the criminal justice system because criminal justice cannot be served if judges, law enforcement officials, witnesses, or even victims are intimidated, threatened, or corrupted.[474] In *United States v. Michael Coiro,*[475] for example, it is obvious that national and international cooperation would be ineffective unless the key participants in the investigation and law enforcement processes were adequately protected to perform their roles and provide their accounts without interference.[476] The elements of the offense included "the use of physical force, threats or intimidation or the promise, offering or giving of an undue advantage to induce false testimony or to interfere in the giving of testimony or the production of evidence",[477] and "the use of physical force, threats, or intimidation to interfere with

permanent or temporary, whether paid or unpaid, irrespective of that person's seniority; (ii) any other person who performs a public function, including for a public agency or public enterprise, or provides a public service, as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party; (iii) any other person defined as a "public official" in the domestic law of a State Party. However, for the purpose of some specific measures contained in chapter II of this Convention, "public official" may mean any person who performs a public function or provides a public service as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party

[471] Article 8 paragraph 1, the Palermo Convention, UNTOC, *supra* note 4

[472] Article 8 paragraph 3, the Palermo Convention, UNTOC, *supra* note 4; D. MCCLEAN, *supra* note 75 at 120

[473] D. LUBAN ET AL., *supra* note 459 at 532

[474] *Id.*

[475] 922 F.2d 1008 (2d Cir. 1991).

[476] Sharing Electronic Resources and Laws on Crime (SHERLOC), Newsletter, Special Issue, (Oct. 7, 2016), available at: https://sherloc.unodc.org/cld/uploads/pdf/Newsletters/SHERLOC_Newsletter_-_Special_Issue_october_7_2016.pdf; UNODC SHERLOC Case Law Database. UNODC No.: USAx068, available at: https://sherloc.unodc.org/cld//case-law-doc/justiceobstructioncrimetype/usa/1991/us_v._michael_coiro.html?lng=en&tmpl=sherloc

[477] Article 23(a), the Palermo Convention, UNTOC, *supra* note 4

the exercise of official duties by a justice or law enforcement official,"[478] which are all prohibited under Article 23.

State parties to the UNTOC Convention should consider their prevention, investigation, and prosecution[479] when an offense is transnational in nature. Transnational offenses are defined in Article 3(2) as those committed "(a) in more than one state, (b) in one state, but with a substantial part of its preparation, planning, direction, or control taking place in another state, (c) in one state but involving an organized criminal group that engages in criminal activities in more than one state, or (d) in one state, but having substantial effects in another state".[480] Subparagraphs (a), (b), and (d) are straightforward. Subparagraph (c) provides that 'transnational crime' includes an act committed within a state without any effect on other states if committed by a criminal group that operates abroad.[481] It broadens the concept of "transnational" to the extent that it applies to criminal activities and actors.[482] Simultaneously, this means that crimes committed by local groups that do not cross national borders are outside the scope of the UNTOC Convention.

The jurisdictional provisions of the Convention then should provide for the prosecution of these offenses. States Parties are required by Article 15(1) to establish jurisdiction over the offenses listed in Articles 5, 6, 8, and 23 when they occur on their territory or aboard their vessels or aircraft.[483] Paragraph 1 of Article 15, which deals with territorial jurisdiction, is nearly identical to Article 4(1)(a) of the Trafficking Convention.[484] While states must establish jurisdiction over specified offenses, this does not imply an obligation to exercise that jurisdiction in any particular

[478] Article 23(b)
[479] Article 3(1)
[480] Article 3(2), the Palermo Convention, UNTOC, *supra* note 4
[481] T. Obokata, *supra* note 283 at 29.
[482] *Id.*
[483] Article 15(1), the Palermo Convention, UNTOC, *supra* note 4
[484] D. McCLEAN, *supra* note 75 at 167.

case.[485] Furthermore, Article 15(2) allows States Parties to establish jurisdiction in various circumstances.[486] Article 15(2) is not mandatory and is subject to Article 4, which sets the principles of sovereign equality and territorial integrity of States, as well as the principle of non-intervention in the internal affairs of other States.[487] Paragraph 2 of Article 4 provides that "nothing in this Convention entitles a State Party to undertake in the territory of another state the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other state by its domestic law." This reference is intended to limit some countries' claims to extraterritoriality. For example, current US law would not always extend criminal jurisdiction over covered offenses that occurred outside of US territory on board vessels flying the US flag or aircraft registered under US law.[488] As a result, the administration proposed a reservation to Article 15(1)(b) to limit the United States' obligation to be consistent with the federal law's reach.[489] Consequently, the jurisdictional provisions set forth in Article 15 of the Convention are linked to the mandatory and permissive jurisdictional clauses outlined in the same Article and are under international law principles.

Under Article 1 of the UNTOC Convention, its purpose was to promote practical international cooperation in the prevention and combat of transnational organized crime. This

[485] D. MCCLEAN, *supra* note 75 at 167.
[486] Article 15 (2): Subject to article 4 of the UNTOC Convention, a State Party may also establish its jurisdiction over any such offense when: (a) The offense is committed against a national of that State Party; (b) The offense is committed by a national of that State Party or a stateless person who has his or her habitual residence in its territory; or (c) The offense is: (i) One of those established in accordance with article 5, paragraph 1, of this Convention and is committed outside its territory with a view to the commission of a serious crime within its territory; (ii) One of those established in accordance with article 6, paragraph 1 (b) (ii), of this Convention and is committed outside its territory with a view to the commission of an offense established in accordance with article 6, paragraph 1 (a) (i) or (ii) or (b) (i), of this Convention within its territory.
[487] D. MCCLEAN, *supra* note 75 at 168.
[488] Ex. Rept. 109-4 - U.N. CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME (TREATY DOC. 108-16), Ex.Rept.109-4, 109th Cong. (2022), https://www.congress.gov/congressional-report/109th-congress/executive-report/4/1.
[489] *Id.*

cooperation involves law enforcement, prosecution, and judicial authorities, as well as border control agencies and other entities mandated to prevent and combat organized crime. The machinery provisions for international cooperation can be found in Articles 13 to 21 and 24 to 30. Article 16 of the Convention establishes a comprehensive extradition regime applicable to States Parties. This would to the core offenses under Articles 5, 6, 8, and 23, and serious crimes under Article 2(b) if the offenses were criminal under both the requesting and requested states' laws.[490] When extradition would be sought or multilateral, and bilateral extradition treaties would be negotiated, the principles of extradition in the Model Treaty on Extradition[491] would apply to those extraditable offenses. Those principles should include double/dual criminality, the rule of specialty, non-extradition of nations, risk of persecution in the requesting State, political offense exception, risk of an unfair trial in the requesting state, double jeopardy (ne bis in idem), and non-discrimination. In the absence of such a treaty, states that make extradition conditional on the existence of such a treaty could rely on the UNTOC Convention as a legal basis for extradition.[492] Notably, Article 16(9) of the Convention follows the familiar pattern of other modern international criminal law treaties in requiring States Parties to establish *aut dedere aut judicare* (extradition or prosecution) jurisdiction.

Mutual legal assistance is a critical component of international criminal justice cooperation in combating TOC as defined in Article 18. Mutual legal assistance[493] would require States Parties to provide each other with the broadest possible scope of assistance in investigations, prosecutions, and judicial proceedings involving UNTOC Convention's offenses, in which they would receive and help in obtaining evidence or statements from individuals, serving judicial documents,

[490] D. LUBAN ET AL., *supra* note 459 at 540
[491] *See also* some guidance's *Revised manuals, supra* note 274 Part One, at n. 16, 23, 48, 67, 87, and 107
[492] Article 16(5), the Palermo Convention, UNTOC, *supra* note 4
[493] Article 18(1)

conducting searches, seizures, and freezing, inspecting objects and sites, and providing information, evidence, and experts' evaluations.[494] However, as stated in Article 18(6), this undertaking would have no bearing on the obligations of States Parties under "any other treaty, bilateral or multilateral, that governs or will govern, in whole or in part, mutual legal assistance." In practice, the latter provision would restrict the application of mutual legal assistance provisions to circumstances in which States Parties would lack other applicable arrangements.[495] However, some provisions on mutual legal assistance could create a significant loophole.[496] For instance, Article 18(9)[497] empowers States Parties to withhold assistance due to the absence of dual criminality. By contrast, under Articles 18(8) and (22), a State Party may not refuse to provide mutual legal assistance on the grounds of bank secrecy or because the request involves "fiscal matters," but could refuse if "execution of the request is likely to prejudice its sovereignty, security, order public or other essential interests" under Article 18(21)(b).[498] Therefore, the procedures for governing assistance requests in these instances would be provided from paragraphs 9 to 29.

Article 13 on international cooperation in the field of confiscation would function as a miniature Mutual Legal Assistance Treaty. States Parties would cooperate to the maximum degree permitted by their legal systems, particularly in identifying, tracing, freezing, or seizing assets subject to the UNTOC Convention's regime.[499] They would be encouraged to enter into additional bilateral and multilateral agreements to bolster this provision's effectiveness.[500] While Article 14

[494] Article 18(3)(a)-(i)
[495] D. LUBAN ET AL., *supra* note 459 at 540; *See also* guidance's *Revised manuals, supra* note 274 Part Two, at n. 82, 94, 98, 106, 114, 119-20, 171, 179, 201, 206
[496] D. LUBAN ET AL., *supra* note 459 at 541
[497] Article 18 paragraph 9 applies only if the States Parties in question are not bound by a treaty of mutual legal assistance or decide to apply it instead of a corresponding provision in a binding treaty. *See* D. MCCLEAN, *supra* note 75 at 216
[498] D. LUBAN ET AL., *supra* note 459 at 541
[499] Article 13(2), the Palermo Convention, UNTOC, *supra* note 4
[500] Article 13(4)

addresses the disposition of the proceeds of crime or confiscated property, it contains some intriguing echoes of the comparable earlier provision.[501] When another State Party requests to confiscate, for example, states must consider returning the property to the state of origin to the extent permitted by domestic law and, if so requested, to compensate victims or return the property to its legitimate owners.[502] States would be encouraged to set aside a portion of the proceeds for technical assistance or to help intergovernmental organizations fight organized crime.[503]

Article 17 discusses the transfer of sentenced persons by pointing out that several multilateral agreements are in place for this purpose. The Model Agreement on the Transfer of Foreign Prisoners[504] could still serve as a guide in negotiating such agreements. Article 21 invites states to consider transferring proceedings to one another, particularly in cases involving multiple jurisdictions, so to concentrate the prosecution. Again, the Model Treaty on the Transfer of Criminal Proceedings [505] would be available to States Parties interested in negotiating and concluding bilateral or multilateral treaties to strengthen cooperation in the fields of crime prevention and criminal justice.

Article 19 of the Convention encourages States Parties to enter into bilateral or multilateral agreements or arrangements under which the competent authorities of one or more states could establish joint investigative bodies in connection with matters subject to investigations, prosecutions, or judicial proceedings in one or more states.[506] Article 19 of the Convention promotes a new kind of international cooperation that goes beyond traditional forms of assistance,

[501] D. LUBAN ET AL., *supra* note 459 at 533
[502] Article 14(2), the Palermo Convention, UNTOC, *supra* note 4
[503] D. LUBAN ET AL., *supra* note 459 at 533
[504] Model Agreement on the Transfer of Foreign Prisoners, *supra* note 8
[505] Model Treaty on Transfer of Proceedings in Criminal Matters, *supra* note 11
[506] ANDREAS SCHLOENHARDT, *Digest of Cases of International Cooperation in Criminal Matters Involving the United Nations Convention Against Transnational Organized Crime as a Legal Basis,* (UNODC, Vienna: 2021) at 57, available at: https://www.unodc.org/documents/organized-crime/tools_and_publications/Digest_Cases_International_Cooperation_UNTOC_Legal_Basis.pdf

such as mutual legal assistance and law enforcement cooperation.[507] In addition to Article 27, this provision deals with law enforcement cooperation. As a result, state parties would need to work closely together in their law enforcement activities to achieve the common goal of effectively combating offenses covered by the Convention.[508] In the absence of such agreements or arrangements, Article 27(2) states that States Parties could use the Convention as the basis for mutual law enforcement cooperation in the areas covered by the Convention.[509]

Article 20 then addresses special investigative techniques, such as controlled delivery and electronic or other forms of surveillance. Each State Party would need to make provisions for using controlled delivery[510] and other specialized investigative techniques, "such as electronic or other forms of surveillance and undercover operations" where permitted by the basic principles of its domestic legal system.[511] The UNTOC Convention provides for the conclusion of appropriate bilateral or multilateral agreements to this effect by States Parties. These machinery provisions obviously exemplify how multilateral treaties would be used to encourage States to take specific actions under domestic law to address a global problem that had been perceived and conceptualized at a global level. Finally, Article 32 of the Convention establishes a Conference of the Parties (COP) to "improve the capacity of States Parties to combat transnational organized crime and to promote and review the implementation of this Convention."

Accordingly, the parties to the UNTOC Convention would be obliged to adopt the scope of the application. In addition, states parties would be obligated by the Convention to adopt specific

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[507] D. MCCLEAN, *supra* note 75 at 238, *See also,* Article 49 of the Merida or UNCAC Convention; Article 9 of the Trafficking Convention
[508] A. SCHLOENHARDT, *supra* note 506 at 60
[509] D. MCCLEAN, *supra* note 75 at 281; A. SCHLOENHARDT, *supra* note 506 at 60
[510] Article 2(i) of the Palermo Convention, UNTOC defines: "[c]ontrolled delivery" shall mean the technique of allowing illicit or suspect consignments to pass out of, through or into the territory of one or more States, with the knowledge and under the supervision of their competent authorities, with a view to the investigation of an offense and the identification of persons involved in the commission of the offense
[511] A. SCHLOENHARDT*, supra* note 506 at 58-60

definitions, the criminalization of four offenses (participation in an organized criminal group, laundering of criminal proceeds, corruption, and obstruction of justice) under their domestic law, and a variety of measures to facilitate cooperation between the parties. Although some nations could lack the provisions against organized crime, the Convention would encourage them to take comprehensive measures and provide guidance on how to approach their legislative powers and policy implications.

3.3.2.3 The UN Protocol to Prevent, Suppress, and Punish Trafficking in Persons 2000

The Protocol on Trafficking in Persons, like the Protocols on Migrant Smuggling and Firearms (discussed below), supplements the UNTOC Convention and is also to be interpreted in conjunction with the Convention. Article 2 of the Protocol establishes three objectives that States Parties are required to follow as: (1) preventing and combating human trafficking with a particular emphasis on women and children, (2) protecting and assisting victims of such trafficking with due regard for their human rights, and (3) promoting cooperation among States Parties to accomplish those objectives.

The key definition is "trafficking in persons", which is defined as:

> The recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.[512]

[512] Article 3(a) of the Trafficking in Persons Protocol, *supra* note 16

The term "exploitation" is defined further in the same article as "at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs."[513]

Article 5 of the Protocol also establishes requirements for States Parties to criminalize so-called human trafficking or trafficking in persons through legislative and other measures. Article 5(1) is completely mandatory, and it is noted that the other measures here are in addition to legislative measures and presuppose the existence of a law.[514] The obligation to criminalization should be read in conjunction with other relevant obligations established by the Palermo Convention itself, according to Article 5(2).[515] For example, states must prohibit so-called inchoate offenses, such as attempting and conspiring to commit organized crime, including human trafficking and joint criminal enterprise, as well as secondary participation, as defined by the UNTOC Convention (e.g., aiding and abetting).[516] Money laundering, corruption, and obstruction of justice are also among the other related offenses that the UNTOC Convention intends to criminalize.[517] Furthermore, as embodied by the Trafficking in Persons Protocol and the Organized Crime Convention, transnational criminal law sufficiently encourages States to strengthen substantive criminal law at the national level.[518]

Article 6 establishes states' obligations to protect victims of human trafficking, including the consideration of implementing measures to aid victims, such as legal and medical assistance, training opportunities, or housing, in collaboration with civil society in appropriate cases.

[513] Article 3(a) of the Trafficking in Persons Protocol, *supra* note 16.
[514] D. MCCLEAN, *supra* note 75 at 332
[515] TOM OBOKATA, *Human Traffick, in Routledge Handbook of Transnational Criminal Law,* 175 (NEIL BOISTER & ROBERT J. CURRIE (ed.), Routledge Taylor & Francis Group 1st ed.: 2015)
[516] T. OBOKATA, *supra* note 515 at 175
[517] *Id.*
[518] *Id.*

According to Article 6(4) of the Protocol, states must "take into account, in applying the provisions, [. . .] the age, gender and special needs of victims of trafficking in persons, in particular the special needs of children, including appropriate housing, education and care." The inclusion of a gendered and human rights-based approach to victim protection is significant, and it has ramifications for linking transnational organized crime to the international human rights' legal framework.[519]

The Protocol also outlines state responsibilities for the possibility of issuing temporary or permanent residence arrangements under Article 7 or safely repatriating them under Article 8 and establishes measures for states to enact to prevent human trafficking, such as inter-state cooperation, information exchange, and training, as well as the adoption of border measures to prevent and detect human trafficking under Articles 9 to 11.

However, it should be noted that treating trafficked persons would be an essential part of the future of human trafficking.[520] For instance, in certain circumstances, the United States and certain other countries may issue temporary visas or residence permits to identified noncitizen trafficking victims.[521] Moreover, few countries have witness protection for threatened human trafficking victims, agreements between NGOs and government agencies for dealing with victims, or policies to protect service providers from testifying in cases involving the victims they are

[519] OECD, *Trafficking in Persons* (Governance and Democracy Division, Jun. 2008), available at: https://www.oecd.org/dac/gender-development/44896390.pdf

[520] HEATHER J. CLAWSON & NICOLE DUTCH, *Addressing the Needs of Victims of Human Trafficking: Challenges, Barriers, and Promising Practices,* 1-10 (U.S. Department of Health and Human Service, Office of the Assistant Secretary for Planning and Evaluation) available at: https://rhyclearinghouse.acf.hhs.gov/sites/default/files/docs/19724-Addressing_the_Needs_of_Victims.pdf; *See also,* TIFFNY DOVYDAITIS, *Human Trafficking: The Role of the Health Care Provider,* J MIDWIFERY WOMENS HEALTH 55(5), 462-67 (2010).

[521] United Nations Office on Drugs and Crime, *Anti-human trafficking manual for criminal justice practitioners: Module 12: Protection and assistance to victim-witnesses in trafficking in persons cases* 1-22 (UNODC, Vienna: 2009), available at: https://www.unodc.org/documents/human-trafficking/TIP_module12_Ebook.pdf

assisting.[522] Then, there has been little formal follow-up on known trafficking victims to determine how they could become trafficked in the future.[523]

Therefore, it would be critical to protect the victims, better understand the true nature and scope of trafficking operations and increase the number of successful prosecutions to fulfill the Protocol's promise of coordinated international action.

3.3.2.4 The UN Protocol Against the Smuggling of Migrants by Land, Sea, and Air 2000

Human trafficking is distinct from migrant smuggling for a variety of reasons. These characteristics would assist in distinguishing human trafficking from the smuggling of migrants in terms of coercion, transnationality, source of criminal profit/purpose of the crime, and the individual or institution targeted by the crime.[524] Migrant smuggling entails the voluntary participation of those being smuggled in terms of coercion. However, there is evidence that the line between the two crimes may become blurred in this area.[525]

To begin, Article 2 states that the Protocol's purpose is to "prevent and combat the smuggling of migrants, as well as to promote cooperation among States Parties [. . .], while protecting the rights of smuggled migrants" because one of the Protocol's primary objectives is to

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[522] United Nations Office on Drugs and Crime, *Anti-human trafficking manual for criminal justice practitioners: Module 12: Protection and assistance to victim-witnesses in trafficking in persons cases, supra* note 521

[523] ALISON JOBE, *The Cause and Consequences of Re-trafficking: Evidence from IOM Human Trafficking Database* 31-41 (International Organization for Migration (IOM): 2010), available at: https://childhub.org/sites/default/files/library/attachments/1196_re-trafficking_iom_original.pdf

[524] The Inter-Agency Coordination Group against Trafficking in Persons (ICAT), *What is the difference between trafficking in persons and smuggling of migrants?* 1-2 (UNODC, Vienna Issue 1: Oct, 2016); Office to Monitor and Combat Trafficking in Persons, *Human Trafficking & Migrant Smuggling: Understanding the Difference,* (Jun., 2017), available at: https://www.state.gov/wp-content/uploads/2019/02/272325.pdf; United Nations Office on Drugs and Crime, *Global Report on Trafficking in Persons,* (UNODC, Vienna: 2018); United Nations Office on Drugs and Crime, *Global Study on Smuggling of Migrants,* (UNODC, Vienna: 2018)

[525] ALEXIS A. ARONOWITZ, *Human Trafficking, Human Misery: The Global Trade in Human Beings* (PRAEGER 1st ed., 2009); DONNA M. HUGHES, *Role of Marriage Agencies in the Sexual Exploitation and Trafficking of Women from the Former Soviet Union,* 11 INT'L REV. VICTIMOLOGY (1) 49, 49-71 (2004); International Labour Organization, *Fishers First: Good practices to end labour exploitation at sea,* (ILO, Geneva: 2016)

protect migrants from exploitation by smugglers who seek to profit from migrants' needs and lack of alternatives.

The Smuggling of Migrants Protocol serves as a common denominator for national legislation worldwide[526] defining "smuggling of migrants" as "the procurement, in order to obtain, directly of indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident."[527] The inclusion of the term "financial or other material benefit" as an element of the definition in subparagraph (a) of Article 3 of this Protocol was made "to emphasize that the intention was to include the activities of those who provided support to migrants for humanitarian reasons or on the basis of close family ties."[528] Simultaneously, the Protocol was not intended to "criminalize the activities of family members or support groups such as religious or non-government organizations."[529] Article 3(b) defines "illegal entry" as "crossing borders without complying with the necessary requirements for legal entry into the receiving state." For example, in the smuggling of migrants from the Morocco to Spain case,[530] three migrants had been hiding in the modified compartments at the front and rear of the vehicle to enter another border country without providing any legal documents that constituted "illegal entry." The illegal border crossing, then, would be a necessary component

[526] ANDREAS SCHLOENHARDT, *The UN Protocol against the Smuggling of Migrants by Land, Sea and Air 2000, in International Law and Transnational Organised Crime,* 175 (PIERRE HAUCK & SVEN PETERKE (ed.), Oxford U. Press, 1st ed.: 2016)
[527] Article 3(a), the Smuggling of Migrants Protocol, *supra* note 17
[528] United Nations Office on Drugs and Crime, *Travaux Préparatories of the negotiations for the elaborations of the United Nations Convention against Organized Crime and the Protocols thereto,* (UNODC, Vienna: 2006) [hereafter *Travaux Préparatories*] at 469, available at: https://www.unodc.org/documents/treaties/UNTOC/Publications/Travaux%20Preparatoire/04-60074_ebook-e.pdf; *see also,* D. MCCLEAN, *supra* note 75 at 383
[529] *Id.*
[530] UNODC SHERLOC Case Law Database. UNODC No.: ESPh35, available at: https://sherloc.unodc.org/cld//case-law-doc/migrantsmugglingcrimetype/esp/2016/resolucion_552016.html?lng=en&tmpl=sherloc; Resolución 55/2016

of the concept of smuggling migrants and demonstrate the transnational nature of this activity.[531] The term "receiving state" is also not "limited to a State Party, nor to the state in which a prosecution is brought."[532] Noticeably, the Protocol on the Smuggling of Migrants takes a broad view of the term "migrant", including both voluntary and involuntary movements, thus including refugees for the purposes of the Protocol. However, there is a distinction between migrants, who are generally accepted as people who move voluntarily, and refugees, who do not move voluntarily because they have no other option but to use smugglers to flee armed conflict or persecution.[533]

The Protocol's scope of application is specified in Article 4, which emphasizes further that it would apply "to the prevention, investigation, and prosecution of the offenses established in accordance with Article 6 of the Protocol, where the offenses are transnational in nature and involve an organized criminal group." It is worth noting that Article 4 is textually similar, *mutatis mutandis,* to Article 3(1) of the UNTOC and is virtually identical to Article 4 of the Trafficking in Persons Protocol.[534] As a result, the important definitions relevant to Article 4, such as "organized criminal group"[535] and the transnational element,[536] could be applied to the Smuggling of Migrants Protocol according to Article 1(2).[537] Again, Article 4 would need to be read in conjunction with Article 34(2) of the Palermo Convention, which provides that the Convention and its Protocols would establish offenses in each State Party's domestic law regardless of their transnational nature.[538]

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[531] A. SCHLOENHARDT,, *supra* note 526 at 171
[532] D. MCCLEAN, *supra* note 75 at 384
[533] UNHCR, *UNHCR viewpoint: 'Refugee' or 'migrant'-Which is right?,* (UNHCR: Jul. 11, 2016), available at: https://www.unhcr.org/news/latest/2016/7/55df0e556/unhcr-viewpoint-refugee-migrant-right.html
[534] D. MCCLEAN, *supra* note 75 at 387
[535] As defined in Article 2(a), the Palermo Convention, UNTOC, *supra* note 4
[536] As defined in Article 3(2), the Trafficking in Persons Protocol, *supra* note 16
[537] D. MCCLEAN, *supra* note 75 at 387; *See also* Article 1(2) prescribes that "[t]he provisions of the [UNTOC/the Palermo] Convention shall apply, *mutatis mutandis,* to this Protocol unless otherwise provided herein.
[538] A. SCHLOENHARDT, *supra* note 526 at 173-4

Criminalization is central to the Smuggling of Migrants Protocol because it serves to deter and punish the smuggling of migrants and serves as the foundation for numerous forms of prevention, international cooperation, technical assistance, and other measures.[539] The obligation contained in the *châpeau* of Article 6[540] would be to criminalize the smuggling of migrants when committed intentionally.[541] Additionally, States Parties would be required to criminalize certain constituents or related elements of migrant smuggling, including the production of fraudulent travel or identification documents for the purpose of facilitating migrant smuggling,[542] procuring, providing, or possessing[543] such a document to facilitate migrant smuggling, and enabling a person to remain unlawfully within the state concerned[544] - including the procurement of legal residence through some illegal means.[545]

States Parties would thus be required to criminalize attempting to commit such offenses,[546] participating in such offenses as an accomplice,[547] and organizing or directing others to commit such offenses.[548] States Parties would also be required to recognize acts that could put migrants' lives in danger or involve degrading or inhuman treatment, including exploitation, as aggravated

[539] United Nations Office on Drugs and Crime, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto,* UN Sales No. E.05.V.2 (UNODC: 2004) at 349, para 55.
[540] A. SCHLOENHARDT, *supra* note 526 at 177
[541] Article 6(1), the Smuggling of Migrants Protocol, *supra* note 17 in accordance with Article 34(2) of the UNTOC Convention, the co-requisites of transnationally and involvement of an organized criminal group do not apply to the obligation of criminalization except, as noted by *Legislative Guides*, where the language of the criminalization requirement specifically incorporates one of these elements. UNODC, *Legislative Guides, supra* note 539, at 333-4, para 20.
[542] Article 6(1)(b)(i), the Smuggling of Migrants Protocol, *supra* note 17
[543] Article 6(1)(b)(ii), the Smuggling of Migrants Protocol, *supra* note 17; An Interpretative Note attached to Article 6 makes clear that the reference to "possession" does not extend to possession of a fraudulent travel or identity document by a migrant for purpose of enabling his or her smuggling. UNODC, *Travaux Préparatories,, supra* note 528 at 489; *see also* UNODC, *Legislative Guides, supra* note 539, at 349, para 54
[544] Article 6(1)(b) and 6(1)(c), the Smuggling of Migrants Protocol, *supra* note 17
[545] UNODC, *Legislative Guides, supra* note 539, at 341, note 9
[546] Subject to the basic concepts of the legal system of the State: Article 6(2)(a), the Smuggling of Migrants Protocol, *supra* note 6; UNODC, *Legislative Guides, supra* note 539, at 271, para 41, notes that this caveat was introduced to accommodate legal systems which do not recognize the criminal concept of 'attempt.'
[547] Article 6(2)(b), the Smuggling of Migrants Protocol, *supra* note 17
[548] Article 6(2)(c)

smuggling offenses,[549] presumably through the imposition of more severe penalties.[550] Otherwise, the Protocol on the Smuggling of Migrants would be silent on the subject of the penalties, and the UNTOC Convention's fundamental requirement would sanction that to be proportionate to the gravity of the offense.[551]

The Smuggling of Migrants Protocol, in Articles 7 to 9, emphasizes migrant smuggling by sea.[552] Article 7 requires States Parties to collaborate extensively to prevent and suppress the smuggling of migrants by sea.[553] "Appropriate measures" are authorized under Articles 8 and 9 against vessels that are, or are reasonably suspected of being, involved in the smuggling of migrants by sea.[554] The authorities are in a particular case "about the basic safety and security of migrants and others on board such vessels, given the dilapidated conditions of vessels often used by smugglers and the fact that boarding may take place at sea and far from safe harbour conditions."[555] However, the term "engaged" in Articles 8(1), (2), and (7) should be interpreted broadly to prevent practical loopholes from engaging vessels in sea smuggling directly or indirectly.[556] In accordance with Article 8(7), the term "search" was used rather than "inspect" to justify a greater level of intrusion on vessels suspected of smuggling activities.[557] Therefore,

[549] Article 6(3), the Smuggling of Migrants Protocol, *supra* note 17, *See* further UNODC, *Legislative Guides, supra* note 539, at 346-7
[550] UNODC, *Legislative Guides, supra* note 539, at 346, para 46
[551] *Id*, at 351, para. 59 (referring to Article 11(1) of the UNTOC Convention).
[552] PATRICIA MALLIA, *Migrant Smuggling by Sea,*120-6 (Leiden/Boston, Martinus Nijhoff Publishers: 2010); ANNE T. GALLAGHER, *Migrant smuggling, in Routledge Handbook of Transnational Criminal Law,*193-5 (NEIL BOISTER & ROBERT J. CURRIE (ed.), Routledge Taylor & Francis Group 1st ed.: 2015)
[553] A. SCHLOENHARDT, *supra* note 526 at 189
[554] *Id.; See also* Articles 7, 8, and 9, the Smuggling of Migrants Protocol, *supra* note 17
[555] UNODC, *Legislative Guides, supra* note 539, at 365 para 70
[556] UN General Assembly, *Report of the Ad Hoc Committee on the elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions*; Addendum: Interpretative notes for the official record (*travaux préparatories*) of the negotiations for the United Nations Convention against Transnational Organized Crime and the Protocols thereto, UN Doc. A/55/383/Add.1 (Nov. 3, 2000) [hereafter "Interpretative Notes] at para 100.
[557] Article 8(7), the Smuggling of Migrants Protocol, *supra* note 17; UNODC, *Travaux Préparatories,, supra* note 528 at 503.

Articles 7 to 9 anticipate extensive cooperation between States Parties.[558] This is because cooperation to combat migrant smuggling by sea must adhere to both customary and conventional international law, such as the United Nations Convention on the Law of the Sea (UNCLOS),[559] which stipulates that these ships (for example) would be subject to the exclusive jurisdiction of the flag State on the high seas.[560] Articles 8 and 9 provide that these measures could only be exercised in another state's territorial sea with the permission or authorization of the state responsible for the coastal sea in question.[561] As a result, the broad powers conferred by these provisions would be limited by the extensive and coordinated cooperation that would be required between the requesting and flag states.[562]

It should be noted that the Smuggling of Migrants Protocol would not intend to criminalize migrants. According to Article 5, migrants would not be subject to criminal prosecution under the Protocol.[563] As a result, smuggled migrants could not be held accountable for the crime of smuggling or for the fact that they were smuggled in violation of the Protocol.[564] However, countries could take action against smuggled migrants whose conduct violated domestic law[565] because they could face criminal charges unrelated to migrant smuggling, and the Article would not protect them from removal or deportation to another country.[566] Articles 10 to 15 and 18 impose obligations on States sharing common borders in terms of information exchange, border

[558] ANDREAS SCHLOENHARDT, *supra* note 526 at 190
[559] UNODC, *Travaux Préparatories,, supra* note 528 at 494; The United Nations Convention on the Law of the Sea (UNCLOS), 1833 U.N.T.S. 3, done Dec. 10, 1982, entered into force Nov. 16, 1994., *supra* note 146
[560] Article 92(1), Status of Ships under UNCLOS, *supra* note 146
[561] If no flag state is involved then Article 8(7), the Smuggling of Migrants Protocol, *supra* note 6, will apply; D. MCCLEAN, *supra* note 75 at 405-10
[562] *See* Article 8(2), (3) and (5), the Smuggling of Migrants Protocol, *supra* note 6
[563] A. SCHLOENHARDT, *supra* note 539 at 188-9
[564] *Id.*
[565] *Id.* at 189
[566] *Id.*

security, the validity and control of travel documents, training and technical cooperation, and the return of smuggled migrants.[567]

The smuggling of migrants is frequently overlapped with human trafficking. Most trafficked migrants are put to work in criminal enterprises, such as money laundering operations once they arrive in their destination country with their labor increasing the returns on investment their smugglers received from them through fraud, threats, or force, thus turning a case of migrant smuggling into an issue of human trafficking.[568] After achieving a specific goal in migrant smuggling, criminal organizations could move on to a more permissive environment.[569] Sweatshop workers, karaoke bars, brothels, and massage parlors are all common examples of labor exploitation in money laundering.[570] Hence, these activities could help determine whether a case would involve migrant smuggling or whether human trafficking was a source of illicit profit. Therefore, States Parties would need to establish the inhuman or degrading treatment of migrants, including exploitation, as aggravating circumstances according to Article 6 of the Smuggling of Migrants Protocol.[571]

Combating migrant smuggling presents unique challenges to the international community and national governments.[572] Due to the nature of migrant smuggling, this crime is determined by a combination of demand and supply factors.[573] A comprehensive approach to combating this crime would need to consider its geography and the complex contributing factors, such as the web

[567] D. LUBAN ET AL., *supra* note 459 at 567
[568] VENESSA NEUMANN, *Never Mind The Metrics: Disrupting Human Trafficking by Other Means,* 68 J. INT'L AFF. 39 (2), 39-51 (2015)
[569] *Id.* at 47
[570] VENESSA NEUMANN, *supra* note 568 at 47
[571] Article 6, the Smuggling of Migrants Protocol, *supra* note 17
[572] A. SCHLOENHARDT, *supra* note 539 at 196
[573] United Nations Office on Drugs and Crime, *Smuggling of Migrants: A Global Review and Annotated Bibliography of Recent Publications,* 126 (UNODC: 2011), available at: https://www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Smuggling_of_Migrants_A_Global_Review.pdf

of smuggling routes connecting sending, transit, and destination points via sea, land, and air.[574] As a consequence, to effectively and universally prevent and combat migrant smuggling, more states would need to ratify the Smuggling of Migrants Protocol

3.3.2.5 The UN Protocol Against the Illicit Manufacturing and Trafficking in Firearms, Their Parts and Components, and Ammunition 2001

In 2001, the Protocol Against Illicit Manufacturing and Trafficking in Firearms, Their Parts, Components, and Ammunition[575] was adopted to supplement the UNTOC Convention. As of 2021,[576] 121 states had ratified the Firearms Protocol with Germany most recently accessed in 2021, but not the United States.[577]

First, Articles 1 to 6 of the Firearms Protocol contain general provisions. Accordingly, States Parties are required to interpret this Protocol in conjunction with the UNTOC Convention in accordance with the identical text of Article 1.[578] In this provision, the words *mutatis mutandis* infers "with such modifications as circumstances require" or "with the necessary modifications."[579] The Protocol's key terms are defined in Article 3.

Article 3(a) defines "firearm" as any "portable barreled weapon" capable of ejecting projectiles 'by the action of an explosive.'"[580] It is obvious that this definition excludes large

[574] United Nations Office on Drugs and Crime, *Smuggling of Migrants: A Global Review and Annotated Bibliography of Recent Publications, supra* note 573 at 126.
[575] The Firearms Protocol, *supra* note 18
[576] United Nations Office on Drugs and Crime, *The Firearms Protocol,* (UNODC), available at: https://www.unodc.org/unodc/en/firearms-protocol/the-firearms-protocol.html#:~:text=The%20Protocol%20against%20the%20Illicit,ammunition%20at%20the%20global%20level.
[577] United Nations, *Political Will Along with Weapons-Control Management Critical in Stemming Illicit Trafficking of Small Arms, Speakers Tell security Council,* Meeting Coverage, SC/14708, (Nov. 22, 2021), available at: https://www.un.org/press/en/2021/sc14708.doc.htm
[578] D. MCCLEAN, *supra* note 75 at 449
[579] *Id.* at 450
[580] AARON X. FELLMETH, *The UN Protocol against the Illicit Manufacturing and Trafficking in Firearms, Their Parts and Components, and Ammunition 2001, in International Law and Transnational Organised Crime,* 207 (PIERRE HAUCK & SVEN PETERKE (ed.), Oxford U. Press, 1st ed.: 2016)

weapons, such as artillery, weapons whose power is derived from the direct expulsion of air, such as air rifles or pellet guns, and weapons whose power is derived from tension release or other kinetic force, such as BB guns or crossbows.[581] Additionally, antique firearms and replicas are expressly forbidden.[582] The definition appears to include portable mortars and most grenade launchers.[583]

"Parts and components" are defined under Article 3(b) as "elements that are specifically designed for a firearm and essential for its operation", such as barrels, receivers, and any part of the action.[584] The use of the conjunction "and" indicated grammatically that elements that were not specifically designed for firearms or were not necessary for their operation did not qualify as parts or components.[585] However, silencers and mufflers are included even though they do not satisfy the second part of the definition because silencers are not generally required for the operation of any firearm.[586]

Article 3(c) defines ammunition as a complete round, its components, and casing or gunpowder. This broad definition is critical due to the ease with which ammunition could be manufactured using low-technology components and minimal equipment.[587]

Article 3(d) defines "illicit manufacturing" as manufacturing from illicitly trafficked components, manufacturing without a license in the state of manufacture, or manufacturing without complying with Article 8 of the Firearms Protocol's marking requirements.[588] However, Article 3 does not define the term "manufacturing."[589] While the term 'manufacturing' obviously

[581] A. X. FELLMETH, *supra* note 580, at 207
[582] *Id.*
[583] *Id.*
[584] D. MCCLEAN, *supra* note 75 at 457-8; A. X. FELLMETH, *supra* note 580, at 207
[585] *Id.*
[586] *Id.*
[587] D. MCCLEAN, *supra* note 75 at 459; A. X. FELLMETH, *supra* note 580, at 207
[588] D. MCCLEAN, *supra* note 75 at 459-60; A. X. FELLMETH, *supra* note 580, at 207
[589] A. X. FELLMETH, *supra* note 580, at 207

includes the complete assembly from the components, it also allows States Parties to include major repairs, partial assembly, or modular components within the term.[590]

Article 3(e) also defines "illicit trafficking" as the importation, exportation, sale, movement, or transfer of firearms between States Parties or across the territory of a State Party in transit, if "any one of the States Parties concerned does not authorize" such traffic. Additionally, it includes any firearms traffic that is not marked in accordance with Article 8.[591]

Article 4(1) of the Firearms Protocol specifies that its application is limited to offenses resulting from illicit traffic that are "transnational in nature and involve an organized criminal group."[592] Additionally, Article 4(2) states that "state-to-state transactions or state transfers in cases where the application of the Protocol would prejudice the right" of self-defense guaranteed by the UN Charter are excluded from the Protocol's scope.[593] However, the words "state-to-state transactions" refer to transactions between sovereign states.[594] Transfers made by individuals or non-governmental organizations are then not protected under Article 4(2).[595]

One of the Firearms Protocol's core substantive provisions is Article 5, which requires States Parties to adopt legislative and other measures to criminalize firearms' illicit manufacturing and trafficking, their parts, components, and ammunition.[596] Article 5(1)(c) also criminalizes the obliteration and falsification of the marking required under Article 8.[597] However, the offenses listed in Article 5(1) subparagraphs (a), (b), and (c) require *mens rea* of intention.[598] Furthermore, the Interpretative Note to Article 5(2) indicates that States would be free to define

[590] A. X. FELLMETH, *supra* note 580, at 207
[591] D. MCCLEAN, *supra* note 75 at 460; A. X. FELLMETH, *supra* note 580, at 207
[592] D. MCCLEAN, *supra* note 75 at 462-4; A. X. FELLMETH, *supra* note 580, at 207
[593] D. MCCLEAN, *supra* note 75 at 464
[594] *Id.*
[595] *Id.*
[596] *Id.* at 465-7
[597] *Id.* at 467
[598] *Id.*

"attempts" to include "both acts perpetrated in preparation for a criminal offense and those carried out in an unsuccessful attempt to commit the offenses, where those acts would also be culpable or punishable under domestic law."[599]

Finally, Article 6 requires states to take measures leading to confiscation of illegally manufactured or trafficked firearms, so that States could take measures within their domestic legal systems to prevent "illegally manufactured or trafficked firearms, parts and components and ammunition" from falling into the hands of "unauthorized persons."[600] Other disposition methods, such as confiscation and use by military or police forces, would also be permitted provided that the firearms were marked and their disposition was recorded.[601]

Second, the Protocol's Articles 7 to 15 contain most of its prevention-related provisions. Article 8 requires States Parties to adopt regulations requiring each firearm manufactured in or imported into their territory to bear a distinctive marking that includes the manufacturer's name, country of origin, and serial number (or similar identification scheme).[602] States Parties are also required by Article 7 to keep records on firearms for 10 years after manufacture or importation to trace and identify them.[603] Aside from gathering information, however, this provision does not specify what information should be kept or gathered.[604] Notably, criteria from the International Criminal Police Organization's (NTERPOL) Firearms Tracing System, such as barrel length and estimated number of discharges, could be used.[605] As such, this provision opens the door to future

[599] A. X. FELLMETH, *supra* note 580, at 208
[600] D. MCCLEAN, *supra* note 75 at 468-9; A. X. FELLMETH, *supra* note 580, at 208
[601] *Id.*
[602] A. X. FELLMETH, *supra* note 580, at 208
[603] Article 7, the Firearms Protocol, *supra* note 18
[604] A. X. FELLMETH, *supra* note 580, at 208
[605] INTERPOL, *Illicit Arms Records and tracing Management System (iARMS),* (INTERPOL), available at: https://www.interpol.int/en/Crimes/Firearms-trafficking/Illicit-Arms-Records-and-tracing-Management-System-iARMS; A. X. FELLMETH, *supra* note 580, at 208

technological identification measures.[606] While Article 7 requires information to be retained for a minimum of 10 years, no safeguards against destruction or tampering are imposed.[607] In any case, the intended records include licensing information and also the Article 8 required marking information on each firearm.[608] Neither provision is extremely specific about the type of marking that would need to be used or the information that would need to be included.[609]

Article 10 requires import and export licensing for the trade and transit of firearms. Due to the licensing requirements for firearms, States Parties may not export firearms to another state until the importing state issues an import license and a communication protocol had been established between the exporting, transiting, and importing states to help reduce the likelihood that licensed exports were diverted during transit from the importing state for which the export license was issued.[610]

Article 11 further requires states to take appropriate security measures to protect firearms shipments during manufacture, carriage, and border inspections to prevent smuggling theft.[611] Article 11 could also be strengthened by the addition of more institutionalized procedures.[612] This would assist in avoiding the establishment of minimum manufacturing and transportation security standards, training in border inspection and procedures, as well as technologies for detecting theft or smuggling.[613] Like Article 15, the provision requires states to consider establishing a regulatory system for registering and licensing arms brokers despite the significant role brokers play in firearms' international sale and movement.[614]

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[606] D. MCCLEAN, *supra* note 75 at 472
[607] *Id.*
[608] Article 7(a),(b), the Firearms Protocol, *supra* note 18; A. X. FELLMETH, *supra* note 580 at 208-9
[609] A. X. FELLMETH, *supra* note 580, at 209
[610] D. MCCLEAN, *supra* note 75 at 479-84
[611] A. X. FELLMETH, *supra* note 580, at 209
[612] *Id.*
[613] *Id.*
[614] *Id.*

Article 12 establishes important guidelines for sharing information to prevent and prosecute illegal firearms manufacture and trafficking.[615] These provisions are both broad and practical. They include the responsibility to share case-specific information about firearms shipments, as well as more general information about organized criminal groups who are engaged in illicit firearms manufacturing and trafficking, the concealment techniques employed by such groups, and their customary trafficking routes.[616] States Parties also agree to share their experiences with legislation and regulation that aims to prevent illicit manufacturing and trafficking, and also law enforcement technology and firearms tracing data.[617] Article 14 then adds to these obligations by requiring cooperation among States Parties and with "relevant international organizations," such as Interpol that provide law enforcement training and technical assistance.[618]

Article 13 focuses on a broader obligation of cooperation at the bilateral, regional, and global levels.[619] Each party agrees to designate a single point of contact to act as an international liaison on issues relating to illicit firearms manufacturing and trafficking.[620]

Article 15 encourages states who have not yet implemented a system for regulating arms brokers to do so by requiring brokers to register or be licensed, or disclose their involvement in export or import transactions.[621] It also encourages states who have enacted brokering legislation to use the Article 7 procedures to share information about brokers.[622]

Finally, Articles 16-18 set forth the final provisions. Article 16 states that a clause providing for arbitration or, if the establishment of an arbitral tribunal and agreement on

[615] D. MCCLEAN, *supra* note 75 at 487-91
[616] *Id.*
[617] Article 12(3), the Firearms Protocol, *supra* note 18
[618] A. X. FELLMETH, *supra* note 580, at 209
[619] D. MCCLEAN, *supra* note 75 at 492-5; Article 13(1), the Firearms Protocol, *supra* note 18
[620] Article 13(2), the Firearms Protocol, *supra* note 18; A. X. FELLMETH, *supra* note 580, at 209
[621] D. MCCLEAN, *supra* note 75 at 497-500; A. X. FELLMETH, *supra* note 580 at 209-10
[622] *Id.*

procedures fail, referral to the ICJ.[623] Simultaneously, States Parties are expressly allowed to disavow this provision with a reservation, which many have done.[624] Signature, ratification, accession, and entry into force are all governed by Articles 17 and 18. Notably, regional economic integration organizations may sign or accede if at least one member state is a party to the Firearms Protocol.[625]

Intergovernmental and municipal regulatory and enforcement measures are required to effectively combat weapons smuggling.[626] A strategy that would be based solely on state responsibility would be unlikely to eradicate weapons smuggling. Relying solely on individual criminal responsibility under international or national law would be unlikely to be an effective means to deal with cross-border arms transfer.[627] Therefore, the regulation of legal and illegal arms transfers would still be required to combat the pernicious effects of arms trafficking.[628]

3.3.2.6 The UN Convention Against Corruption 2003

While the Palermo Convention was a significant step forward, this new Convention is the most recent in a series of developments in which both the domestic and international levels recognized the need for effective anti-corruption measures.[629] The development of international action against corruption could be seen as a progression from general consideration and declarative

[623] Article 16(2), the Firearms Protocol, *supra* note 18; A. X. FELLMETH, *supra* note 580 at 210
[624] A. X. FELLMETH, *supra* note 580 at 210
[625] *Id.*
[626] Article 17(2), the Firearms Protocol, *supra* note 18
[627] CATHERINE E. DRUMMOND & ANTHONY E. CASSIMATIS, *Weapons smuggling,in Routledge Handbook of Transnational Criminal Law,* 263 (NEIL BOISTER & ROBERT J. CURRIE (ed.), Routledge Taylor & Francis Group 1st ed.: 2015)
[628] *Id.*
[629] JOHN HATCHARD, *Criminalizing corruption: The global initiatives, in Routledge Handbook of Transnational Criminal Law,* 352 (NEIL BOISTER & ROBERT J. CURRIE (ed.), Routledge Taylor & Francis Group 1st ed.: 2015); DIMITRI VLASSIS, *The United Nations Convention Against Corruption Overview of its Contents and Future Action,* Resource Material Series No. 66 (Sep., 2005).

statements,[630] to practice advice, to binding legal obligations. As a result, many countries have sought the assistance of one another in the fight against corruption through several cases, which has progressed from general consideration to binding legal obligations.[631]

First, the United Nations Convention against Corruption's purpose is to promote and strengthen measures to prevent and combat corruption more effectively, to promote, facilitate, and support international cooperation and technical assistance, including asset recovery and to promote integrity, accountability, and public management of public affairs and public property.[632] The Convention's key terms such as 'property,'[633] 'proceeds of crimes,'[634] and 'confiscation'[635] are defined. Furthermore, the UNCAC Convention defines the terms 'public official,'[636] 'foreign public official,'[637] and 'official of a public international organization'[638] in novel ways. A 'public official' is defined broadly as "any person holding a legislative, executive, administrative or judicial office [. . .] and any person performing a public function, including for a public agency or public enterprise, or provid[ing] a public service."[639] For example, in the *R. v. Roberge* case,[640] Benoît Roberge should have been performing and providing a public service in his official duties as a police officer, but his conduct breached the public trust by participating in a criminal organized

[630] *See eg.,* GA/RES/51/59 and 51/191, annexes, and the discussion held at the 9th U.N. Congress on the Prevention of Crime and Treatment of Offenders, held in Cairo from 29 April - 8 May 1995 (A/CONF.169/16/Rev.1, para 245-61.
[631] D. VLASSIS, *supra* note 629 at 2
[632] Article 1, The Merida Convention, UNCAC, *supra* note 19
[633] Article 2(d)
[634] Article 2(e)
[635] Article 2(g)
[636] Article 2(a)
[637] Article 2(b)
[638] Article 2(c)
[639] Article 2(a)
[640] *R. v. Roberge,* 2014 QCCQ 2419 (CanLII), (Apr. 4, 2014), available at: https://www.canlii.org/fr/qc/qccq/doc/2014/2014qccq2419/2014qccq2419.html?autocompleteStr=Roberge%202014&autocompletePos=4; Documentary, *Benoit Roberge: Walk the Line,* (The Fifth Estate: Jul. 27, 2016), available at: https://youtu.be/ciMtfRNbMqQ

group instead.[641] This significant definition would maintain the necessary connection to national law because it would be within the context of national law that the determination of who falls into the definition's categories would be made.[642] Throughout the negotiation process, there was intense debate over whether a definition of 'corruption' was necessary and, if so, what would the context for such a definition be.[643] As a result of the negotiation process, several negotiators concluded that attempting to define corruption in legal terms would have had a detrimental effect on the remainder of the UNCAC Convention's text, which was neither feasible nor desirable.[644] Corruption could easily be defined as a term that was referred to widely understood behavior and became increasingly consistent throughout the world. According to Kofi Annan, then-Secretary-General of the United Nations, he stated at the time that

> 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.[645]

However, the differences in national circumstances or traditions would be the primary factor in defining the term 'corruption' broadly or narrowly.[646] The more attempts made to crystallize the concept into a concise legal text, the fewer unintended risks would be introduced into the concept's collective perception.[647] Consequently, these risks could have an impact on not only the current understanding of the UNCAC Convention, which would deprive it of the dynamism required to remain relevant to future national efforts and international cooperation, but also the capture of

[641] *R. v. Roberge,* 2014 QCCQ 2419 (CanLII), *supra* note 640
[642] D. VLASSIS, *supra* note 629 at 2-3
[643] *Id.* at 3
[644] *Id.*
[645] United Nations Office on Drugs and Crime, *United Nations Convention against Corruption,* iii (UNODC, Vienna: 2004)
[646] D. VLASSIS, *supra* note 629 at 3
[647] *Id.*

which definition would have been applied to only some aspects of the phenomenon, which would prevent countries from taking a broader anti-corruption action that they could have already taken or could take in the future.[648] Although the outcome of the negotiations did not include a definition of corruption in the final text, the negotiators were heavily influenced by the UNTOC Convention's similar approach, which did not define TOC but did include a definition of an organized criminal group.[649]

The scope of the application under Article 3 states that, except as otherwise provided in the Convention, the Convention's offenses do not need to cause damage or harm to state property to be implemented.[650] Additionally, this provision would be critical to international cooperation and asset recovery.[651] Finally, Article 4 states that the UNCAC Convention was inspired by and follows the formulation of a similar Article in the UNTOC Convention, especially considering the jurisdictional provisions among the concerns of States Parties.[652]

Second, Articles 5 to 14 of the UNCAC Convention contain a comprehensive summary of preventive measures emphasizing both the importance of prevention and the breadth of available specific measures. In particular, the UNCAC Convention contains provisions on preventive anti-corruption policies and practices,[653] preventive anti-corruption bodies,[654] specific anti-corruption measures for the public sector,[655] codes of conduct for public officials,[656] public procurement and

[648] D. VLASSIS, *supra* note 629 at 3
[649] *Id.*
[650] *Id.*
[651] United Nations Office on Drugs and Crime, *Legislative guide for the implementation of the United Nations Convention against Corruption,* (UNODC, New York, 2nd revised ed.: 2012),[hereafter UNODC, *Legislative guide*] available at: https://www.unodc.org/documents/treaties/UNCAC/Publications/LegislativeGuide/UNCAC_Legislative_Guide_E.pdf
[652] D. VLASSIS, *supra* note 629 at 3
[653] Article 5, The Merida Convention, UNCAC, *supra* note 19; UNODC, *Legislative guide, supra* note 651 at 19-24
[654] Article 6
[655] Article 7; UNODC, *Legislative guide, supra* note 651 at 27-31
[656] Article 8; UNODC, *Legislative guide, supra* note 651 at 32-33

management of public finances,[657] public reporting,[658] measures relating to the judiciary and prosecution services,[659] measures to prevent corruption involving the private sector,[660] social participation,[661] and measures to prevent money laundering.[662] Additionally, the prevention measures in these articles have been structured in such a way that they are inherently flexible in their implementation, thus recognizing the variety of approaches that States Parties could take or their individual capacities.[663]

These provisions on preventive measures would be integrated into the mechanisms that the Convention would require States Parties to establish.[664] Simultaneously, these provisions also define the criminalization of a variety of corruption-related behavior.[665] Notably, the prevention measures encompass all of the approaches that the international community collectively believes would be necessary for establishing a comprehensive and effective response to corruption at all levels.[666]

Articles 15 to 42 deal with criminalization and law enforcement. States Parties to the UNCAC Convention are required to criminalize the following acts when they are committed intentionally: bribery of national public officials,[667] active bribery of foreign public officials,[668] embezzlement,[669] misappropriation,[670] or other diversion of property by a public official,[671] money

[657] Article 9, The Merida Convention, UNCAC, *supra* note 19
[658] Article 10
[659] Article 11
[660] Article 12; UNODC, *Legislative guide, supra* note 651 at 36-42
[661] Article 13
[662] Article 14; UNODC, *Legislative guide, supra* note 651 at 42-53
[663] D. VLASSIS, *supra* note 629 at 3
[664] UNODC, *Legislative guide, supra* note 651 at 15
[665] D. VLASSIS, *supra* note 629 at 3
[666] UNODC, *Legislative guide, supra* note 651 at 15
[667] Article 15, The Merida Convention, UNCAC, *supra* note 19
[668] Article 15(a); UNODC, *Legislative guide, supra* note 651 at 64-5
[669] Article 17; UNODC, *Legislative guide, supra* note 651 at 68-9
[670] *Id.*
[671] *Id.*

laundering,[672] and obstruction of justice.[673] States Parties would also establish legal persons' civil, administrative, or criminal liability.[674]

Due to the differences in the domestic laws of the States Parties, some countries may have already established additional criminal offenses or may find their establishment to be beneficial in combating corruption.[675] The UNCAC Convention includes a number of provisions encouraging States Parties to consider criminalizing such private sector conduct as influence trading,[676] concealment,[677] abuse of functions,[678] illicit enrichment,[679] or bribery.[680]

However, the final formulation of the criminalization, which included both "mandatory" and "discretionary" offenses, should not be overlooked because it created a conundrum for negotiators as to how international cooperation or more important principles, such as dual criminality, which normally govern such forms of international cooperation as mutual legal assistance could cooperate.[681] Thus, the UNCAC Convention's solution to international cooperation would be another significant innovation.[682]

Other measures of criminalization and law enforcement appear to be similar to those contained in the UNTOC Convention.[683] These include establishing jurisdiction for prosecution;[684] seizing, freezing, and confiscating proceeds[685] or other property, protecting witnesses, experts and

[672] Article 23; UNODC, *Legislative guide, supra* note 651 at 69-71
[673] Article 25; UNODC, *Legislative guide, supra* note 651 at 75-6
[674] Article 26; UNODC, *Legislative guide, supra* note 651 at 88-93
[675] D. VLASSIS, *supra* note 629 at 3
[676] Article 18, The Merida Convention, UNCAC, *supra* note 19
[677] *Id.*
[678] Article 19
[679] Article 20
[680] Article 21
[681] D. VLASSIS, *supra* note 629 at 4
[682] Article 43-49, The Merida Convention, UNCAC, *supra* note 19
[683] D. VLASSIS, *supra* note 629 at 4
[684] Article 42, The Merida Convention, UNCAC, *supra* note 19
[685] Article 31; UNODC, *Legislative guide, supra* note 651 at 113-122

victims,[686] as well as cooperating persons,[687] and other matters pertaining to investigations and prosecutions.[688]

Articles 43 to 49 deal with international cooperation in general though there are a number of additional and more specific cooperation provisions dealing with other subject matter, such as asset recovery[689] and technical assistance.[690] The core material deals with the same basic areas of cooperation as the UNTOC Convention, such as extradition, mutual legal assistance, and less formal forms of cooperation during investigations and other law-enforcement activities.[691]

Requirements for international cooperation would be specific to the scope or range of offenses to which States Parties would apply. Because of the wide range of corruption issues, many countries could impose proposals to criminalize a wide range of behavior, while others could face conduct that they could not criminalize (e.g., illicit enrichment).[692] Although the criminalization of specific acts of corruption could be limited to constitutional or other fundamental reasons, States Parties that would be unable to do so would need to cooperate with other States that had done so.[693] Regarding the requirements of the dual criminality principle, states that would be unable to criminalize some of the UNCAC Convention's offenses would need to compromise on others to keep them as narrow as possible within their fundamental legal requirements.[694]

Due to various principles, extradition could be granted in circumstances where the requested State Party's law would permit the extradition of offenders without regard for dual

[686] Article 32, The Merida Convention, UNCAC, *supra* note 19
[687] Article 33
[688] Article 36-41
[689] Article 54-56
[690] Article 60-62
[691] D. VLASSIS, *supra* note 629 at 4
[692] *Id.*
[693] *Id.*
[694] *Id.*

criminality.[695] In the absence of dual criminality, mutual legal assistance could not be granted unless the assistance requested involved some form of coercive action, such as arrest, search, or seizure.[696] States Parties would thus be encouraged to allow a broader scope of assistance without the possibility of dual criminality.[697] However, the underlying rule would need to be applied to all forms of cooperation where dual criminality would be required because once the relevant States Parties had criminalized the conduct that underpins an offense, it would no longer be a question of whether the actual offending provisions coincided. [698] Along with civil recovery, several provisions would be formulated to enable a State Party to seek civil recovery in another State Party regardless of criminalization. Hence, States Parties would be encouraged to assist one another in civil matters in the same way that they could assist one another in criminal matters.[699]

Articles 51 to 59 of the UNCAC Convention contain provisions on asset recovery. The right to recover stolen public assets is a fundamental principle of the UNCAC Convention and one of its main innovations.[700] The UNCAC provisions have established a framework for countries to adopt mechanisms into their civil and criminal laws to facilitate the tracing, freezing, forfeiting, and returning of funds that were obtained through corrupt activities.[701] Another point of contention

[695] Article 44(2), The Merida Convention, UNCAC, *supra* note 19; *See also,* other principles applicable to the grounds of refusal of extradition in the *Revised manuals, supra* note 707 Part One (Extradition) for the Merida/UNCAC Convention when those offenses are fiscal offenses (Articles 23, 44(6) at 11, prejudice (race, religion, nationality, ethnic origin etc) (Article 44 (15)) at 17, nationality (Article 44(11)) at 23, extraterritoriality (Article 42(2)) at 27.
[696] Article 46(9), The Merida Convention, UNCAC, *supra* note 19; *See also,* other principles applicable to the grounds of refusal of assistance in the the *Revised manuals, supra* note 707 Part Two (Mutual Assistance in Criminal Matters) for the Merida/UNCAC Convention when those offenses are involved in fiscal matters (Article 46(8)) at 88, bank secrecy (Article 31(7)) at 90, legislative power for postponement (Article 46(26)) at 91, it also mentions about information required at 93, language and translation when the use of verbal requests may be necessary (Article 46(14)) at 96, execution of requests (Articles 46 (17) and (24)) at 97, enforcement of final order (Article 55(1)) at 118
[697] D. VLASSIS, *supra* note 629 at 4
[698] *Id.*
[699] *Id.*
[700] Article 51, The Merida Convention, UNCAC, *supra* note 19; United Nations General Assembly, *Fify-eighth Sess. on Report of the Ad Hoc Committee for the Negotiation of a Convention against Corruption on the work of its first to seventh sessions, addendum, Interpretative notes for the official records (travaux préparatories) of the negotiation of the United Nations Convention against Corruption,* A/58/422Add.1 (Oct. 7, 2003), at para 48
[701] D. VLASSIS, *supra* note 629 at 5

was whether assets should be returned to requesting State Parties or should be sent directly to identifiable or pursuing victims.[702] The result was a series of provisions that favored asset return to the requesting State Party based on the degree to which the assets were originally linked to it.[703] Thus, funds embezzled from the State would be returned to it even if they were later laundered,[704] and proceeds of other UNCAC Convention-covered offenses would be returned to the requesting State Party if the requesting State Party established ownership or damages recognized by the requested State Party as a basis for return.[705] In other instances, assets could be returned to the requesting State Party or a previous legitimate owner, or they could be used to compensate victims in some way.[706] Additionally, mechanisms for direct recovery in civil or other proceedings[707] would be included as a comprehensive framework for international cooperation[708] that would incorporate more general requirements for mutual legal assistance.[709] Asset recovery would incorporate elements that would be designed to prevent illicit transfers and generate records that could be used to trace, freeze, seize, and confiscate illicit transfers.[710] Identifying experts who could assist developing countries in this process would also be included as a form of technical assistance.[711]

Technical assistance and information exchange under Articles 60 to 62 in the UNCAC Convention would generally refer to assistance to help countries in complying with the UNCAC's provisions. These articles would address training, material and human resources, research, and

[702] D. VLASSIS, *supra* note 629 at 5
[703] *Id.*
[704] Article 57 (3)(a), The Merida Convention, UNCAC, *supra* note 19
[705] Article 57 (3)(b)
[706] Article 57 (3)(c)
[707] Article 53
[708] Articles 54-55
[709] D. VLASSIS, *supra* note 629 at 5
[710] Article 52, The Merida Convention, UNCAC, *supra* note 19
[711] Article 60(5)

information sharing.[712] The Convention would encourage training on investigative techniques, strategic anti-corruption policy planning and development, preparing requests for mutual legal assistance, public financial management, and methods used to protect victims and witnesses in criminal cases.[713] States Parties should also consider collaborating to conduct evaluations and studies on the forms, causes, and costs of corruption in specific contexts to develop more effective policies to combat the problem.[714]

Additionally, the UNCAC Convention contains a robust mechanism for implementation under Articles 63 and 64 in the form of a Conference of the States Parties (COSP),[715] which assists States Parties and signatories in implementing the Convention and provides policy guidance to UNODC regarding the development and implementation of anti-corruption activities.[716] As with the Conference of the Parties (COP), the COSP has its own Working Groups who are devoted to particular thematic areas, such as the Working Group on Prevention and the Working Group on Asset Recovery.[717]

Finally, Articles 65 to 71 include the provisions to ensure that the Convention's requirements are interpreted as minimum standards, which States Parties could exceed with "more strict or severe"[718] measures than those specified in the specific provisions, as well as the two articles governing the signature, ratification, and entry into force.[719]

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[712] Article 60-62, The Merida Convention, UNCAC, *supra* note 19
[713] *Id.*
[714] *Id.*
[715] Article 63
[716] United Nations Office on Drugs and Crime, *Conference of the States Parties to the United Nations Convention against Corruption,* (UNODC), available at: https://www.unodc.org/unodc/en/corruption/COSP/conference-of-the-states-parties.html
[717] *Id.*
[718] Article 65(2), The Merida Convention, UNCAC, *supra* note 19
[719] Articles 67-68

Furthermore, the UNCAC Convention contains provisions for establishing and maintaining a robust and effective mechanism to ensure and monitor its implementation. The relevant provisions of the Convention were painstakingly negotiated and were inspired by some similar provisions in the UNTOC, both in terms of detail and potential impact. As a result, the Convention should be carefully read while remaining focused on the task at hand. While this new international instrument would only be the beginning of the redoubled efforts to prevent and control corruption, the necessary ratifications for the Convention to be entered into force should be secured as soon as possible. In summary, the Conference of the States Parties is the most effective mechanism for States Parties to promote and achieve implementation in order to ensure the Convention functions effectively.

3.4 The Regional Level

Following the post-Cold War, the security regime addressed security threats by emphasizing the need to suppress TOC by governments and international organizations.[720] There were some multilateral, not just bilateral, efforts to expand the security regime's capacity, but the security regime also made some regional efforts.[721] This section will focus in particular on the efforts of the Association of Southeast Asian Nations (ASEAN) through a description of its framework for combating transnational crime.

[720] VALSAMIS MITSILEGAS, *Regional organisations and the suppression of transnational crime, in Routledge Handbook of Transnational Criminal Law,* 73 (NEIL BOISTER & ROBERT J. CURRIE (ed.), Routledge Taylor & Francis Group 1st ed.: 2015)
[721] Michigan Journal of International Law, *Post-Cold War International Security Threats: Terrorism, Drugs, and Organized Crime Symposium Transcript,* 21 MICH. J. INT'L L. 527, 614 (2000).

3.4.1 ASEAN's Framework for Combating Transnational Crime

Numerous ASEAN bodies are directly or indirectly involved in developing policies and initiatives to combat transnational crime. First, the ASEAN Ministerial Meeting on Transnational Crime (AMMTC) is the organization's highest-level policymaking body.[722] The ASEAN Ministers of Interior/Home Affairs adopted the ASEAN Declaration on Transnational Crime on December 20, 1997, which reaffirmed ASEAN's commitment to a comprehensive approach to fighting transnational crime through increased regional collaboration and international cooperation.[723] In June 1999, the second ASEAN Ministerial Meeting on Transnational Crime adopted the ASEAN Plan of Action to Combat Transnational Crime.[724] This meeting also agreed in principle to establish the ASEAN Centre for Combating Transnational Crime (ACTC).[725] On August 7 in Quezon City, Philippines, a Special Working Group on the Establishment of the ACTC met to prepare a comprehensive report on the ACTC's operationalization.[726] The Working Group finalized the arrangements for the establishment of the ACTC, and recommended to the AMMTC for consideration and approval a draft agreement on the Center's establishment.[727] The ACTC was another ASEAN regional initiative that aimed to combat transnational crime by the intention to facilitate data sharing, assist in implementing program activities that were outlined in the proposed action plan, and serve as a repository of information on national legislation, regulatory measures, and jurisprudence in individual member countries.[728] Moreover, the ACTC is expected to have

[722] RIDDHI SHAH, *An 'ASEAN Way' of Combating Transnational Crime,* (SSPC Issue Brief, No. 7: Feb. 2013), available at: https://www.sspconline.org/sites/default/files/IssueBrief7.pdf
[723] ASEAN Declaration on Transnational Crime, Manila, Philippines (Dec. 20, 1997), available at: https://asean.org/wp-content/uploads/2012/05/ASEAN-Declaration-on-Transnational-Crime-1997.pdf
[724] SANDRAM PUSHPANATHAN, *Combating Transnational Crime in ASEAN,* (ASEAN: Nov. 26, 1999), available at: https://asean.org/combating-transnational-crime-in-asean-by-s-pushpanathan/
[725] *Id.*
[726] *Id.*
[727] *Id.*
[728] *Id.*

research capabilities that would enable it to conduct in-depth analyses of transnational crime activities and recommend appropriate regional strategies for combating these heinous crimes.[729] The 14th AMMTC, which met via videoconference on November 26, 2020, discussed the efforts made by Viet Nam to draft a Concept Paper on the Establishment of a Direct Communication Link (DCL) in the AMMTC to facilitate the timely exchange of transnational crime information and cases and to establish operational procedures for handling relevant incidents in emergencies.[730] ASEAN's efforts to combat transnational crime would be bolstered by establishing the Center.

The Plan's central objective has been to develop mechanisms and activities to expand ASEAN member countries' efforts to combat transnational crime from the national and bilateral to the regional level and strengthen regional commitment and capacity to take on the expanded task.[731] The Plan would establish a cohesive and responsive ASEAN in the fight against transnational crime with crucial program activities, including information exchange, cooperation in legal and law enforcement matters, institutional capacity building, training, and extra-regional cooperation.[732]

The Plan called for increased cooperation and coordination between the AMMTC and other ASEAN bodies in the investigation, prosecution, and rehabilitation of perpetrators of such crimes, including the ASEAN Law Ministers and Attorneys-General, the ASEAN Chief of National Police (ASEANAPOL), the ASEAN Finance Ministers Meeting (AFMM), and the ASEAN Directors-General of Immigration and Customs.[733] The Plan of Action included the following legal

[729] S. PUSHPANATHAN, *supra* note 724
[730] Joint Statement, Fourteenth ASEAN Ministerial Meeting on Transnational Crime (14th AMMTC), (Nov. 26, 2020), available at: https://asean.org/wp-content/uploads/ADOPTED-JOINT-STATEMENT-14TH-AMMTC.pdf; *See also* KIMKONG HENG, *ASEAN's Challenges and the Way Forward,* (The Diplomat: Aug. 15, 2020), available at: https://thediplomat.com/2020/08/aseans-challenges-and-the-way-forward/#:~:text=ASEAN%20is%20also%20constrained%20by,and%20the%20rise%20of%20authoritarianism.
[731] ASIAN PLAN OF ACTION TO COMBAT TRANSNATIONAL CRIME, *supra* note 728
[732] *Id.*
[733] S. PUSHPANATHAN, *supra* note 724

provisions: (1) work to criminalize specific transnational crimes, such as illicit drug trafficking, money laundering, terrorism, piracy, arms smuggling, and human trafficking in ASEAN member countries, and [734] (2) develop multilateral or bilateral legal arrangements to facilitate apprehension, investigation, prosecution, and extradition, witness exchange, evidence sharing, inquiry, seizure, and forfeiture of the proceeds of crime to enhance mutual legal and economic cooperation.[735]

Concerning law enforcement, the Plan of Action outlined the following: (1) Establish an exchange program for ASEAN officials in the policy, legal, law enforcement, and academic fields,[736] and (2) implement measures to safeguard judges, prosecutors, witnesses, and law-enforcement officials and personnel against retaliation by transnational criminal organizations.[737] In addition, the plan included the following in terms of extra-regional cooperation: (1) Strengthen information exchange with ASEAN dialogue partners, regional organizations, relevant United Nations specialized agencies, and other international organizations with a particular emphasis on the sharing of critical information about the identities, movements, and activities of known transnational criminal organizations,[738] and (2) increase international interest and support for ASEAN initiatives against transnational crime through the participation of the ASEAN Member Countries and the ASEAN Secretariat in relevant international conferences.[739] Furthermore, an ad hoc working group would be formed to develop and finalize a work plan for putting the Plan into action.[740] Thus, the ASEAN Secretariat is seeking technical assistance from dialogue partners,

[734] ASIAN PLAN OF ACTION TO COMBAT TRANSNATIONAL CRIME, *supra* note 728.
[735] *Id.*
[736] *Id.*
[737] *Id.*
[738] *Id.*
[739] *Id.*
[740] S. PUSHPANATHAN, *supra* note 724.

relevant international and regional organizations, and non-governmental organizations to develop the work program.[741]

Second, the ASEAN Regional Forum (ARF) was established at the ASEAN post-ministerial conferences in 1994 to promote constructive dialogue and consultation on common political and security issues, and contribute to regional efforts to build confidence and prevent conflict.[742] The ARF currently has 27 participants, including ASEAN members, Australia, Bangladesh, Canada, China, Democratic People's Republic of Korea, European Union, India, Japan, Mongolia, New Zealand, Pakistan, Papua New Guinea, Republic of Korea, Russia, Sri Lanka, Timor-Leste, and the United States.[743] The ARF conducts the majority of its counter-terrorism activities through the inter-sessional meeting on counter-terrorism and transnational crime (ISM-CT/TC).[744] In addition, the ARF has established work plans in counter-terrorism and transnational crime, disaster relief, maritime security, and non-proliferation and disarmament.[745]

Third, the ASEAN Senior Officials on Drugs Matters (ASOD) was formed in 1984. Drug-related initiatives are guided by the ASEAN Plan of Action on Drug Abuse Control, which was adopted at the 17th ASOD Meeting in October 1994.[746] Four priority areas are covered by this Action Plan as follows: prevention, treatment, rehabilitation, enforcement, and research.[747] In the area of preventive education and information, numerous workshops on drug education for teachers

[741] S. PUSHPANATHAN, *supra* note 724.
[742] SIMON SHELDON, *ASEAN and Multilateralism: the Long, Bumpy Road to Community,* 30 CONTEMP. S. E. ASIA (2) 264, 278 (2008)
[743] ASEAN, *ASEAN Regional Forum,* available at: https://aseanregionalforum.asean.org/about-arf/#:~:text=The%20current%20participants%20in%20the,%2C%20Republic%20of%20Korea%2C%20Russia%2C
[744] JÜRGEN HAACKE, *The ASEAN Regional Forum: from dialogue to practical security cooperation?,*22 CAM. REV. INT'L AFF. 427, 431 (Sept. 2009)
[745] ASEAN Secretariat, *ASEAN Annual Report 2011-2012: evolving towards ASEAN 2015,* (ASEAN), at 32, available at: https://asean.org/wp-content/uploads/2021/08/2012-6.-Jun-ASEAN-Annual-Report-2011-2012.pdf
[746] SANDRAM PUSHPANATHAN, *Managing Transnational Crime in ASEAN,* (ASEAN: Jul. 1, 1999), available at: https://asean.org/managing-transnational-crime-in-asean-by-s-pushpanathan/
[747] S. PUSHPANATHAN, *supra* note 724

and curriculum designers have been held, and comparative studies have investigated preventive education.[748] Cooperation in law enforcement activities includes the exchange of law enforcement officers and personnel, the conduct of training programs with the assistance of international agencies, and the sharing of information about narcotics trafficking trends, modus operandi, and routes.[749] In addition, ASEAN members have regularly exchanged personnel involved in treatment and rehabilitation.[750] These programs have been bolstered by the efforts of the four training centers in the ASEAN member countries. Concerning the Action Plan's four priority areas, the following training centers have been included: the ASEAN Training Center for Narcotics Law Enforcement in Bangkok, the ASEAN Training Center for Preventive Drug Education in Manila, the ASEAN Training Center for Treatment and Rehabilitation in Kuala Lumpur, and the ASEAN Training Center for Drug Detection in Body Fluids in Kuala Lumpur (Singapore).[751] Additionally, the 1997 Kuala Lumpur-adopted ASEAN Vision Document 2020 aimed to achieve a drug-free Southeast Asia by 2020.[752] However, at the 33rd ASEAN Ministerial Meeting, the governments of the member countries set the goal of achieving a drug-free Southeast Asia by 2015.[753] Furthermore, on May 28, 2011, ASEAN adopted the ASEAN Convention on Counter-Terrorism (ACCT) as its framework for combating transnational crime.[754] The ACCT aimed to strengthen cooperation among the law enforcement agencies of its member countries in the fight against terrorism and

[748] S. PUSHPANATHAN, *supra* note 724
[749] *Id.*
[750] *Id.*
[751] *Id.*
[752] R. SHAH,*supra* note 722.
[753] United Nations, *Drug-Free ASEAN 2015: Status and Recommendations,* (UNODC and Regional Centre for East Asia and the Pacific: 2008), available at: https://www.unodc.org/documents/southeastasiaandpacific/Publications/ASEAN_2015.pdf
[754] ASEAN, *ASEAN Convention on Counter Terrorism*, available at: https://asean.org/wp-content/uploads/2021/01/ACCT.pdf

serve as a framework for regional cooperation in combating, preventing, and suppressing terrorism in all of its manifestations.[755]

Fourth, at their inaugural meeting in Thailand on March 1, 1997, the ASEAN Finance Ministers Meeting (AFMM) signed the ASEAN Agreement on Customs.[756] Apart from enhancing ASEAN cooperation in Customs activities and expediting the implementation of AFTA, the agreement aimed to bolster cooperation in combating narcotics and psychotropic substance trafficking, and facilitate joint anti-smuggling and Customs control efforts.[757]

Fifth, the ASEAN Chiefs of National Police (ASEANAPOL) coordinates regional cooperation against transnational crime at the preventive, enforcement, and operational levels. ASEANAPOL has been a pioneer in exchanging knowledge and expertise in policing, law enforcement, criminal justice, and transnational and international crimes.[758] It established three ad hoc commissions to address drug trafficking, arms smuggling, counterfeiting, economic and financial crimes, credit card fraud, extradition, and arrangements for the surrender of criminal offenders and fugitives.[759] In addition, it has taken steps to combat emerging forms of transnational crime, including forgery of travel documents, phantom ship fraud, product counterfeiting, and piracy.[760] ASEANAPOL has also established its own database system to facilitate the rapid, reliable, and secure exchange of information among member countries, and provide additional access to the INTERPOL General Secretariat's computerized systems.[761]

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[755] *ASEAN Convention on Counter Terrorism, supra* note 754
[756] S. PUSHPANATHAN, *supra* note 724
[757] *Id.*
[758] S. PUSHPANATHAN, *supra* note 746
[759] *Id.*
[760] *Id.*
[761] *Id.*

Extra-regional cooperation is also essential. This recognizes that national and regional efforts alone will not suffice to combat transnational crime effectively.[762] The AMMTC has agreed to explore ways to strengthen collaboration with its dialogue partners, regional organizations, and international organizations, including the United Nations and its specialized agencies, the Colombo Plan Bureau, and ICPO-INTERPOL.[763] Informal consultations between senior officials and interested parties have been encouraged to promote greater cooperation.[764] Both the AMMTC and AMM have asked dialogue partners to assist in developing a work program to implement the Plan of Action and the implementation of activities to combat transnational crime in various forms.[765] ASEAN is also eager to strengthen its ties with the ACPF. The ACPF is an UN-affiliated NGO that has expressed interest in ASEAN's efforts to combat transnational crime.[766] It attended the Informal Consultative Meeting between ASEAN and other international organizations on Combating Transnational Crime in the Philippines on November 26, 1998.[767] At the consultative meeting, the ACPF expressed interest in supporting the ACTC's activities and implementing the Action Plan to Combat Transnational Crime.[768] The ACPF has also collaborated with law enforcement and legal services in ASEAN member countries.[769] It has hosted and funded several workshops on transnational crime cooperation by focusing on establishing cross-sectoral links between law enforcement, prosecution, and other institutions.[770]

In conclusion, Southeast Asia, surrounded by other significant markets for illicit activities, such as East Asia, South Asia, and Oceania, is consequently particularly vulnerable to the reach

[762] S. PUSHPANATHAN, *supra* note 724; S. PUSHPANATHAN, *supra* note 746.
[763] *Id.*
[764] *Id.*
[765] ASIAN PLAN OF ACTION TO COMBAT TRANSNATIONAL CRIME, *supra* note 728
[766] S. PUSHPANATHAN, *supra* note 724
[767] *Id.*
[768] *Id.*
[769] *Id.*
[770] *Id.*

and influence of organized crime groups.[771] The region now plays a significant role in the regional and global trade in synthetic drugs, particularly methamphetamine and heroin, and the trafficking of people, wildlife, timber, and counterfeit goods and medicines.[772] The displacement of organized crime groups from neighboring countries and regions has coincided with a significant shift in the regional drug market, which is characterized by a massive increase in methamphetamine production, particularly in Northern Myanmar, with trafficking networks shipping the supply across Southeast Asia to more distant and lucrative markets.[773] Simultaneously, the quantity of precursor chemicals that have been seized remains insignificant compared to the volume of illicit drugs produced and trafficked within and outside the region.[774] In addition, uneven economic development and the need for cheap labor enable organized crime groups to traffic and smuggle large numbers of people within the region.[775] Furthermore, environmental crimes in Southeast Asia demonstrate organized crime groups' global reach and the transnational nature of illicit supply chains, and the region continues to play a critical role in the transportation of high-value, highly endangered, and illegally sourced wildlife and timber for the regional market, as well as other parts of Asia and global markets.[776] In addition, organized crime groups increasingly target Southeast Asia as a global supply hub for counterfeit goods, especially illicit tobacco products, and manufacturing, repacking, and distribution of counterfeit medicines.[777] In Southeast Asia, organized crime groups now wield unprecedented power and control multibillion-dollar

[771] United Nations Office on Drugs and Crime, *Transnational Organized Crime in Southeast Asia: Evolution, Growth and Impact,* (UNODC: 2019), available at: https://www.unodc.org/documents/southeastasiaandpacific/Publications/2019/SEA_TOCTA_2019_web.pdf
[772] *Id.* at 1-8
[773] *Id.*
[774] *Id.*
[775] United Nations Office on Drugs and Crime, *Transnational Organized Crime in Southeast Asia: Evolution, Growth and Impacts, supra* note 771 at 65
[776] *Id.*at 1-8
[777] *Id.*

industries.[778] Aside from destroying lives, transnational organized crime syndicates use their financial power to further corrupt and undermine the rule of law.[779] Apart from the direct consequences of drug use, sexual exploitation, and environmental degradation, organized crime groups in Southeast Asia launder large sums of money through lightly or unregulated cash-based industries, such as casinos.[780] As a result, transnational criminal organizations now pose a significant threat to the region's public security, health, and sustainable development.

Given that transnational organized criminal groups continue to pose threats to this region, ASEAN must take a bold step forward to comprehensively address the menace of TOC to neutralize and eradicate those threats. Hence, ASEAN would require the assistance and expertise of developed countries, relevant international and intergovernmental organizations, and non-governmental organizations to contribute effectively to regional and global efforts against TOC.[781]

3.5 Conclusion

Transnational organized crime (TOC) is an imminent threat to both national and international communities, and has dire consequences for public safety, public health, democratic institutions, and global economic stability. TOCs are distinguished from other types of crimes because when organized criminal groups conduct illicit businesses to obtain monetary or material benefits, they violate the laws of multiple countries or (in certain circumstances) regional and international levels. Additionally, their illegal activities have continuously evolved by capitalizing

[778] United Nations Office on Drugs and Crime, *Transnational Organized Crime in Southeast Asia: Evolution, Growth and Impacts, supra* note 771 *at* 177
[779] *Id.*
[780] *Id.*
[781] S. PUSHPANATHAN, *supra* note 724.

on the weaknesses of law enforcement agencies and legal systems. Consequently, a thorough knowledge of the laws that apply to TOC is needed if countries are to combat it effectively.

Branches of international law have established multiple facets to govern the relationship between States, international organizations, and individuals to implement fundamental rules and principles of international law to address TOC-related issues with regard to the various applicable laws. For instance, when states deal with the severity of gross human rights violations or humanitarian intervention against organized criminal groups, the use of force principle applies. Simultaneously, international humanitarian law aims to alleviate human suffering during times of war by distinguishing those who do not or no longer participate in hostilities. In addition, international human rights law could be applied in situations where both the use of force and international humanitarian law would be used to protect and respect the fundamental rights of those who would be victims or an accused. Then, the law of the sea would play an important role in enforcing and exercising jurisdiction over organized crime activities, including piracy, slavery, human trafficking, drug trafficking, and the transportation of WMD. While TOC is not a core crime, the next generation of international criminal law is evolving to combat organized crime and gang violence, which are embedded in complex and dynamic phenomena. As a result, international law principles would enable States, individuals, and organizations to collaborate on comprehensively implementing legal measures to combat TOC.

International instruments, such as treaties and agreements, are critical in addressing TOC. Using the model treaties as a legal reference, States Parties could negotiate bilateral and multilateral treaties on specific areas of international criminal cooperation, such as the transfer of foreign prisoners, extradition, mutual legal assistance, and the transfer of criminal proceedings. Additionally, international core conventions on TOC (e.g., drug control conventions, the Palermo

Convention and its Protocols, and the Merida Convention) could widely be used as legal mechanisms for addressing TOC. As a result, legal terms relevant to the issues of TOC would be defined, criminal offenses committed by specific offenders would be penalized, and States Parties would have access to international cooperation on these matters. As such, ASEAN needs to cooperate with other regions to address TOC effectively although its characteristics are different from those of other regions. However, doing so would require the assistance and expertise of valuable contributors and global efforts against TOC. Thus, implementing these international instruments effectively would be critical if countries are to deal with TOC holistically.

Chapter 4

The Thai Criminal Legal System and Law Enforcement

4.1 Introduction

Thailand is one of the countries that endures a disproportionate part of the direct impact of organized crime on a global scale. Thailand's geographical location as a source, a destination, and a country receptive to transnational criminal organizations contributes to Thailand's vulnerability to transnational criminal organizations.[1] Human trafficking[2] and drug trafficking,[3] in particular, are the most serious problems of the country, thus wreaking havoc on the economy, social structure, and law enforcement.[4] Moreover, as criminal organizations have evolved, so have their ability to exploit legal loopholes and the advantages of the numerous environments available to facilitate crime. Nowadays, the offenses of organized criminal groups are more sophisticated, as crimes are perpetrated across multiple nations, thereby making it difficult to track down perpetrators and acquire evidence to prosecute criminal organizations. As a result, Thailand has signed the United Nations Convention against Transnational Organized Crime 2000, or UNTOC

[1] Human Rights Watch, *Sufficient progress not made to warrant Tier2 ranking for Thailand in TIP Report 2020: Seafood Working Group responds to Trafficking in Persons Reports 2020,* (HRW, Jul. 30, 2020), available at: https://www.hrw.org/news/2020/07/30/sufficient-progress-not-made-warrant-tier-2-ranking-thailand-tip-report-2020?gclid=Cj0KCQjwjN-SBhCkARIsACsrBz5cDCL5sO-xtvTu1dKngqb36JaDTbmpdNZBJDqoVBioc-MRYWS46d0aAi5MEALw_wcB; SARA MCGEOUGH, *Human Trafficking in Thailand,* (The Exodus Road, Feb. 2, 2022), available at: https://theexodusroad.com/human-trafficking-in-thailand/

[2] *Id.*

[3] MAZOE FORD & SUPATTRA VIMONSUKNOPPARAT, *Asia's infamous Golden Triangle and the soldiers tracking down the drug smugglers who rule its narcotics trade,* (ABC, Dec. 12, 2021), available at: https://www.abc.net.au/news/2021-12-12/golden-triangle-drug-smugglers-who-rule-narcotics-trade/100677834#:~:text=A%20Thai%2Dled%20operation%20involving,used%20to%20make%20illegal%20drugs; *See also* CHOUVY, PIERRE-ARNAUD. *Drug trafficking in and out of the Golden Triangle*, (Hal Open Science: 2013) at 1-32

[4] BROADHURST, RODERIC & LE, VY KIM, *Transnational Organized Crime in East and South East Asia* EAST AND SOUTH-EAST ASIA: INTERNATIONAL RELATIONS AND SECURITY PERSPECTIVES, Andrew T. H. Tan, ED., Routledge, London (Forthcoming), at 11-15

Convention,[5] to join the fight against transnational organized crime (TOC), which has expanded its operations worldwide.

However, Thailand's laws governing the prevention and suppression of TOC have been updated to make it more practical for law enforcement authorities to perform their duties. Therefore, this chapter aims to discuss how the criminal law system plays a significant role in combating TOC in Thailand.

4.2 The Thai Criminal Legal System for Enforcing TOC

This section will examine Thailand's laws governing organized crime on a transnational scale. These laws include the Thai Penal Code and Criminal Procedure Code, the Anti-Human Trafficking Act B.E. 2551 (2008), the Anti-Participation in Transnational Organized Crime Act B.E. 2556 (2013), the new Thai Narcotics Code, the Act on Procedure of Narcotic Case B.E. 2550 (2007), the Anti-Money Laundering Act B.E. 2542 (1999), the Organic Act on Counter Corruption B.E. 2561 (2018), the Mutual Assistance in Criminal Matters Act B.E. 2535 (1992), and the Extradition Act B.E. 2551 (2008).

4.2.1 The Thai Penal Code and Criminal Procedure Code

Thailand has a civil law system, which makes enacting laws and legislation more difficult because this requires time and several procedures.[6] Moreover, the Thai legal system is a statutory

[5] The United Nations Convention against Transnational Organized Crime, New York, opened for signature, adopted by the resolution A/RES/55/25 of Nov. 15, 2000, entered into force Sept. 29, 2003, 2225 UNTS 209, Thailand has signed the UNTOC Convention on 18 December 2001, and also ratified on 17 October 2013.[hereafter the Palermo Convention or UNTOC]

[6] NGAMNET TRIAMANURUK ET AL, *Overview of Legal Systems in the Asia-Pacific Region: Thailand,* Paper 4 (2004) at 4, available at: https://scholarship.law.cornell.edu/lps_lsapr/4

law system, which means it is mainly based on legislatively enacted written law.[7] The Constitution, which is the supreme law, legislation such as codes and acts, decrees, and customs are primary sources of law.[8] The Supreme Court's opinions are persuasive, have some precedential value, and are frequently utilized as secondary authoritative sources of law.[9]

According to several codes in Thailand, the Thai Penal Code is the codified system or body of laws prescribing punishments for crimes and offenses against the general public or another individual.[10] However, the Thai Penal Code does not explicitly impose punishments for TOC. As a result, similar criminal law principles could be applied for punishment at various times. The first example is Section 209, which prescribes that "whoever is a member of a body of persons whose proceedings are secret and whose aim is unlawful is said to be a member of a secret society and shall be punished . . ."[11] It should be noted that a member of a body of persons must include more than two persons, each of whom has the right to be involved in meetings and vote on committing unlawful acts.[12] The offense would be accomplished when he/she became a member of a secret society, regardless of whether they had to act in accordance with that purpose.[13] Another example is Section 210, which states that "whenever five persons upwards conspire to commit any offense provided in this Book II and punishable with maximum imprisonment of one year upwards, every such person is said to be a member of a criminal association, and shall be punished . . ."[14] It should

[7] Thailand Legal Research, Southeast Asian Region Countries Law, available at: https://unimelb.libguides.com/c.php?g=930183&p=6722017#:~:text=Thailand%20has%20a%20predominantly%20civil,to%20conform%20to%20local%20custom.
[8] Thailand Legal Research, Southeast Asian Region Countries Law, *supra* note 7
[9] *Id.*
[10] Criminal Law in Thailand, Penal Code, Thailandlawonline, available at: https://www.thailandlawonline.com/table-of-contents/criminal-law-translation-thailand-penal-code#:~:text=The%20Thailand%20Penal%20Code%20is,the%20one%20who%20violates%20it.
[11] *Id.* at Section 209
[12] Supreme Court Dika No. 301-303/2470(1927); Supreme Court Dika No. 1176/2543(2000)
[13] *Id.*
[14] Section 210 of Penal Code, *supra* note 10

be noted that although the word “conspire” is not ever defined in the Thai Penal Code, Piroh said that the principle of "principals" should be applied and interpreted to this offense instead. Moreover, any offense in Book II would include the kingdom's security, terrorization, public administration, justice, religion, public peace, public danger, counterfeit and alteration, trade, sexuality, life and body, liberty and reputation, and against the property.[15] Therefore, it could be seen that the offenses relating to TOC have to date not been imposed in the Thai Penal Code.

Simultaneously, the Criminal Procedure Code is a body of law establishing the procedures for prosecuting individuals suspected of committing criminal offenses.[16] First, the courts are appropriately notified when a criminal commits a crime, whether it is an ordinary or TOC. The law enforcement agencies, such as police officers, investigators, prosecutors, and judges, must implement this Code of Criminal Procedure.

Organized crime is a crime committed by transnational elements.[17] It is worth noting that neither the Thai Penal Code nor the Criminal Procedure Code defines an offense that is punishable by Thai law and has been committed outside the Kingdom.[18] It could imply what types of cases must be determined based on the content of the provisions in the Thai Penal Code; provisions relating to offenses committed outside the Kingdom are found in Section 4, Paragraph 2, and Sections 5-9[19] of the Thai Penal Code. As a part of law enforcement, the Criminal Procedure Code does not set up a separate or unusual way to prosecute a criminal for a transnational crime that is different from ordinary criminal proceedings. Instead, Section 20[20] of the Criminal Procedure

[15] Penal Code, *supra* note 10
[16] The Criminal Procedure Code, available at: https://www.samuiforsale.com/law-texts/thai-criminal-procedure-code.html
[17] Article 3(2) of the UNTOC, *supra* note 5
[18] CHULASINGH VASANTASINGH, *Power of Attorney-General in Issuing a Prosecution or Non-prosecution Order in the Extraterritorial Case where Offense Punishable under Thai Law Committed Outside the Kingdom of Thailand,* 38 L. J. Chulalongkorn U. 1, 2 (2020).
[19] CHULASINGH VASANTASINGH, *supra* note 18
[20] The Criminal Procedure Code Section 20 states that:

Code contains the legal rules that are frequently applied and are concerned about transnational criminal organizations that have committed crimes against the law both within and beyond Thailand.

Assume an offense is committed in violation of the criminal law of Thailand, but the offense occurs outside the Kingdom of Thailand, in that case, the investigator in charge of the case would be the attorney-general or the prosecution service of Thailand, or the attorney-general in the current position, or the investigator designated by the attorney-general. Compared to other types of criminal investigations done in Thailand, Section 20 of the Criminal Procedure Code mainly provides investigations. Sections 18 and 19 of the Criminal Procedure Code state that instead of administrative employees, senior police officers, sheriff's deputies, and civil officials, police officers or their equivalent would be responsible for crimes that happen inside or outside the Kingdom of Thailand. Rather than that, Section 20 of the Criminal Procedure Code mandates that the attorney-general serves as the principal investigator. Therefore, the criminal procedure law

"If the offense punishable under Thai law has been committed outside the Kingdom of Thailand, the Attorney-General or a person acting for him shall be a responsible inquiry official or such duty may be assigned to any public prosecutor or inquiry official to be responsible for holding an inquiry.

In case where the Attorney-General or a person acting for him assign responsibility of holding an inquiry to any inquiry official, The Attorney-General or a person acting for him may let any public prosecutor participate holding an inquiry together with an inquiry official.

The public prosecutor assigned to be a responsible inquiry official or to hold an inquiry together with an inquiry official shall have the same power and duty as the inquiry official do. All other power and duty provided by law shall be the public prosecutor's power and duty.

In case of public prosecutor joins an inquiring officer in holding an inquiry, the inquiring officer shall confirm with the public prosecutor's order advice of collecting evidences.

In case of necessity, the following inquiry officials shall be empowered to inquire in the period of waiting for an order of an Attorney-General or a person acting for him.

(1) An inquiry official of jurisdiction where an alleged offender is arrested.

(2) An inquiry official requested by the government of other country or an injured person to punish an alleged offender.

If a public prosecutor or a responsible inquiry official in holding an inquiry, as the case may be, deems that holding an inquiry is finished, the opinion according to Section 140, Section 141 or Section 142 shall be made and sent, together with a file, to the Attorney General or a person acting for him."

says that the attorney-general would already possess the authority to investigate criminal acts committed outside the Kingdom, as defined by the Criminal Procedure Code.

Because the offenses were committed outside of the Kingdom of Thailand, the law stipulates that there would be sensitive foreign relations issues.[21] Thus, the question would arise as to what would constitute a criminal offense committed outside the Kingdom, which consequently would bring the matter within the power of the attorney-general's inquiry authority on the subject by taking into account Sections 7 and 9 of the Thai Penal Code.

Thus, it could be seen as a definitive determination of offenses outside the Kingdom. The Thai Penal Code would require offenders to be punished in the Kingdom. The attorney-general would be the responsible investigator as defined in Section 20 of the Criminal Procedure Code in such a criminal case. However, in cases of criminal offenses under Section 4, Paragraph 2 and Sections 5 and 6 of the Thai Penal Code, the law "shall hold" as occurring or acting in the Kingdom. Then, Section 20 of the Criminal Procedure Code would apply, as this would be an instance that would be uniquely distinct from offenses committed within the Kingdom.

In addition to being unable to change, this would be also the case that regular investigators stay in the same area as before.[22] However, the Thai Supreme Court's judgment no. 2670/2535 B.E. 2535 (1992)[23] determined that: because acts committed on Thai ships or airplanes are considered offenses committed in the Kingdom of Thailand under Article 4 of the Thai Penal Code, Paragraph 2, Royal Thai Police investigators, who have jurisdiction to examine cases across Thailand, would have the authority to investigate this case.[24] Additionally, there are some

[21] KHANIT NA NAKHON, *Criminal Procedure Law,* (Winyuchon, 6th ed., 2003) at 318; C. VASANTASINGH, *supra* note 18 at 1
[22] Read Prosecutor 10-12 (1980), *in* KHANONG RUACHAI, *Criminal Procedure Law Book 1,* (Bangkok, 8th ed., Textbooks and Teaching Materials Project Faculty of Law, Thammasat University: 2005)
[23] Office of Judicial Affairs, *Supreme Court's Decisions (Khum Piparksa Sarn Dika)*, (Vol. 8) at 168
[24] K. RUACHAI, *Criminal Procedure Law Book 1*, *supra* note 22 at 99-100

intriguing issues in accordance with the Office of the Attorney General's determination that the criminal offenses listed in Section 4, Paragraph 2 and Sections 5 and 6 of the Thai Penal Code would be entirely distinct from those committed in Thailand. Given the sensitivity of such cases and their potential impact on national relations, it would be well worth enacting Section 20 of the Criminal Procedure Code to accomplish the goal of such legislation.

Nevertheless, if the thought, claim, or belief occurred within the jurisdiction of any court, Section 22[25] of the Criminal Procedure Code would require that such issue be resolved in that court. However, the Criminal Court would need to resolve the matter if the offense occurred outside the borders of the Kingdom of Thailand under Section 22(2). Consequently, if an inquiry was conducted in a neighborhood that fell within the jurisdiction of a specific court, the case should be resolved there.

Therefore, although neither the Thai Penal Code nor the Criminal Procedure Code provides a precise definition of TOC or a procedure specific to organized crime, both codes could be used to complete the gaps or legal loopholes.

4.2.2 Anti-Human Trafficking Act B.E. 2551 (2008)

Thailand has worked to combat human trafficking since its inception despite the country's limited resources, budget, and outdated legislation. Nevertheless, international organizations have proposed strategies for mitigating the escalating effects of human trafficking. As a result, tackling

[25] The Criminal Procedure Code Section 22 states that:

"When an offense has or is alleged or believed to have, been committed inside the district of any court, the offense shall be subject to the jurisdiction of such court, save:

(1) Where the defendant is residing or has been arrested, or the inquiry has been held, in any locality outside the district of such court, in which event may the offense be tried and adjudicated by the court having jurisdiction over such locality.

(2) Where the offense has been committed outside the Kingdom of Thailand, in which event shall the offense be tried and adjudicated by the Criminal Court and, had the inquiry been held in a locality subject to the jurisdiction of any court, by such court also."

human trafficking in Thailand to a limited extent is more difficult because such concerns require the collaboration of many parties, both from the place of origin of the human trafficking problem and neighboring countries.

Thailand signed the Palermo Convention, or UNTOC,[26] the Trafficking in Persons Protocol,[27] and the Smuggling of Migrants Protocol[28] on December 18, 2001. On August 6, 2004, Thailand placed the issue of human trafficking on its national agenda stating that drastic and immediate action was required. The victim is considered a victim, not a criminal, and should not be prosecuted but rather rehabilitated in order to aid victims of human trafficking to reintegrate into society. However, a firm stance must be taken against every form of human trafficking. Since then, Thailand has implemented the Anti-Human Trafficking Act B.E. 2551 (2008)[29] and the Anti-Participation in Transnational Organized Crime Act B.E. 2556 (2013).[30]

In general, human trafficking in Thailand remains grave because the country's geography is reported as the state of the human trafficking origin, passage, and destination.[31] As a result, the Thai government's strategy aims to deal with the prevention and suppression of human trafficking through a victim-centered approach.

[26] The Palermo Convention or UNTOC Convention, *supra* note 5
[27] The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, New York, adopted by General Assembly resolution A/RES/55/25 of Nov. 15, 2000, entered into force Dec. 25, 2003, 2237 UNTS 319; Doc. A/55/383, Thailand has signed this Protocol on 18 December 2001 and ratified it on 17 October 2013 [hereafter the Trafficking in Persons Protocol]
[28] The Protocol against the Smuggling of Migrants by Land, Sea and Air, New York, adopted by General Assembly resolution A/RES/55/25 of Nov. 15, 2000, entered into force Jan. 28, 2004, 2241 UNTS 507; Doc. A/55/383, Thailand has signed this Protocol on 18 December 2001 but not ratified this Protocol yet. [hereafter the Smuggling of Migrants Protocol]
[29] The Anti-Human Trafficking Act B.E. 2551 (2008) entered into force on 30 May 2008 in accordance with Section 2
[30] The Anti-Participation in Transnational Organized Crime Act B.E. 2556 (2013) entered into force on 26 September 2013 in accordance with Section 2
[31] U.S. Embassy & Consulate in Thailand, *Statement on 2015 Trafficking in Persons (TIP) Report,* at 331-333, available at: https://2009-2017.state.gov/j/tip/rls/tiprpt/2015/index.htm

First, the Anti-Human Trafficking Act has been in effect since 2008 in Thailand. Moreover, this Act has been frequently revised to the present day. This law was enacted because it did not restrict the offense to the illegal exploitation of women and children but rather acted more broadly. For example, these acts include luring a person into prostitution or sending them to trade outside the kingdom, using forced service labor, or begging for forced amputation for commercial purposes, and any other kind of criminal exploitation. Furthermore, human trafficking is currently conducted in an increasingly transnationally criminal manner. Therefore, to increase the effectiveness of the prevention and suppression of human trafficking, the Thai government had to comply with the obligations of the Convention and Protocol and enhance victim support and protection.[32]

It should be noted that the Anti-Human Trafficking Act B.E. 2551 (2008) does not precisely define what human trafficking is. The term "trafficking in persons", as defined in Article 3(a) of the Trafficking in Persons Protocol,[33] is more broadly defined than the term "human trafficking offense" defined in Section 6[34] of this Act. However, both definitions are equivalent to one another because they include act, means, and purposes, which are the three essential elements

[32] The Anti-Human Trafficking Act B.E. 2551 (2008), *supra* note 29 at 33, available at: https:///www.doe.go.th/prd/download/download_by_pool_file/87607

[33] Article 3(a) of the Trafficking in Persons Protocol, *supra* note 27, "trafficking in persons" is defined as: "the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs."

[34] The Anti-Human Trafficking Act B.E. 2551 (2008), *supra* note 29, does not exactly define what human trafficking is, but Section 6 of this Act defines the human trafficking offense as occurring when "[w]hoever, for the purpose of exploitation, does any of the following acts: (1) procuring, buying, selling, vending, bringing from or sending to, detaining or confining, harboring, or receiving any person, by means of the threat or use of force, abduction, fraud, deception, abuse of power, or of the giving money or benefits to achieve the consent of a person having control over another person in allowing the offender to exploit the person under his control; or (2) procuring, buying, selling, vending, bringing from or sending to, detaining or confining, harboring, or receiving a child; is guilty of trafficking in persons."

of human trafficking. Simultaneously, Section 7 defines actions that could result in a penalty. These actions include anyone who offers support or sponsorship by providing property or seeking accommodation to assist in any manner, protecting the offender from being punished, solicited, guided, or contacted as a member of a trafficking criminal organization. This person would be similarly punished for a human trafficking offense.[35] Then, Section 52 of the Anti-Human Trafficking Act provides penalties for this offense. The punishments also consider the child's age when determining the severity of the punishment. For instance, if the offense is committed against a child over the age of 15 years but under 18 years, in such a scenario, the perpetrator would be subject to imprisonment from six to 12 years. On the other hand, if the offense is committed against a minor under the age of 15 years, the offender would be subject to imprisonment of between eight and 15 years. Therefore, the age of the victim, such as a child, is more important to be addressed for this offense.[36]

Since 2015, the Anti-Human Trafficking Act has been revised (second amendment) to reiterate the commitment to establishing confidence in the practical and long-term reduction of human trafficking. Nonetheless, the second amendment rendered some provisions of this Act unsuitable for preventing and repressing human trafficking because this crime had evolved into a transnational crime over time. Hence, this Act should be amended to strengthen the prevention and repression of trafficking by compelling the general public to disclose information to government officials. As a result, public awareness would play an essential role in supplementing the duties of government officials.[37]

[35] Section 7 of the Anti-Human Trafficking Act B.E. 2551(2008), *supra* note 29
[36] Section 52
[37] The second amendment of the Anti-Human Trafficking Act B.E. 2551 (2008), *supra* note 29 at 34; YUTTHAPONG PINONONG, *Anti-Human Trafficking Act (No.2), B.E. 2558 (2015)*, available at: https://www.parliament.go.th/ewtadmin/ewt/parliament_parcy/ewt_dl_link.php?nid=31050

Following the second amendment, the issue of forced labor or service against a child was addressed.[38] With the third amendment passed in 2017, this Act was amended to establish an offense committed against a child up to 15 years of age.[39] In this regard, for the criminal who commits an offense against a child to carry out labor or offer services that may be gravely harmful and adversely affect the person's body or mind, growth or development, the penalty provisions would be altered more suitably.[40] In 2019, however, the fourth amendment lacked any clauses identifying the crimes or protecting victims from compelled labor or services.[41] As a consequence, this circumstance rendered it impossible for the Act to appropriately prohibit and combat forced labor or services as part of the illegal exploitation of trafficking offenses. Instead, it should define the nature of the offense of forced labor or services and establish methods to aid and preserve the welfare of victims with trials governed by human rights principles and the same guidelines as the victims.[42] Thus, the government of Thailand has rapidly begun to address this issue.[43]

Nevertheless, it could be observed that human trafficking in Thailand and other countries is evolving. Consequently, this Supreme Court ruling[44] could exemplify a case of human trafficking with transnational components. Therefore, the Supreme Court of Thailand decided that the first defendant and other offenders would be punished under the Anti-Human Trafficking Act B.E. 2551 (2008); Sections 6 and 52 constitute Section 83 of the Thai Penal Code as joint culprits for the offenses. For example, when the 17 victims were Lao nationals, they were persuaded to commit prostitution in Thailand. The first defendant and three or more of them shared their duties

[38] The second amendment of the Anti-Human Trafficking Act B.E. 2551 (2008), *supra* note 29 at 35
[39] I*d.*; Y. PINONONG, *supra* note 37
[40] *Id.*
[41] *Id.* at 36
[42] *Id.*; DEPARTMENT OF LABOUR PROTECTION AND WELFARE, *Handbook of Diagnosing Offenses of Forced Labor under the Amended Decree of the Anti-Human Trafficking Act B.E.2551 B.E.2562 (for officers)*, March 2020, at 1-8
[43] PATAN TONMANEEWATENA, *The Offence of "Forced Labour or Services",* Nitipat Nida L. J. Vol. 9 No. 1/2020 at 49 available at: https://so04.tci-thaijo.org/index.php/nitipat/article/download/241397/166018/843707
[44] Supreme Court Dika No. 801/2561 (2018)

by specifically persuading some victims to go into prostitution, bringing such victims from Lao PDR. to Thailand, and subsequently taking the victims to a karaoke shop to undertake prostitution. The first defendant's person in charge also received his share of prostitution. Hence, this incident involved a criminal organization that committed crimes on more than one state border. Nonetheless, it would be considered as an offense committed in Thailand since the preparation, planning, and ordering of support had been committed in another state. Therefore, it would be a TCO under Section 3 of the Anti-Participation in Transnational Organized Crime Act B.E. 2556 (2013).

In conclusion, the Thai government must address the issue of human trafficking with urgency. Consequently, the Anti-Human Trafficking Act should be continuously amended with provisions, definitions, and measures to systematically punish offenders and protect victims of this crime in accordance with the human rights principles.

4.2.3 Anti-Participation in Transnational Organized Crime Act B.E. 2556 (2013)

Thailand is currently experiencing difficulties with transnational criminal groups. This has a considerable impact on national stability and security. Nonetheless, the existing law does not make it essential for criminals to face successful prosecution for their participation in transnational criminal organizations. Thailand has also ratified the United Nations Convention against Transnational Organized Crime (UNTOC).[45] Hence, it would be appropriate to define the offense to encompass such conduct and develop procedures for investigating such violations. As a result,

[45] The Palermo Convention or UNTOC Convention, *supra* note 5

it was necessary to enact the Anti-Participation in Transnational Organized Crime Act, B.E. 2556 (2013).[46]

The Anti-Participation in Transnational Organized Crime Act B.E. 2556 (2013) came into force on September 26, 2013. There are important terms that should be addressed. First, Section 3 of this Act defines an organized criminal group as "a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes in order to obtain, directly or indirectly, financial, property or other material benefit."[47] Moreover, a serious crime is defined as a "conduct constituting a criminal offense punishable by a maximum imprisonment of at least four years or a more serious penalty."[48] As a result of the similarity between these terms and the definitions of "organized criminal group" and "serious crime" in Articles 2(a) and (b) of the UNTOC Convention, Thailand could treat both under the same guidelines of the UNTOC Convention.

Simultaneously, this Act also expressly defines the term "transnational organized crime," which differs from Article 3(2) of the UNTOC Convention. Section 3 of this Act seeks to specifically include an organized criminal group capable of committing a transnational crime. It prescribes an organized criminal group could commit a crime that has one of the following characteristics: (1) A crime is committed in more than one state, (2) a crime is committed in one state, but a substantial part of its preparation, planning, direction, support, or control takes place in another state, (3) a crime is committed in one state but involves an organized criminal group that engages in criminal activities in more than one state, and (4) a crime is committed in one state

[46] SUTTIMAT CHANDAENG, *Anti-Participation in Transnational Organized Crime Act, B.E. 2556 (2013)*, (Introduce new laws and interesting laws, Sep-Oct 2013) at 89, available at: https://www.senate.go.th/assets/portals/93/fileups/272/files/S%E0%B9%88ub_Jun/6new/new56.pdf
[47] Section 3 of the Anti-Participation in Transnational Organized Crime Act B.E. 2556 (2013), available at: http://www.ctic.police.go.th/downloads/APinTOCAct_B.E.2556.pdf
[48] *Id.*

but has substantial effects on another state.[49] This term may prevent law enforcement officials and scholars from the ambiguity inherent in the broad term "transnational in nature" under Article 3(2) of the UNTOC Convention. This would be because the term "transnational organized crime" would be interpreted to include the commissioning of either individuals or members of an organized criminal group as their criminal group's commissions. Under the term "transnational organized crime" established in Section 3, individuals who are not members of organized criminal groups and are not directly involved in the commission of a crime could still be charged as accessories to the crime.

Thailand's civil law system criminalizes participation in TOC. Section 5 is regarded as filling in the gaps to avoid escaping justice. By participating in a TOC, individuals who commit one of these crimes would be deemed to have committed an offense. This would include the actions of whoever intends to become a member or network of a TOC[50] or conspire among two or more persons to commit a serious crime concerning a TOC.[51] The individual would be directly or indirectly participating in an activity or operation of a TOC with knowledge of the organization's objectives and operations, or with the intent to conduct such a serious crime.[52] Participation in a TOC would also be conceivable if a person managed, ordered, supported, instigated, facilitated, or consulted in the commission of a serious crime by a TOC with knowledge of its goals and operations or planning.[53] Therefore, the person who participated in one of these acts would be regarded as a member of an international organized criminal group.

[49] Section 3 of the Anti-Participation in Transnational Organized Crime Act B.E. 2556 (2013)
[50] Section 5(1) of the Anti-Participation in Transnational Organized Crime Act B.E. 2556 (2013)
[51] Section 5(2)
[52] Section 5(3)
[53] Section 5(4)

In cases of offenses committed outside Thailand, a provision would be imposed to bring criminals and punish them within Thailand's territory. Section 10 of the Penal Code would be applied to Section 6 of this Act, so that if an offender committed an offense outside the Kingdom, the Thai Court would have the discretion to sentence the offender's commission within the Kingdom as an offense of participating in a TOC.[54] Therefore, Thailand's criminal justice system could bring offenders to justice if they committed crimes outside the country involving TOC.

However, it would be essential to note that this Act should have an estoppel clause to prevent individuals' legal arguments. Thus, Section 7 of this Act could state that anyone who committed a crime while participating in a TOC would be assumed to have also committed a serious crime.[55] Section 7 also mentions that anyone else involved in ta serious crime or at the meeting where it was happening would be assumed to have agreed to the serious crime.[56] Therefore, Section 7 of this Act could be comparable to Section 209 or 210 of the Thai Penal Code, which was previously imposed as the guideline for interpretation.

Furthermore, this Act also seeks to increase the punishment for government officials who commit crimes. Section 8 doubles penalties for members of the House of Representatives and other organizations, excluding officers and investigators. In addition, law enforcement personnel and investigators are subject to three times the penalties specified in Section 9[57] of the Act. Thus,

[54] Section 6 of this Act prescribes that "[w]hoever commits an offense in Section 5 outside the Kingdom, shall be punished in the Kingdom as specified in this Act." . . . "[f]or the purpose of the first paragraph, Section 10 of the Criminal Code shall be applied mutatis mutandis."

[55] Section 7 of this Act imposes that "[a]ny person who commits an offense of participating in transnational organized crime has committed a serious crime according to the objectives of transnational organized crime; other persons committing an offense of participating in transnational organized crime who exist while the serious crime is being committed or participate in a meeting, but do not object to the commission of that serious crime as well as the chief, the manager or the person holding other position in that transnational organized crime, shall all be punished according to the legal provisions concerning such serious crime."

[56] Section 7

[57] In the case of the commission of an officer, Section 9 prescribes that "[a]n officer or an investigator according to this Act who has committed an offense against his position concerning an offense in this Chapter, shall be punished three times of the penalties specified therein."

Sections 8 and 9 aim to increase the severity of punishments for government officials participating in organized criminal groups.

The Supreme Court in Thailand has decided the cases of TOC that are committed inside and outside the country. For example, first, Thailand's Supreme Court[58] determined that between September 18, 2017, and November 8, 2017, the seven defendants and others who fled together formed a panel of three or more individuals who operated as transnational criminal organizations. This criminal organization concealed its operations and intent to commit serious crimes by coordinating two or more conspiracies or networks. Additionally, they exchanged and released electronic cards issued by others to resolve the right to use them for unlawful cash withdrawals in a manner that was likely to cause harm to others or the general public. They committed serious offenses by laundering money in the Kingdom and abroad, participating directly or indirectly in the activities or actions of transnational criminal organizations, and co-organizing, ordering, assisting, and encouraging, conveniently or consulting on such serious offenses. Furthermore, they were involved knowing the activity's goal and execution and intent to commit a crime with the resolve to execute a significant offense, which was an offense punishable by four or more years in prison. This criminal group set up phone and computer systems outside the Kingdom in the form of offices, phone networks, or "Call Centers." They used voice communications via the Internet to produce randomly generated phone numbers of ordinary residents in the Kingdom. They subsequently called to defraud the general population and receive financial benefits, property, and other material interests, whether directly or indirectly. Hence, this was an offense defined by the fact that it was committed within the boundaries of more than one state and was an offense

[58] Supreme Court Dika No. 8591/2563 (2020), 14 December 2020

committed within the boundaries of a single state. However, the outcome of a substantial offense happens in another state, which involves a criminal organization committing several states, preparing to plan, order, support, or control the offense and the network of work that has a division of duties that is entangled in the Kingdom of Thailand and many other nations with the misconduct of engaging in transnational criminal organizations. From this court's decision, it was clear that the defendants were involved in this criminal group inside and outside the Kingdom.

Second, the Thai Supreme Court also examined another transnational organized crime case. The Supreme Court[59] decided that the defendants and victims deceived each victim using Facebook software between September 3, 2017, and September 4, 2017. In addition, they tended to obfuscate the victim by acting fraudulently in the "Romance scam" by informing the victim to accept delivery of a package, but was detected by the authorities of Suvarnabhumi Airport, Bangkok. As a result, the victim was obliged to send 152,500 Thai Baht (USD$4,600) to the defendant's account, which was incorrect; the facts of the case revealed that the plaintiff did not establish conclusively that the defendant acted or was involved with the criminal organization only by transferring the money through the defendant's account.

In situations involving participation in criminal organizations, government personnel should investigate gathering substantial evidence exhaustively, as sensitive evidence that demonstrates the perpetrator's affiliation with a criminal organization could be overlooked or destroyed. For example, certain sensitive pieces of evidence could show how offenders engage in illicit activity and join criminal organizations in great detail. In addition, it would provide substantial evidence of the offender's intent to commit or join a criminal organization. If government officials had not decided whether the evidence would be utilized or accepted in

[59] Supreme Court Dika No. 4913/2563 (2020), 15 October 2020

transnational criminal proceedings, the prosecution of more cases would have been hampered because it lacked clear evidence. Therefore, government officials need to collect and integrate evidence linking each offender's activity to their organizational function to prosecute transnational criminal organizations.

4.2.4 The new Thai Narcotics Code B.E. 2564 (2021) and the Act on Procedure of Narcotic Case B.E. 2550 (2007)

In Thailand, narcotics are initially governed by the Narcotics Act B.E. 2522 (1979) ("Narcotics Act"), which categorizes narcotics into five groups. Heroin, amphetamines, methamphetamines, morphine, and chemical compounds, such as acetic anhydride and acetyl chloride fall under groups 1 through 4. However, category 5 is now problematic because it contains four items that do not belong under categories 1 through 4 of the Narcotics Act. They include cannabis, kratom (*Mitragyna Speciosa*), opium, magic mushrooms, and any or all parts of cannabis/kratom, which need to be reissued to the list of narcotics under category 5.[60] In addition, numerous revisions to the Narcotics Act concerning category 5 narcotics (e.g., Narcotics Act (No. 8) B.E. 2564 (2021)) have been made to promote the commercial use of kratom as a cash crop.[61] Therefore, in May 2021, kratom was removed from category 5.

On November 8, 2021, the government of Thailand published the Act Prescribing the Use of the Narcotics Code B.E. 2564 (2021) in the Royal Thai Government Gazette to implement the new Thai Narcotics Code within 30 days after publication. All prior narcotics laws, including the Narcotics Act and its amendments, were revoked after implementing the Thai Narcotics Code. As

[60] Nuttaros Tangprasitti & Sattapat Suradecha, *New Classification of Narcotics Under Category 5 of the Narcotics Code,* (March 2022), available at: https://www.nishimura.com/en/articles/new-classification-of-narcotics-under-category-5-of-the-narcotics-code.html
[61] *Id.*

a result, the Narcotics Code is currently the principal law governing the production, import, export, sale, possession, and use of narcotics and interagency cooperation in Thailand.[62] As a consequence, cannabis was removed from category 5 of the new Narcotics Act because the eradication of cannabis was congruent with efforts by the private and public sectors to promote cannabis (and hemp) as a cash crop in Thailand's rising global consumption trends, including the food and beverage industry.[63] To fully legalize cannabis, a new categorization under category 5 of the Thai Narcotics Code has been issued by the Ministry of Public Health (MOPH) as a secondary law.[64] As a result, cannabis would be removed from category 5 and legalized for further use once the notification goes into force. However, this situation does not include cannabis or hemp extractions containing greater than 0.2% of tetrahydrocannabinol (THC) by weight, as required by the notification.[65]

In Thailand, the manufacture, import, export, sale, possession, and use of narcotics are prohibited unless permission is obtained. Any party intending to seek permission may apply to the Minister of Public Health, Secretary-General of the Food and Drug Administration, or the person selected by the latter under the ministerial regulation's rules, procedures, and circumstances.[66] However, permission may be obtained for educational, medical, scientific, and industrial purposes. In cases of exemption, the manufacture, import, export, sale, or possession of narcotics may be permissible for certain professions.[67] The medical, dental, government agencies, and the Thai Red Cross Society are among those professions governed by the Minister of Public Health and under

[62] N. Tangprasitti & S. Suradecha, *supra* note 60
[63] KPMG, Cannabis *and hemp to be removed from the narcotics list,* Legal News Update, Issue 11 (March, 2022), available at: https://home.kpmg/th/en/home/insights/2022/03/legal-news-flash-issue-11.html
[64] *Id.*
[65] *Id.*
[66] N. Tangprasitti & S. Suradecha, *supra* note 60
[67] *Id.*

the supervision of the Narcotics Control Committee. Moreover, the possession of certain narcotics by individuals who have been prescribed them by a medical, dental, or veterinary professional to treat a medical condition is exempt from the requirement of a permit.[68]

It should be mentioned, however, that this new Thai Narcotics Code imposes severe punishment for serious narcotics offenses and crimes involving criminal organizations. Serious narcotics charges involve the importation, exportation, distribution, or possession of narcotics unless they involve narcotics possession for use.[69] This includes the conspiracy to support, aid, or attempt to commit such an offense.[70] In addition, Section 127, Paragraph 1 stipulates that anyone who conspires with two or more individuals to conduct a serious narcotics offense would be subject to a five-year prison sentence.[71] Furthermore, the conduct of such a serious narcotics offense with characteristics of a criminal organization would constitute an aggravating circumstance under Paragraph 3 of Section 127 in conjunction with a double offense under Paragraph 1.[72] The concept of an organized criminal group in Section 127, Paragraph 4 would be comparable to the definition of the organized criminal group in Section 3 of the Anti-Participation in Transnational Organized Crime Act B.E. 2556 (2013).[73] As a result, the new Thai Narcotics Code also aims to punish offenses relating to organized criminal groups.

On the other hand, the Act on Procedure of Narcotic Case B.E. 2550 (2007)[74] is Thailand's first narcotic procedural law. This Act states that if any provision or procedure of this Act has not been specifically prescribed, the provision of procedure of the Criminal Procedure or other laws

[68] N. Tangprasitti & S. Suradecha, *supra* note 60
[69] Section 1 of the Narcotics Code 2564 (2021)
[70] *Id.*
[71] Section 127 paragraph 1
[72] Section 127 paragraph 3
[73] Section 127 paragraph 4; Section 3 of the Anti-Participation in Transnational Organized Crime Act B.E. 2556 (2013), *supra* note 47
[74] The Act on Procedure of Narcotic Case B.E. 2550 (2007), available at: https://www.oncb.go.th/PublishingImages/Pages/NARCOTICS_LAW/Act_on_Procedure_of_Narcotic.pdf;

governing the establishment of the specific courts would be used for applying to be inconsistent with this Act.[75] This provision could fulfill narcotics prosecution by utilizing other related procedural laws.[76] Moreover, this Act grants the entitlement to an undercover operation with a view to the investigation of an offense relating to narcotic law.[77] With regard to undercover, this infers that "all operations to conceal the competent official's status or the aim of operations."[78] The competent official could also misrepresent other persons in a false direction or cover the competent official's operations in secret.[79] The undercover operation appears within Section 19 of the Anti-Participation in Transnational Organized Crime Act B.E. 2556 (2013) and Article 20 of the UNTOC Convention. Therefore, the undercover operation would be necessary for investigation because it would essentially assist government officials in collecting relevant evidence.

However, this Act also imposes specifically different prescriptions for prosecution. Section 22 of this Act allows for the prosecution of an offender for a narcotic offense punishable by death or life imprisonment unless the offender is prosecuted and brought to court within 30 years from the date of the commission of the offense.[80] The prescription period has been increased from 20 to 30 years because it would assist in furthering the suppression of narcotic offenses that would be more sophisticated. If the 30-year prescription period expires, the narcotic case would be irreversible. Then, the defendant could not be arrested again, prosecuted, or convicted because the narcotics case would be a serious crime.[81] Consequently, this Act explicitly expands the

[75] Section 3
[76] *Id.*
[77] Section 7
[78] Section 7 paragraph 2
[79] *Id.*
[80] Section 22
[81] Thai Legal Division, Office of the Council of State*, Drug Prosecution Procedure Act B.E. 2550 (2007): Description of the principles and background of sections,* (4th ed. Oct. 2017) at 179-180

prescription for the prosecution of a narcotics case, thereby making it more important for government officials to collect evidence and apprehend offenders.

According to the new Thai Narcotics Code, Thailand is the first Southeast Asian nation to reform its drug control legal framework. The development of the new Thai Narcotics Code is a landmark, and international organizations are eager to participate.[82] This legislation would prompt other nations in the area to adopt similar measures in the near future. In Thailand, an international organization, such as UNODC encourages and fosters interagency dialog.[83] Hence, the opportunity to alter sentencing thresholds would be preserved; low-level drug offenses or possession should not be considered serious or even a crime.[84] In Thailand and Southeast Asia, drug-related charges account for as much as 80% of the prison population due to overcrowding.[85] Thus, this new Narcotics Code could be implemented as an alternative for those who use or possess narcotics for personal use. In addition, UNODC has continued to provide Thailand and the governments of Southeast Asia and the Pacific region with technical assistance to build evidence-based policies consistent with international human rights standards.[86] As such, respect for human rights would be promoted and implemented through all drug-related services and programs.

Therefore, the new Narcotics Code and the Act on Procedure of Narcotic Case are meant to deal with persistent drug problems, particularly those involving narcotics users and possession by allowing them to receive adequate treatment rather than be prosecuted as significant traffickers.

[82] United Nations, *Thai agencies and UNODC discuss the future of new Narcotics Code,* available at: https://www.unodc.org/roseap/2022/04/thailand-new-narcotics-code/story.html
[83] United Nations, *Thai agencies and UNODC discuss the future of new Narcotics Code, supra* note 82.
[84] *Id.*
[85] *Id.*
[86] *Id.*

4.2.5 Anti-Money Laundering Act, B.E. 2542 (1999)

Money laundering is one of the fundamental offenses under the UNTOC Convention,[87] which requires state parties to take legal action to criminalize the laundering of property acquired through crime.[88] Furthermore, criminals and organized criminal groups who commit certain types of crimes use money or property associated with the crime to engage in various kinds of money laundering.[89] In addition, they use this money or property to benefit the crime, thus making it more difficult to suppress. Simultaneously, existing laws (at the time of enactment of this Act.) made it impossible to suppress money laundering or take action against that money or property as it should.[90] Therefore, to break the cycle of such crimes, it would be necessary to implement effective measures to prevent and combat money laundering. Thus, the Anti-Money Laundering Act, B.E. 2542 (1999) was enacted.[91]

However, some provisions of the Act are inappropriate for the prevention and suppression of money laundering. Consequently, the Anti-Money Laundering Act has now been amended.[92] As a result, this most recent amendment seeks to strengthen the provisions regarding financial institution-related offenses, property related to the offenses, the nature of money laundering offenses, and the measures necessary to implement and adhere to international standards effectively.[93]

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[87] Article 6 of the Palermo Convention or UNTOC Convention, *supra* note 5
[88] Article 6 of the Palermo Convention or UNTOC Convention, *supra* note 5
[89] Anti-Money Laundering Act, B.E. 2542 (1999), published in the Government Gazette Vol. 116, Part 29 Gor. On the 21st April 2542, at 30-31 available at : https://www.amlo.go.th/amlo-intranet/media/k2/attachments/amlaYupdateY091017_3831.pdf
[90] Anti-Money Laundering Act, B.E. 2542 (1999), *supra* note 89 at 30-31
[91] *Id.*
[92] Anti-Money Laundering Act, B.E. 2542 (1999) 5th amendment B.E. 2558 (2015), published in the Government Gazette Vol. 132, Part 98 Gor page 1. On the 8th October 2558
[93] *Id.* at 33

The Anti-Money Laundering Act was enacted to deter and prosecute offenders who routinely use money or property obtained through criminal activities to perform particular acts in order to convert these assets or money into lawful property. Additionally, this Act imposed some predicate offenses[94] associated with organized crime, such as offenses involving narcotics,[95] human trafficking,[96] and participation in TOC[97] according to Section 3. Moreover, Section 3 of this Act defines "asset involved in an offense." This definition could assist in examining the circumstances in which there would be probable cause to believe that there could be a transfer, distribution, placement, layering, or concealment of any asset related to the commission of an offense.[98] Accordingly, such assets would be restrained or seized by the Transaction Committee.[99] These assets would include: "(1) money or property derived from a commission of a predicate offense, or from aiding or abetting in the commission of a predicate offense, (2) money or property derived from the sale, distribution, or transfer in any manner of the money or asset in (1), or (3) fruits of the money and property in (1) or (2)."[100] Regardless of how many times the assets in items (1), (2), or (3) had been sold, distributed, transferred, or transformed, or found,[101] whoever was in possession of, was receiving a transfer of, or was listed as the owner of such an asset in a registration or record would be considered as committing an offense.[102] As a result, the Anti-Money Laundering Act was enacted to enhance government officials to perform their duties and prosecute offenders or consider seizing those assets involving criminal proceedings.

[94] Section 3 of the Anti-Money Laundering Act, *supra* note 89
[95] Section 3(1)
[96] Section 3(2); Section 14 of the Anti-Human Trafficking Act, B.E. 2551 (2008), *supra* note 29
[97] Section 22 of the Anti-Participation in Transnational Organized Crime Act, B.E. 2556 (2013), *supra* note 30
[98] Section 3 of the Anti-Money Laundering Act, *supra* note 89
[99] Section 48
[100] Section 3
[101] *Id.*
[102] *Id.*

Moreover, this Act provided consideration to whoever was involved in the commission of money laundering. Section 5 aimed to punish whoever "transfers, receives the transfer, or charges the form of an asset involved in the commission of an offense, for the purpose of concealing or disguising the origin or source of that asset, or for the purpose of assisting another person either before, during or after the commission of an offense to enable the offender to avoid the penalty or receive a lesser penalty for the predicate offenses."[103] It also stated that whoever "acts by any manner which is designed to conceal or disguise the true nature, location, sale, transfer, or rights of ownership, of an asset involved in the commission of an offense."[104] Consequently, the offender would be deemed to have committed a money laundering offense.[105] This Act was also amended to include whoever acquired, possessed, or used property knowingly at the time of acquiring, possessing, or using that property as property in connection with the offense to have similarly committed a money laundering offense.[106] It should be noted that this provision aimed to punish anyone involved in the commission of an offense with the intent to bring the offender effectively to justice. Therefore, this provision would assist law enforcement agencies in examining who and which assets would be associated with the money laundering offense.

Due to the activities of organized criminal groups, these individuals commit transnational crimes involving money laundering. Consequently, this Act established penalties for anyone who committed money laundering outside Thailand's borders. Section 6 of this Act stipulates that anyone who commits a money laundering offense, even if committed outside of Thailand, would be punished in Thailand.[107] Such circumstances would include "either the offender or co-offender

[103] Section 5(1)
[104] Section 5(2)
[105] Section 5, paragraph 2
[106] Section 5(3)
[107] Section 6

is a Thai national or resides in Thailand."[108] Although the offender could be an alien, the offender would be punished "if the offender has taken action to commit an offense in Thailand or is intended to have the consequences resulting therefrom in Thailand, or the Royal Thai Government is an injured party."[109] However, the alien offender would still be considered an offense in the state in which "the offense is committed under its jurisdiction, and if that individual appears in Thailand and is not extradited under the Extradition Act."[110] Hence, it would be possible to examine whether the principle of double jeopardy under Section 10 of the Penal Code[111] would apply to this situation in order to uphold the standards of human rights. Therefore, this provision aimed to expand Thailand's jurisdiction to prosecute offenders who committed money laundering offenses outside the country but were punishable in Thailand.

According to the money laundering offenses, the court could impose the same penalty on anyone who undertook the following activities as they would be a principal offender.[112] These actions under Section 7 include assisting a criminal before or during the commission of a crime.[113] In addition, procuring or supporting with money or other assets, transportation, shelter, or any other object would be included.[114] This would also consist of any additional activities undertaken to aid the offender in evading or escaping punishment for a crime or to benefit from the commission of a crime.[115] The court may not impose a lesser sentence than that prescribed by the law for this offense if the offender obtained or provided money or assets, shelter, or a hiding place to aid his/her father, mother, son or daughter, wife or husband in evading capture.[116] Furthermore,

[108] Section 6(1)
[109] Section 6(2)
[110] Section 6(3)
[111] Section 6 paragraph 2
[112] Section 7 paragraph 1
[113] Section 7
[114] Section 7(1)
[115] Section 7(2)
[116] Section 7 paragraph 2

whoever attempted to commit a money laundering offense would receive the same penalty as the law would provide for a successfully committed offense under Section 8.[117] Thus, Sections 7 and 8 would be imposed as aggravating circumstances for fulfilling the legal loopholes of offenders escaping justice.

Therefore, the Anti-Money Laundering Act aimed to prevent and suppress money laundering offenses under the requirements of the UNTOC Convention and still remains an issue that affects the performance of the relevant sectors, which must be improved and addressed in the issue of TOC in Thailand.

4.2.6 Organic Act on Counter Corruption B.E. 2561 (2018)

The Organic Act on Counter Corruption B.E. 2561 (2018) aims to assist the National Anti-Corruption Commission ("NACC") in effectively preventing and suppressing corruption. According to this Act, its first promulgation and publication in the Royal Thai Government Gazette had been issued since B.E. 2542 (1999)[118] before the United Nations Convention against Transnational Organized Crime 2000 was entered into force.[119] This Act has now repealed and replaced its various amendments that criminalize bribery by legal entities, such as corporations and foreign juristic persons.[120] Although Article 8 of the UNTOC Convention made corruption one of the fundamental offenses,[121] this Act has made legal entities criminally accountable for

[117] Section 8
[118] The Organic Act on Counter Corruption B.E. 2542 (1999) was published in the Government Gazette Vol. 116 part 114 Gor, on the 17th September 2542(1999), available at: https://www.soc.go.th/wp-content/uploads/2019/03/1.pdf; now the Organic Act on Counter Corruption B.E. 2561 (2018) published in the Government Gazette Vol. 135 part 52 Gor, on 21st July 2561 (2018), available at: https://www.nacc.go.th/download/article/article_20180723163853.pdf
[119] Criminalization of Corruption under Article 8 of the Palermo Convention or the UNTOC Convention, *supra* note 5
[120] JOHN FRANGOS, *Thailand Passes New Anti-Corruption,* Tilleke&Gibbins (Aug 20, 2018), available at: https://www.tilleke.com/insights/thailand-passes-new-anti-corruption-law/
[121] *Id.*

bribes paid to Thai state officials, foreign state officials, and intergovernmental organization officials.[122] In addition, the legal entity would be accountable if the bribe was given by a related person, such as employees, joint venture partners, agents, etc.[123] As a result, this Act specifically expanded the definition of legal entities showing that the Thai government was seeking to address the corruption problem in Thailand further.

Moreover, this Act provided the NACC the authority and responsibility to carry out its duties. The Act specifies in Section 28 the NACC's authority to hear and render decisions on cases involving claims against political officeholders, the judiciary of the Constitutional Court, and incumbents in independent organizations.[124] The offender would be held accountable under this Act if he/she had affluent circumstances, was corrupt in his/her duties, deliberately performed his/her duties, or exercised power contrary to the Constitution or the law provisions, or if he/she grossly violated or failed to adhere to ethical standards.[125] The NACC could also determine that an extraordinarily affluent public official committed a corruption offense in the performance of his/her duties, a crime against a position of official responsibility, or a crime against a position of duty in the judiciary.[126] Due to the Act, however, the NACC could prosecute other related offenses and would have the obligations and other powers under other laws where those offenses would involve public officials or were related to a corruption offense.[127] Hence, it would be essential to note that the NACC could fulfill its tasks under the Anti-Money Laundering Act when it examined or considered such cases to render opinions or assess the offender's commission if the cases

[122] JOHN FRANGOS, *supra* note 120.
[123] *Id.*
[124] Section 28 of the Organic Act on Counter Corruption B.E. 2561 (2018), *supra* note 118
[125] *Id.*
[126] *Id.*
[127] *Id.*

entailed money laundering offenses.[128] As a result, the NACC would be responsible for the authority under this Act or any other laws relating to the prevention and suppression of corruption to be carried out.

Nonetheless, the NACC also has the authority to take action against any other person who is the principal, instigator, or accessory, such as the giver, the person who requests or receives a gift, or the legal entity involved in the provision of property or any other benefit to a government official.[129] In this circumstance, any person could be an individual or even an organized criminal group member. Because of the activities of organized criminal groups, they seek opportunities to bribe officials to pave the way for benefiting their illegal businesses. Additionally, organized criminal groups are believed to exert significant influence over Thai government officials.[130] As a result, state embedded corruption is pervasive in the nation, and numerous public servants at all levels of government are involved in organized crime, either directly or indirectly.[131] For example, there have been cases of corrupt government officials facilitating human trafficking through Thailand and state embedded actors allowing organized criminals to significantly influence the country's political elections.[132] Another example is organized criminal groups that operate in the country and have connections to foreign actors from other Asian nations and small European groups.[133] In Thailand, these foreign organized crime groups are involved in illegal markets, including drug trafficking, arms trafficking, human smuggling, wildlife trading, money laundering, and cybercrime.[134] Some foreign criminal organizations are also believed to

[128] Section 38
[129] Section 30
[130] Global Initiative Against Transnational Organized Crime, *Global Organized Crime Index: Thailand,* (2021), available at: https://ocindex.net/country/thailand
[131] *Id.* at 5
[132] *Id.*
[133] *Id.*
[134] *Id.*

substantially impact parliamentary elections.[135] Therefore, the NACC and other law enforcement officials should not overlook opportunities for organized criminal groups to engage in bribery with any level of public leadership. Additionally, it is possible that a member of a criminal organization is assisting these public officials in concealing their illegal activities.

As a result, the Act could assist the National Anti-Corruption Commission and other government officials in examining the possibility of corruption offenses. This offense could be committed by public officials of all levels, or anyone engaged in bribery of public officials, particularly organized criminal groups. In the case of organized crime, law enforcement officials should carefully examine their activities, as evidence could be concealed and challenging to obtain due to corruption-related offenses.

4.2.7 Mutual Assistance in Criminal Matters Act, B.E. 2535 (1992)

Transnational crime threatens the country's stability, and more sophisticated technological advancements have been produced. As a result, the nature of the offense has been extended beyond the country, such as drug trafficking or economic crimes. This instance has impacted the enforcement of criminal laws and resulted in legal complexity. In the face of such challenges, each government has devised a strategy of assistance and collaboration to prevent and suppress crime. First, it provides mutual assistance in criminal situations, such as extradition, prisoner transfers, and mutual assistance in criminal cases. Then, bilateral, or multilateral agreements or treaties would be used as international agreements.[136]

[135] Global Initiative Against Transnational Organized Crime, *supra* note 130 at 5.
[136] ARIYAPORN BODHISAI, *Guidelines for providing international assistance in criminal matters,* (Julniti: Nov.-Dec. 2013) at 149-156 [translation]

This Act is the second amendment to the Mutual Assistance in Criminal Matters Act, B.E. 2535 (1992),[137] since B.E. 2559 (2016),[138] when this Act was passed. It establishes a legal framework for collaboration in the judicial process, including the supply of documents, evidence, and witness examination, the forfeiture or confiscation of assets, and the transfer of imprisoned persons for witness examination, which is also an issue stipulated in international treaties.

According to this Act, the attorney general or a person designated by him/her would be the central authority,[139] which means a person with powers and duties to coordinate in providing assistance to a foreign state or seeking assistance from a foreign state.[140] Before providing assistance to a foreign state, the central authority would consider the following criteria.[141] First, Thailand could assist the requesting state even when it had no treaty on mutual assistance in criminal matters with that state.[142] However, the requesting states would need to demonstrate that they would provide comparable assistance if Thailand requested it.[143] Second, unless Thailand and the requesting state had a treaty on mutual assistance in criminal matters, the Act constituting assistance would be a crime punished by one of the Thai law's offenses.[144] Additionally, the treaty's wording would state the opposite.[145] As a result, any assistance would need to adhere to the Act's terms.[146] Third, Thailand would reserve the right to refuse assistance requests that could jeopardize Thailand's sovereignty or other vital public interests or would be connected with a

[137] The Mutual Assistance in Criminal Matters Act, B.E. 2535 (1992), available at: http://web.krisdika.go.th/data/outsitedata/outsite21/file/Mutual_Assistance_in_Criminal_Matters_Act_BE_2535_(1992).pdf
[138] The Second Amendment of the Mutual Assistance in Criminal Matters Act B.E. 2559 (2016), available at: https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/103543/125827/F1790091798/THA103543.pdf
[139] Section 6 of the Mutual Assistance in Criminal Matters Act
[140] Section 4
[141] Section 9
[142] Section 9(1)
[143] *Id.*
[144] Section 9(2)
[145] *Id.*
[146] *Id.*

political offense.[147] Finally, the assistance would not be related to military offenses.[148] Consequently, these criteria would be prescribed as identical to the Model Treaty on Mutual Assistance in Criminal Matters,[149] which established the fundamental principle that all instances of mutual assistance would need to be taken into consideration.

Nevertheless, the central authority would have the authority and responsibility to assist state and Thai government agencies that request assistance.[150] Such power and duty would be that the central authority would receive a request for assistance from a requesting state and transmit it to the competent authority.[151] A Thai government agency could request assistance from the central authority to deliver assistance to a requested state.[152] However, the central authority would consider which circumstances should provide or seek assistance to others.[153] When the central authority would assign the work of assistance to the competent authority, the central authority could monitor and accelerate the work of assistance from the competent authority in order that such assistance to a foreign state would be completed promptly.[154] The central authority would also issue regulations or announcements to carry out the implementation of this Act.[155] Therefore, the central authority would need to consider its role when assisting Thai government agencies and states that request or receive assistance from Thailand. Furthermore, this would be due to the role of the central authority, which should coordinate providing or seeking assistance for a foreign state in international relations.

[147] Section 9(3)
[148] Section 9(4)
[149] Report of the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, U.N.Doc.A/CONF.144/28 (1990) at 75, as adopted by G.A. res. 45/117, annex, 45 U.N. GAOR Supp. (No. 49A) at 215-19, U.N. Doc. A/45/49 (1990), and subsequently amended by G.A. res. 53/112
[150] Section 7
[151] Section 7(1)
[152] Section 7(2)
[153] Section 7(3)
[154] Section 7(4)
[155] Section 7(5)

Additionally, this Act further imposes procedural conditions under which other states could seek assistance from Thailand under two conditions. First, if a state has such a treaty with Thailand and is seeking assistance from Thailand, that state should file a request for assistance to the central authority or the person designated by the attorney general for assistance.[156] The request would need to satisfy the conditions for the assistance by this Act. Once the request for assistance was completed, the central authority would forward the request to the responsible authorities. In this instance, the central authority would send the request to a special prosecutor for the case's approval. Unless the board of directors determines otherwise, the central committee would also be consulted if the central committee's opinion conflicted with the central authority's decision. As a result, the central authority would need to submit such opinions and judgments to the Prime Minister for consideration. If the Prime Minister issued any instructions, they would need to be followed.[157]

However, if the central authority determined that the request did not meet the criteria for assistance, it would be refused. For example, the request would relate to military offenses, a subject who could be able to assist in certain instances, the request did not adhere to the procedure, or the evidence was incorrect. The central authority would then justify its refusal to provide assistance or notify the requesting states of any conditions or failures. However, if the central authority approved the request, it would obstruct the investigation, prosecution, or other criminal procedures in Thailand. Consequently, the central authority would either delay implementing the request or act on it by establishing the necessary circumstances, then notify the requesting states of the central

[156] Section 6
[157] ARIYAPORN BODHISAI, *Guidelines for providing international assistance in criminal matters,* (Julniti: Nov.-Dec. 2013) at 154 [translation]

authority's decision about assistance to be considered as a ceasefire unless the Prime Minister instructed otherwise.[158]

After the special prosecutor for the case received the matter from the central authority, the special prosecutor for the case would notify the prosecutor to proceed with that request. The prosecutor would have the power to file a complaint with the court against the person who would testify or the person who would possess or maintain the witness, document, or material evidence that would be domiciled or have an address in the court's area to examine such evidence. When the court has completed its examination of the evidence, the prosecutor would need to apply for a record of the testimony and any other evidence submitted to the special prosecutor for the case. Finally, the special prosecutor would send the results of the operation and the relevant documents and items to the central authority for further delivery to the requesting state.[159]

Second, if a state did not have a treaty with Thailand on mutual assistance in criminal matters, it would be unable to do so and would need to instead submit a request through diplomatic channels. This Act makes no provision for how to behave in practice. Consequently, the requesting state would need to submit a letter requesting assistance to the requested state's embassy/consulate. Alternatively, a request could be made directly to the Royal Thai Embassy/Consulate-General in that nation through the requester's Ministry of Foreign Affairs. Once received, the state department would forward the item to the appropriate central authority. The central authority would then receive the case; it would be up to the central authority to determine if the request would fall under the assistance criteria. If the request met the eligibility criteria for assistance, the central authority would notify the requesting state that assistance would be offered. However, the requesting states

[158] Section 11 of the Mutual Assistance in Criminal Matters Act; A. BODHISAI, at 155
[159] A. BODHISAI, at 155

would need to confirm in writing that they would offer Thailand comparable assistance in the future.[160]

Since the central authority would receive the request for assistance from the requesting state, the authorized officers would take the appropriate action. Once this was completed, the central authority would be informed of the conclusion of the operation and any documents or items linked with it. If the competent authorities could not make the request, they would need to notify the central authority. Since the authorities would have informed the central authority of the results, the central authority would continue to provide the requesting state with the operation's results and any relevant documentation and items.[161]

In conclusion, while transnational crime has evolved and altered tremendously due to technological advancements and advancements in transportation, communication is convenient and rapid and is not confined to domestic situations. Additionally, criminal assembly is currently carried out as a network across the borders of numerous countries. As a result, each country's criminal justice system could not be effectively avoided and controlled independently. Thus, the prevention and suppression of such crimes would require international cooperation (e.g., mutual assistance in criminal matters) to support one another. This mutual assistance in criminal matters would assist in criminal issues in apprehending criminals, regardless of whether the individual had fled to the territory of another country, to prevent and suppress crime.

4.2.8 Extradition Act, B.E. 2551 (2008)

Criminal activity is regarded as one of the risks to the general public and social order that countries must address by prevention, suppression, deterrence, or desecration. Due to the current

[160] A. BODHISAI, at 155
[161] Sections 13 and 14 of the Mutual Assistance in Criminal Matters Act

political and economic climate, significant advances have been made in science and technology. These circumstances have complicated and made crime more difficult to prove guilt in certain types of crime, such as cybercrimes and financial crimes. In addition, globalization has made many offenses able to be committed across borders between two or more states. For example, suppose a serious offense occurred in one state, and in that case, the individual fled to another state, and the harmed state would be unable to prosecute the individual due to violating the state's sovereignty; thus, the collaboration of these two states would be required to close or plug a legal loophole that would allow for the return of the fugitive offender living in one state to prosecution in another damaged state. Therefore, the requesting state would need to request that the requested state, where the perpetrator resides or hides, extradite the individual for criminal prosecution and punishment under the requesting state's laws. This type of collaboration is referred to as international criminal cooperation or "extradition".

International cooperation is derived from diplomatic relations governed by laws, the details of which are codified in the form of treaties for a country's common good. On the other hand, extradition is a cooperative effort between the state and the accused or defendant to return them to the country of the request for criminal charges or to enforce the decision.[162] Extradition cooperation as a concept and theory is based on four cooperation channels:[163] treaty principles, reciprocity principles, friendly relationship principles, and domestic law principles. Moreover, the state's channel choice would determine the cooperative policy by legislation. As a consequence, it would be essential to study the procedure to perform it correctly and efficiently.

[162] KHANIT NA NAKHON, *Criminal Procedure Law,* (Winyuchon, 9th ed., 2018) at 467
[163] M. CHERIF BASSIOUNI, *International Extradition: United States law and Practice,* (Oxford U. Press, 6th ed., 2014) at 8

Thailand distinguishes two modes of collaboration: treaty-based cooperation and reciprocal cooperation. These have been founded on the state's ideas of equality. The treaty's principles would become evident when the state would need to adhere to the agreement in all aspects.[164] However, there are frequently practical difficulties associated with reciprocal principles because the principle of equality would adhere to it rigidly without fully comprehending the purpose. Furthermore, consideration would frequently employ exaggerated analogies. Additionally, it would be utilized to create circumstances and procedures. To attain legal equality without being equal, equality should be applied only to the amount necessary to balance the two states' laws. This could be accomplished by applying two concepts: the employment of the principles of the resemblance between the two states' laws to the extent they exist. Moreover, the concept of sameness may be invoked as long as it did not violate the laws of a given state.[165] For instance, the primary one categorically refuses the extradition of a state national.[166]

Thailand has extradition treaties with 14 countries comprising Bangladesh, Belgium, Cambodia, Canada, China, Fiji, Indonesia, Lao PDR., Malaysia, the Philippines, South Korea, the United Kingdom, and the United States. Moreover, Australia, Canada, Fiji, and Malaysia have all been interested in claiming the Siamese-British Extradition Treaty based on succession principles. [167] Previously, the Thai government sought the extradition of individuals and collaborated with other countries during the process. The Extradition Act, B.E. 2551 (2008), then served as the legal foundation for its implementation. This would require the attorney general to

[164] JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 371-74 (Oxford U. Press, 8th ed. 2012)
[165] M. CHERIF BASSIOUNI, *supra* note 163 at 497
[166] *Id.* at 499
[167] TASSANA PRADITKIT, *Extradition,* (The Far Eastern University, year 3 Vol. 1, June-Nov. 2009) at 3, available at: http://journal.feu.ac.th/pdf/v3i1t2a3.pdf

serve as the central authority with the ability to review the requests for extradition. Then if approved, the request would be delivered diplomatically through the Ministry of Foreign Affairs.

In general, Thailand and other states that have received extradition requests should consider the rule of extradition.[168] First, extraditable offenses are defined under international and interagency treaties.[169] In the absence of bilateral treaties or agreements on criminal cooperation, the reciprocal principle would apply if the requesting and requested states had agreed to offer each other criminal prosecution assistance and reciprocate in kind.[170] As a critical concept outlined in the Model Treaty on Extradition and this Act, the principles of double criminality,[171] double jeopardy,[172] and the rule of specialty[173] would be followed. In addition, the maximum sentence for an extraditable offense would be greater than one year, as extradition is a form of international criminal cooperation that requires formalities (diplomatic) and processing costs.[174] Nevertheless, it would need to be a case that would satisfy the requirements for both states to hold the prescription of responsibility, i.e., at the prescription of time in both the requesting state and the requested state of extradition.[175] It would also be crucial to note that a person would need to be present in the requested state where the perpetrator had crossed the border to avoid extradition.

On the other hand, when these exceptions[176] were applied, an extradition request would be refused. Furthermore, political offenses are not considered actual crimes but rather ordinary

[168] ABHINAYA LADCHAVEE, *The use of state jurisdiction against offenders by means of extradition* (Suttiparitut, Sept-Dec, 2010) at 133-138
[169] A. LADCHAVEE, at 133
[170] *Id.* at 133-34; Section 9 of Extradition Act, B.E. 2551 (2008), available at: https://asean.org/wp-content/uploads/2021/01/ExtraditionACTofThailand.pdf
[171] *Id.* at 134; Section 10 of Extradition Act
[172] *Id.*.; Section 7
[173] *Id.*; Section 9
[174] *Id.*
[175] *Id.*; Section 9
[176] TASSANA PRADITKIT, *Extradition,* (The Far Eastern University, year 3 Vol. 1, June-Nov. 2009) at 4, available at: http://journal.feu.ac.th/pdf/v3i1t2a3.pdf

transgressions due to the absence of concepts corresponding to the state's current power.[177] There are substantial grounds for the requesting state to believe that the extradition request would be intended to carry out criminal proceedings or punish the person requested for extradition.[178] As a result of his/her race, religion, nationality, political opinion, or status, the individual would be asked to submit to the judicial proceedings and be tainted by the factors as mentioned earlier.[179] Moreover, suppose offenses against special laws, such as those characterized administratively, include offenses under the forest law, hunting laws, printing offenses, religious offenses, and offenses relating to military law,[180] in that case, these examples would be an exception of an extradition request. The violating nationals would not be extradited to other states for prosecution in civil law countries, as the state would need to defend its nationality and could lack faith in the other states' justice.[181] However, extradition is not prohibited in common law countries, even for their residents, because they adhere to the idea that offenders would be prosecuted regardless of where they committed their crimes.[182] The death penalty also serves as the template for exceptions.[183] Finally, the insufficiency of evidence would allow member states to refuse extradition if the evidence was insufficient under the requested state's statute on witness characteristics.[184] Therefore, these exceptions would serve the rights of individuals when they were met for the refusal of an extradition request.

To summarize, extradition is a topic that affects both international relations and each state's sovereignty. International law does not require a state to extradite a person to another state on a

[177] A. LADCHAVEE, *supra* note 168, at 135
[178] *Id.* at 136-37
[179] *Id.*
[180] *Id.* at 136
[181] *Id* at 136-37
[182] *Id.*
[183] *Id* at 137; Article 4(d) of the Model Treaty on Extradition
[184] *Id.*; Article 3 of the Model Treaty on Extradition

general basis. Nonetheless, extradition is a method or measure of legal cooperation between countries designed to pursue offenders in one country who then flee to another and conduct crimes in the shape of a multinational organization to be extradited and prosecuted for the offense committed by the individual. As a result of this teamwork, the judicial and law enforcement systems would remain realistic and tangible. Extradition procedures and processing are designed to maintain order through state-to-state collaboration. Extradition is also consistent with a state's obligation to maintain peace in society. Thus, it is a universally recognized milestone by the international community.

4.3 Conclusion

Laws preventing transnational crime are always in need of improvement. In addition, various more complicated offenses have developed due to the transnational criminal organizations themselves. As a result, many of the existing laws in Thailand to combat and prevent transnational crime, both the substantive and the procedural laws, were applied before Thailand ratified the UNTOC Convention. New legislation was adopted in reaction to the subsequent anti-transnational crime campaign. However, any legal issues would need to be addressed, altered, or updated to be applied to the future problem of transnational crime. In that case, the issue of transnational crime would need to be revised or updated to accommodate the future problem of transnational crime. Therefore, Thailand’s government should update or adopt legislation to aid law enforcement and make it simpler to safeguard victims of TOC.

Chapter 5

International and National Organizational Resources for Combatting Transnational Organized Crime in Thailand

5.1 Introduction

As transnational organized crime grows in scope both globally and in Thailand, the pattern of offenses is becoming more sophisticated and widespread. To tackle transnational organized crime globally, governments at all levels - international, regional, and national - must collaborate and develop successful tactics. Additionally, these institutions should share reasonably rigid ideas about transnational organized crime, its causes, and how to respond to it. This shared understanding of what approaches are and are not effective assists them in developing a broadly similar policy response. This chapter discusses all of the international, regional, and national institutions that can help Thailand fight against transnational organized crime.

5.2 International Level

This section will discuss the International Criminal Court (ICC), the Terrorism, Transnational Crime and Corruption Center (TraCCC), the International Financial Action Task Force (FATF), the United Nations Office on Drugs and Crime (UNODC), and Interpol at the international level.

5.2.1 International Criminal Court (ICC)

International criminal tribunals and the International Criminal Court (ICC) have jurisdiction over a limited number of "core crimes," including genocide, war crimes, crimes against humanity, and aggression.[1] As a result, the perpetrators of these crimes and their collaborators will no longer be able to evade prosecution and extradition by concealing themselves behind national legal impediments.[2] Although attempts were made to include drug trafficking in the Rome Statute, the final text limited the Court's jurisdiction under Articles 5, 6, 7, and 9 to prosecuting genocide, crimes against humanity, war crimes, and crimes of aggression, respectively.[3] It is thus necessary to understand the reasons that the Rome Statute restricts the ability to exercise jurisdiction over drug trafficking and other forms of international organized crime.

The Rome Conference was held in 1988 to complete the ICC statute's text. The most intriguing aspect is that drug trafficking was still considered for inclusion in the International Criminal Court's mission.[4] The Rome Conference's initial drafts included provisions for "crimes involving the illicit traffic in narcotic drugs and psychotropic substances."[5] Additionally, Trinidad and Tobago, Barbados, Dominica, and Jamaica renewed their offers to amend the draft statute's threshold for violations.[6] This new proposal is intended to bring drug trafficking under the ICC's jurisdiction if the circumstances under which it is committed meet the following criteria. First, the

[1] HARMEN VAN DER WILT, *Expanding Criminal Responsibility in Transnational and International Organized Crime,* 4 GROJIL (1) 1,1 (2016)
[2] ANDREAS SCHLOENHARDT, *Transnational Organized Crime and International Criminal Court-Development and Debates,* 24(1) UNIV. QUEENSLAND L. J. 93 (2005)
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Id.*

drug trafficking is committed on a large scale (and/or) in a transboundary context.[7] Second, an organized and hierarchical organization is the framework for the commission of the drug trafficking.[8] Third, the drug trafficking is committed with the use of violence and intimidation against private individuals, judicial personnel or other institutions, or members of the legislative, executive, or judicial branches of government.[9] Finally, the drug trafficking instills fear or insecurity within a state or disrupts its functioning.[10] It should be noted that these criteria within the new proposal are attempting to compare drug trafficking with core crimes that fit these criteria appropriately. However, this idea remains contentious, but drug trafficking was successfully incorporated into the final wording of the ICC statute. Perhaps amending the ICC's legislation to include such violations will significantly impede the ICC's ability to accept responsibility for them.[11]

However, some argue that the ICC statute should exclude drug trafficking. First, due to the ICC's opposing views on acquiring jurisdiction over drug trafficking and other "treaty crimes," it initially contends that these offenses do not have the same international significance as other international criminal law offenses.[12] The second reason is that these crimes are less grave than genocide and other forms of war crimes.[13] Third, the global scale of drug trafficking and other transnational organized crime would dwarf any international court's capacity and resources.[14] Finally, certain countries' sovereignty concerns may preclude international authorities from

[7] UN Doc A/Conf. 183/C. 1/IL. 48 (Jul. 3, 1998); *See also* PATRICK ROBINSON, *The Missing Crimes, in* ANTONIO CASSESE ET AL (EDS), *The Rome Statute of the International Criminal Court: A Commentary,* (Vol 1: 2000) at 504
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] A. SCHLOENHARDT, *supra* note 2 at 93
[12] *Id.*
[13] *Id.*
[14] *Id.*

prosecuting such violations.[15] For these reasons, the ICC statute does not expand or change the provisions relating to the inclusion of drug trafficking and other treaty crimes.

On the other hand, certain internationalized or hybrid criminal tribunals have jurisdiction over international and domestic crimes committed by the state that established the tribunal.[16] A notable example is the Special Court for Sierra Leone, which has jurisdiction over crimes against humanity, war crimes committed in non-international armed conflicts, other grave violations of international humanitarian law, and 'crimes against Sierra Leonean law.'[17] This case demonstrates how the Special Court for Sierra Leone might exercise jurisdiction over specified core crimes and serious crimes that breach the country's domestic laws. Another intriguing example is the establishment of a regional criminal court to supplement the national legal systems in Latin America and the Caribbean.[18] Because this new regional judicial authority would be capable of conducting independent investigations and optimizing the fight against transnational organized crime on a global scale, this court will be structured similarly to the ICC but will have jurisdiction over (1) illicit drug and firearm trafficking, (2) human trafficking, (3) migrant smuggling, (4) cultural property trafficking. (5) money laundering, and (6) transnational bribery.[19] Thus, these criminal activities may be reduced by uniting countries within the same region or widening and strengthening their jurisdictions, such as that in Sierra Leone, which shares boundaries, common interests, and challenges.

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[15] A. SCHLOENHARDT, *supra* note 2 at 93
[16] H. VAN DER WILT, *supra* note 1 at 7
[17] United Nations, *Statute of the Special Court for Sierra Leone,* U.N. SCOR, UN Doc. S/2002/246 (2002), Article 5
[18] RODRIGO HAZAFF, *A Latin American court against transnational organized crime,* (DEMOCRACYWITHOUTBORDERS: Jun. 30, 2020), available at: https://www.democracywithoutborders.org/13882/a-latin-american-court-against-transnational-organized-crime/
[19] *Id.*

As a result, drug trafficking and treaty crimes are not explicitly addressed in the Rome Statute. However, it is clear that some nations, particularly those in the same region, have advocated for establishing regional criminal courts to handle cases involving transnational organized crime because they have similar concerns and issues to resolve. This reason may encourage ASEAN to make it possible for a regional criminal court to prosecute cases, including transnational organized crime.

5.2.2 Terrorism, Transnational Crime and Corruption Center (TraCCC)

The Terrorism, Transnational Crime and Corruption Center (TraCCC) is a research institute at the Schar School of Policy and Government at George Mason University in the United States.[20] It is the first research and policy development center of its kind. The objectives of TraCCC are to utilize global research connections to conduct both fundamental and applied research by focusing on national security, economic progress, and human rights. TraCCC shares its research through conferences, monographs, its websites, and other universities. TraCCC also organizes seminars, public discussions, intellectual exchanges, and joint research partnerships to improve its educational and scientific offerings. For example, TraCCC's global partners investigate environmental crimes and nuclear proliferation in situations of human smuggling. TraCCC also has visitors from the Fulbright, IREX, and Open World Leadership programs throughout the year and takes part in transnational organizations' multidisciplinary legislative working groups and

[20] Schar School TraCCC, available at: https://traccc.gmu.edu/about-traccc/

conferences. Consequently, this plan requires that international governments and non-government organizations collaborate.[21]

Moreover, TraCCC has also published its studies related to transnational organized crime. For example, Organized Crime and Corruption in Georgia was published in August 2007.[22] This study describes how Georgian citizens expressed their desire to change the culture of corruption and solve the problem of organized crime in their country.[23] First, corruption in Georgia was tied to the economic collapse of the Georgian state in the post-Soviet period.[24] As a result, the improvement of living standards and the economic well-being of Georgia can be used to measure the success of the anti-corruption revolution,[25] which depends not only on Georgia but also on its relationships with neighboring countries.[26] Significantly, political reforms need to be institutionalized because this would create a stable, transparent, and honest bureaucracy in Georgia.[27] Nevertheless, the criminals committing organized crime in Georgia are not exclusively Georgian[28] due to the institutionalized corruption of the past government of Georgia,[29] which made it possible for foreign crime groups and terrorists to conduct their illicit activities.[30] In addition, members of parliament and high-ranking state functionaries protect criminals,[31] resulting in felons such as Ioselani serving as high-level political advisors.[32] As a consequence of

[21] Schar School TraCCC, *supra* note 20.
[22] LOUISE SHELLEY, ET AL, *Organized Crime and Corruption in Georgia,*(Routledge: 2007)
[23] LOUISE SHELLEY, *Introduction,in* LOUISE SHELLEY, ET AL, *Organized Crime and Corruption in Georgia,*(Routledge: 2007) at 14
[24] ERIK R. SCOTT, *Georgia's anti-corruption revolution, in* LOUISE SHELLEY, ET AL, *Organized Crime and Corruption in Georgia,*(Routledge: 2007) at 17-33
[25] *Id.*
[26] *Id.*
[27] SHALVA MACHAVARIANA, *Overcoming economic crime in Georgia through public service reform, in* LOUISE SHELLEY, ET AL, *Organized Crime and Corruption in Georgia,*(Routledge: 2007) at 37-48
[28] LOUISE SHELLEY, *Georgian organized crime, in* LOUISE SHELLEY, ET AL, *Organized Crime and Corruption in Georgia,*(Routledge: 2007) at 50-65
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*

widespread corruption and organized crime, Georgia now faces formidable state security and economic development challenges.[33] Although corruption has vanished from public view in Georgia, it is still firmly embedded within the government.[34] Therefore, international support and goodwill are required to rebuild Georgia's infrastructure, which has resulted in beneficial developments.[35]

In addition, TraCCC has formed partnerships with experts from the Middle East, Africa, Latin America, Asia, and the Caribbean.[36] It is evident from the case of Georgia that this research institute can contribute to expertise in numerous fields, particularly terrorism, transnational crime, and corruption. Like Georgia, Thailand has also experienced transnational crime and corruption. Therefore, the Thai government should learn from and apply the lessons learned from the study of Georgia as an example of a framework to deal with corruption and organized crime within the country if this research is applied to any issues. As a result, Thailand can contribute to this research field with TraCCC or other beneficial organizations with the aim of combating organized crime.

5.2.3 International Financial Action Task Force (FATF)

The Financial Action Task Force (FATF) is a non-government organization that develops and promotes policies and recommendations to fight money laundering and the financing of terrorism on a national and international scale.[37] Despite the fact that the phrase "recommendation" is antithetical to any claim of a formal treaty obligation, the FATF applies a *sui generis* assessment

[33] LONDA ESADZE, *Georgia's Rose Revolution: People's anti-corruption revolution?, in* LOUISE SHELLEY, ET AL, *Organized Crime and Corruption in Georgia,*(Routledge: 2007) at 111-117
[34] *Id.*
[35] *Id.*at 111-117
[36] TraCCC, *supra* note 20
[37] BESART QERIMI, *Countering Strategies Against Transnational Organized Crime: The danger we face multifaceted challenges and unprecedented,* (LAMBERT: 2012) at 145

and punishment system for non-compliance, making the soft law of the FATF Recommendations 'harder' than much 'hard' law.[38]

The FATF members agree to be evaluated by other members in a mutual evaluation process to join the FATF, and their overall evaluation results must be satisfactory.[39] Currently, the FATF model requires four rounds of mutual evaluations by interdisciplinary teams.[40] The FATF has made three significant changes to its approach to money laundering and the identification and sanction of defaulters since it was established in 1989 at the G-7 Summit in Paris.[41] In response to the threat posed to the banking system and financial institutions, the G-7 Heads of State or Government and the President of the European Commission established the Task Force, comprised of representatives from the G-7 Member States, the European Union, and eight other countries.[42]

Then, the 1992 FATF Report set out a process of self-evaluation that allowed members to audit each other's implementation of anti-money laundering schemes.[43] Consequently, peer pressure was used on members to bring them into line with the recommendations.[44] For instance, Austria was pressured to eliminate anonymous bank accounts.[45]

In 2000, the FATF adopted the Non-Cooperating Countries and Territories (NCCT) process, a name-and-shame approach. Based on the recommendations, FATF members and then, controversially, non-members were evaluated against twenty-five criteria.[46] Those who did not meet the requirements were identified as non-cooperative and subject to countermeasures.[47] In

[38] NEIL BOISTER, *An Introduction to Transnational Criminal Law,* (Oxford U. Press 2nd ed.: 2018) at 410
[39] C ROSE, *International Anti-Corruption Norms: Their Creation and Influence on Domestic Legal Systems* (Oxford: OUP, 2015) at 196
[40] N. BOISTER, *supra* note 38 at 410
[41] *Id.*
[42] B. QERIMI, *supra* note 37 at 145
[43] N. BOISTER, *supra* note 38 at 410
[44] *Id.*
[45] *Id.*
[46] *Id.* at 410-11
[47] *Id.*

addition, the FATF identified fifteen states or territories with serious systemic problems, with an additional eight identified in 2001.[48] Only Nauru and Myanmar were subject to countermeasures.[49] At the conclusion of the NCCT process, all countries had made sufficient progress to be removed from the list. Nonetheless, the legal shortcomings of the NCCT process were evident. The countermeasures were implemented prior to 2003, when Recommendation 19 was amended to permit them.[50] Review criteria were issued a few months prior to evaluating non-members, providing violators little notice.[51] Application to non-members of the OECD repeated the violation of the *pacta tertiis* norm[52] and breached it with regard to requests for the application of UNTOC Convention obligations to which the particular state was not a party.[53] The NCCT measures were not exactly countermeasures due to the absence of notification and the fact that the blacklisted country had not committed an intentional wrongdoing aimed at the injured state.[54] They were acts of retaliation in reaction to similar steps taken by the blacklisted state against FATF members, but they were not illegal because international law does not prohibit states from imposing limitations on financial transactions emerging from other states.[55]

In 2006, the NCCT was replaced by the International Cooperation and Review Group (ICRG), which began operating in 2007.[56] States revealed by the mutual evaluation process to have key deficiencies in implementation are referred to the process of review by an ICRG regional regroup and can be placed in one of two tiers, either (1) calling for consideration of risks arising from strategic deficiencies (the 'grey' list) or (2) the application of countermeasures by FATF

[48] N. BOISTER, *supra* note 38 at 411
[49] C. ROSE, *supra* note 39 at 204
[50] N. BOISTER, *supra* note 38 at 411
[51] *Id.*
[52] C. ROSE, *supra* note 39 at 205
[53] N. BOISTER, *supra* note 38 at 411
[54] *Id.*
[55] C. ROSE, *supra* note 39 at 208-9
[56] N. BOISTER, *supra* note 38 at 411

members (the 'black' list arising from the absence of political commitment).[57] Countermeasures include risk mitigation measures such as limitations on dealing with the identified country or persons operating from that country.[58] Almost all states on the two lists are non-Western.

However, the FATF's introduction of countermeasures was criticized for violating the sovereignty guaranteed in the UN Charter and he UNTOC Convention.[59] Nevertheless, seventeen years later, those countries that permit a higher risk of money laundering and terror financing in their financial sector expose themselves to the risk of adverse treatment by members of FATF.[60]

Thailand is a member of the Asia/Pacific Group on Money Laundering (APG).[61] This group is responsible for ensuring the adoption, implementation, and enforcement of internationally recognized anti-money laundering and counterterrorist financing standards, as outlined in the FATF Forty Recommendations and Eight Special Recommendations.[62] As an APG member, Thailand has an open and adaptable approach to international collaboration and a legal framework that satisfies most of FATF's Recommendations.[63] For instance, the requirement of dual criminality is flexibly interpreted.[64] However, Thailand's experience of cooperating with foreign regulators and supervisors needs significant improvement in terms of information sharing, including the risk and market entry requirements.[65] Meanwhile, Thailand has made satisfactory but minimal progress in addressing the technical compliance deficiencies mentioned in the mutual

[57] N. BOISTER, *supra* note 38 at 411
[58] L DE KOKER & M TURKINGTON, Transnational *Organised Crime and the Anti-Money Laundering Regime, in* P. Hauck & S Peterke (eds), *International Law and Transnational Organized Crime* (Oxford: OUP, 2016) at 241, 248
[59] T DOYLE, *Cleaning up Anti-Money Laundering Strategies: Current FATF Tactics Violate International Law*, 24 HOUSTON J. INT. L. (2001-2) 279, 298
[60] N. BOISTER, *supra* note 38 at 411
[61] APG, *APG History and Background,* available at: http://www.apgml.org/about-us/page.aspx?p=91ce25ec-db8a-424c-9018-8bd1f6869162
[62] *Id.*
[63] FATF, *Thailand's measures to combat money laundering and the financing of terrorism and proliferation,* (2017) at 118-9
[64] *Id.*
[65] *Id.*

evaluation report.[66] Thailand will then continue to report to the APG on its efforts to strengthen its implementation of the Anti-Money Laundering and Combating the Financing of Terrorism (AML/CFT) measures under the APG Mutual Evaluation Procedures.[67] As a result, Thailand has adopted the FATF Recommendations and the APG's procedures that will support Thailand and others in systematically combating money laundering.

5.2.4 United Nations Office on Drugs and Crime (UNODC)

The United Nations Office on Drugs and Crime (UNODC) is a global leader in the fight against illegal drugs, transnational organized crime, terrorism, and corruption.[68] In 1997, the United Nations Drug Control Program and the Centre for International Crime Prevention merged to form the United Nations Office for Drugs and Crime (UNODC).[69] Having an extensive network of field offices, it operates globally through regional and liaison offices.[70] Over 90% of its budget comes from voluntary contributions, mainly from governments. As a result, its funds have usually been dedicated to drug control.[71] Moreover, the vast bulk of the funds are donated for special projects rather than general purposes, allowing donor states to dictate the direction of UNODC activity.[72] By supporting its 193 member states, the United Nations also assists in the war on terrorism, drug trafficking, and organized crime.[73]

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[66] FATF, *Thailand's progress in strengthening measures to tackle money laundering and terrorist financing* (2021) at 2-15
[67] *Id.*
[68] United Nations Office on Drugs and Crime, *UNODC Mandate,* available at: https://www.unodc.org/southernafrica/en/sa/about.html
[69] *Id.*
[70] *Id.*
[71] UNODC Budget, available at : https://www.unodc.org/documents/commissions/CCPCJ/Crime_Resolutions/2010-2019/2019/CCPCJ_Resolution_28-4.pdf
[72] *Id.*
[73] B. QERIMI, *supra* note 37 at 128

The mandate of UNODC is to support member governments in combating illicit narcotics, crime, and terrorism.[74] Member states are also committed to the Millennium Declaration, adopted in September 2000, to increase efforts to combat transnational crime in all its manifestations, redouble efforts to fulfill the commitment to combat the global drug problem, and take coordinated action against international terrorism.[75] Moreover, in 2015, the commitment to decreasing conflict, crime, and violence became a fundamental component of the 2030 Agenda for Sustainable Development, which expressly states that "there can be no sustainable development without peace, and no peace without sustainable development."[76] In addition, UNODC assists member states in reaching several targets of the Sustainable Development Goals, including Goal 5 on gender equality, Goal 11 on inclusive, safe, resilient, and sustainable cities, and Goal 16 on promoting peace, justice, and strong institutions.[77]

Meanwhile, the UNODC has several primary pillars for working with others.[78] First, this organization plays an important role in research and analytical work by raising awareness and comprehension of drug and crime issues in order to strengthen the evidence/knowledge base for policy, strategic, and operational decisions.[79] Second, the UNODC assists states in ratifying and implementing numerous international treaties, such as the UNTOC Convention.[80] The UNODC then develops domestic laws related to drugs, crime, and terrorism and provides secretariat and substantive support to treaty-based and governing bodies, such as the Commission on Narcotic

[74] UNODC Mandate*, supra* note 68
[75] *Id.*
[76] United Nations Office on Drugs and Crime, *UNODC and the Sustainable Development Goals,* (UNODC: 2015), available at: https://www.unodc.org/documents/SDGs/UNODC-SDG_brochure_LORES.pdf; United Nations Office on Drugs and Crime, *UNODC and the 2030 Agenda for Sustainable Development,* (UNODC: 2020), available at: https://www.unodc.org/documents/SDGs/SDG_Brochure_FINAL_24-02-2020.pdf
[77] *Id.*
[78] International Society of Substance Use Professionals, *United Nations Office on Drugs and Crime (UNODC),* available at: https://www.issup.net/about-issup/international-partners/unodc; B. QERIMI, *supra* note 37 at 128
[79] *Id.*
[80] *Id.*

Drugs and the Commission on Crime Prevention and Criminal Justice.[81] Finally, the UNODC aims to implement field-based technical cooperation initiatives to enhance Member States' capacity and effectiveness in combating illicit substances, organized crime, corruption, general criminality, and terrorism.[82]

The UNODC is divided into various divisions. For instance, the division for treaty affairs is separated into the Organized Crime and Anti-Trafficking Branch, the Corruption and Economic Crime Branch, the Terrorism Prevention Branch, and the INCB Secretariat.[83] The UNODC provides technical assistance using the UNTOC Convention and its protocols as the framework.[84] Initially, it relied on official commentary to clarify the meaning of the earliest conventions.[85] It then created model treaties and laws to serve as a flexible guide for national legislators.[86] Its most recent innovations include customizable rules and toolkits for legislative implementation that can be applied to various legal traditions and used to draft different types of legislation.[87] Since 2000, the UNODC has been under pressure to catch up to the United Nations' general advances on human rights, the rule of law, and sustainable development, while achieving improved geographical and gender representation among its workforce.[88]

Southeast Asian nations, for instance, now form one of the world's largest trading blocs.[89] The countries in this region are investing extensively in trade facilitation projects and infrastructure

[81] International Society of Substance Use Professionals, *supra* note 78
[82] *Id.*
[83] N. BOISTER, *supra* note 38 at 397
[84] *Id.*
[85] *Id.*
[86] United Nations Office on Drugs and Crime, *Model Laws and Treaties,* (UNODC), available at: https://www.unodc.org/unodc/en/legal-tools/model-treaties-and-laws.html
[87] *Id.*
[88] SM REDO, *Blue Criminology: The Power of United Nations Ideas to Counter Crime Globally* (Helsinki: HEUNI, 2012) at 207
[89] UNODC, *Thailand and UNODC hold high-level ASEAN region border security talks,* available at: https://www.unodc.org/unodc/en/frontpage/2019/April/thailand-and-unodc-hold-high-level-asean-region-border-security-talks.html

to support growing cross-border movements of people, goods, and capital.[90] At the same time, ASEAN governments are growing increasingly concerned that the same investments are accelerating illicit trade and offering commercial possibilities for transnational criminal networks and organizations, particularly in the vulnerable countries and areas of the region.[91] Since 1998, the UNODC has operated the Regional Border Management Programme to assist ASEAN in combating drug trafficking by providing basic border liaison facilities and equipment, as well as capacity building and policy support.[92] The network in Thailand now consists of 28 offices positioned at key border crossings with Myanmar, Laos, including the Golden Triangle.[93] The border liaison offices (BLO) share intelligence with neighboring countries. This has led to a large number of drug seizures and trafficker arrests over the years. Border liaison officers regularly deal with human trafficking, migrant smuggling, wildlife and timber trafficking, and, more recently, waste and cultural heritage trafficking and also assist public health authorities with the COVID-19 pandemic response at borders.[94] Due to the evolution and sophistication of organized criminal groups, drug trafficking remains the most lucrative illegal activity.[95] Therefore, it is evident that the border liaison offices (BLOs) are a mechanism that countries in the region can use to improve border management and security against transnational organized crime and trafficking by expanding the regional BLO network to new locations.[96]

[90] UNODC, *Thailand and UNODC hold high-level ASEAN region border security talks, supra* note 89
[91] *Id.*
[92] UNODC, UNODC Regional Office for Southeast Asia and the Pacific, *UNODC and Thailand hold high-level national border management dialogue,* available at: https://www.unodc.org/roseap/en/2022/05/thailand-high-level-national-border-management-dialogue/story.html
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Id.*

5.2.5 International Criminal Police Organization (INTERPOL)

The United Nations Police (UNPOL) is tasked with peacekeeping and diplomatic protection. However, there is no global police force actively regulating transnational crime. Furthermore, Article 35(b) of the 1961 Single Convention[97] requires parties to cooperate closely with the appropriate international organizations to which they belong in order to maintain a coordinated campaign against illicit traffic. This clause recognizes intergovernmental organizations (IGOs) such as the International Criminal Police Organization (ICPO or INTERPOL) as facilitators of inter-police cooperation. [98] Nevertheless, it is not an intergovernmental agency with arrest authority in various nations; instead, it is a network of national police agencies that can be used to seek out and track down suspected criminals. It is handled by national law enforcement personnel and operated through National Central Bureaus (NCBs).[99]

INTERPOL's work places a premium on transnational crimes: terrorism, drug trafficking, organized crime, and human trafficking. Its primary duty is to facilitate the transmission of information requests from national law enforcement agencies via their NCBs to NCBs in other member states via the INTERPOL General Secretariat in Lyon.[100] Although this was previously accomplished via postal mail, it is now automated through the use of an encrypted Internet-based system (I-24/7).[101] In addition, INTERPOL publishes a variety of alerts on behalf of states: the Red Notice - wanted persons, the Blue Notice - information requests about individuals, the Green

[97] The Single Convention on Narcotic Drugs, New York, adopted March 30, 1961, entered into force Dec. 13, 1964, 520 UNTS. 151
[98] Interpol has no treaty basis but is recognized in customary international law as an IGO. *See* M DEFLEM & S MCDONOUGH, *International Law Enforcement Organisation, in* S KETHINENI (ED), *Comparative and International Policing, Justice, and Transnational Crime* (Durham, NC: Carolina Academic Press: 2010) at 127, 137-41
[99] N. BOISTER, *supra* note 38 at 308
[100] *Id.*
[101] *Id.*

Notice - warnings about international criminals, the Yellow Notice - request for missing persons, and the Black Notice - identification of a body.[102] Since 2005, INTERPOL has also issued the unique INTERPOL-UN Security Special Notices to freeze the assets of suspected Islamist terrorists by use of UN Security Council Resolution 1617.[103] INTERPOL, on the other hand, is not merely a conduit. For example, issuing a Red Notice entails the issuance of the warrant by the state's judicial authority and the administrative sanctions as requested by INTERPOL. Furthermore, INTERPOL serves as a channel for 'diffusion alerts,' which are NCB requests that are transmitted via the INTERPOL I-Link network but not publicized by INTERPOL, unlike the Red Notice. Additionally, INTERPOL serves as a data repository, maintaining databases on names, fingerprints, and DNA profiles, among other valuable sources of information.[104]

While INTERPOL is primarily regarded as adequate, the organization's informal structure and lack of political supervision have been challenged.[105] For example, the Red Notice's 'soft' (non-binding) request for arrest pending extradition is frequently used, commonly honored, and difficult to contest. Around one-third of INTERPOL's members use them to justify arrests; the remainder rely on specific diplomatic requests. However, there have been recorded instances of Red Notices being used for political goals, which is strictly prohibited by Article 3 of INTERPOL's Constitution[106] and considered objectionable by a majority of member states.[107] This resulted in

[102] INTERPOL, *About Notices,* available at: https://www.interpol.int/en/How-we-work/Notices/About-Notices
[103] United Nations Security Council, *Resolution 1617,* S/RES/1617(2005) (Jul 29, 2005), available at: https://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=S/RES/1617%20(2005)&Lang=E
[104] N. BOISTER, *supra* note 38 at 308
[105] *See* generally, M Anderson, *Policing the World* (Oxford U. Press: 1989); J SHEPTYCKI, *Brand Interpol, in* S Hufnagel & C McCartney (eds), *Trust in International Police and Justice Cooperation* (Bloomsbury Hart: London: 2017) at 97
[106] Article 3 of the Interpol Constitution strictly forbids Interpol from undertaking 'any intervention or activities of a political . . . character.' The Constitution of 13 June 1956 (as amended) is available at: https://www.interpol.int/en/Who-we-are/Legal-framework/Legal-documents
[107] *See* selected cases in Fair Trials International, *Cases of Injustice,* available at: https://www.fairtrials.org/campaigns/interpol/

modifications to the Red Notice system, including establishing the Commission for the Control of INTERPOL's Files (CCF), which acts as an independent monitor of the Interpol Secretariat's notice-issuing process. However, because the CCF considers matters on a case-by-case basis and there is no right to an oral hearing, individuals' legal options for contesting the INTERPOL Red Notice are restricted.[108]

The National Central Bureau (NCB) is at the heart of INTERPOL.[109] Each member country collaborates by assisting in investigating crime or criminals in its own country and sharing criminal data and intelligence to help another nation.[110] There are examples of INTERPOL collaborating with Thailand in recent years up to 2022. First, INTERPOL and the Thai police have worked together to tackle illegal logging. Through the sale and trade of illegal timber, criminals may be able to fund conflicts and drug activities with their earnings from illegal logging.[111] Also, timber smugglers sometimes use networks to move the wood to nearby countries and other places.[112] In partnership with law enforcement, INTERPOL and UNODC can help member countries, such as Thailand, fight forestry crime and illegal deforestation by identifying trafficking networks and speeding up international investigations.[113] Second, during an INTERPOL-coordinated operation in Asia, information about financial crime, online gambling, and drug trafficking was shared in relation to operations and intelligence.[114] Due to the issue of 80 Red Notices and 15 Blue Notices

[108] Discussed in M SAVINO, *Global Administrative Law meets "Soft" Powers: The Uncomfortable Case of Interpol Red Notices,* 43 NYU J. INT'L L. POL. 263 (2011) who argues that soft restraint is apt for soft mechanisms.
[109] INTERPOL, *Thailand,* available at: https://www.interpol.int/en/Who-we-are/Member-countries/Asia-South-Pacific/THAILAND
[110] *Id.*
[111] INTERPOL, *INTERPOL and Thai police collaborate to combat illegal logging,* (June 22, 2022), available at: https://www.interpol.int/en/News-and-Events/News/2022/INTERPOL-and-Thai-police-collaborate-to-combat-illegal-logging
[112] *Id.*
[113] *Id.*
[114] INTERPOL, *INTERPOL-coordinated operation combats organized crime in Asia-Pacific* (Nov. 4, 2022), available at: https://www.interpol.int/en/News-and-Events/News/2022/INTERPOL-coordinated-operation-combats-organized-crime-in-Asia-Pacific

by INTERPOL, Thailand and other member nations were able to obtain more information about the identity, location, or criminal activities of various individuals.[115] Consequently, collaboration within a network through the National Central Bureaus (NCBs) can provide assistance not only within an agency's own country to address organized crime issues but also to other member countries.

5.3 Regional Level

This section examines how ASEAN member states tackle transnational organized crime by applying the ASEAN institutional framework for regional cooperation to this problem. Moreover, as the European Union collaborates with ASEAN nations to combat transnational organized crime, it is necessary to comprehend the EU's operational structure in order to successfully manage the region.

5.3.1 The ASEAN Ministerial Meeting on Transnational Crime (AMMTC)

The ASEAN Ministerial Meeting on Transnational Crime (AMMTC) is the apex policy-making forum for ASEAN cooperation in the fight against transnational crime.[116] The AMMTC meets annually in three formats: an annual ministerial meeting, a ministers' retreat, and consultations between ministers and dialogue partners.[117] In addition, the ministerial-level representatives of the ASEAN member countries responsible for countering transnational crime

[115] INTERPOL, *INTERPOL-coordinated operation combats organized crime in Asia-Pacific, supra* note 114
[116] ASEAN PLAN OF ACTION TO COMBAT TRANSNATIONAL CRIME, at 5, available at: https://asean.org/wp-content/uploads/2012/05/ASEAN-Plan-of-Action-to-Combat-Transnational-Crime.pdf
[117] *Id.*

meet at least twice every two years and informally in between when necessary.[118] The AMMTC also coordinates the work of relevant bodies such as the ASEAN Senior Officials on Drug Matters (ASOD), the ASEAN Chiefs of National Police (ASEANAPOL), the ASEAN Directors-General of Customs, the ASEAN Directors-General of Immigration, and the ASEAN Heads of Consular Affairs of the Ministries of Foreign Affairs.[119] The chairmanship of this body is rotated alphabetically among the ASEAN Member Countries, which are controlled and directed through the AMMTC's working groups on transnational organized crime and the Senior Officials Meeting on Transnational Crime (SOMTC).[120] The 11th meeting of the AMMTC was convened on 20 September 2017 and presented its attention to the challenges of illicit wildlife and timber trafficking and human smuggling, which were included on the agendas of the AMMTC and SOMTC.[121] Subsequently, the recent AMMTC conference aimed to promote cross-sectoral coordination and information sharing with crucial ASEAN Sectoral Ministerial Bodies within the ASEAN Economic Community and ASEAN Socio-Cultural Community on countering transnational crime, which included boosting cooperation on border management information sharing and intelligence exchange.[122]

On the other hand, the security issue is critical. As a result, the AMMTC arranges technical support, including financing, for ASEAN member nations upon request from ASEAN Dialogue Partners and external parties based on shared interests and mutual benefits to implement the ASEAN Plan of Action's actions/priority areas as approved by the SOMTC and/or AMMTC.[123]

[118] ASEAN PLAN OF ACTION TO COMBAT TRANSNATIONAL CRIME, *supra* note 116 at 5
[119] *Id.*
[120] ASEAN PLAN OF ACTION IN COMBATING TRANSNATIONAL CRIME (2016-2025), Adopted by 11th AMMTC (Sep. 20, 2017) at 7-8
[121] *Id.* at 7
[122] *Id.* at 8
[123] *Id.*

Finally, the AMMTC certifies the SOMTC's reports and those of ASOD, ASEANAPOL, the ASEAN Directors-General of Customs and Immigration, and the ASEAN Heads of Consular Affairs, and will report on transnational crime problems to the ASEAN Summit via the ASEAN Ministerial Meeting (AMM).[124]

Consequently, the AMMTC meeting is likely to be considered as an essential tool for addressing and assessing the difficulties facing ASEAN member countries in the context of transnational organized crime.

5.3.2 The Senior Officials Meeting on Transnational Crime (SOMTC)

The ASEAN Senior Officials Meeting on Transnational Crime (SOMTC) is convened at least once a year prior to the AMMTC, with the SOMTC Chairmanship coinciding with the AMMTC Chairmanship.[125] This meeting is intended to put into effect the policies and plans approved by the ASEAN Ministerial Meeting on Transnational Crime (AMMTC). Every five years, the SOMTC develops its work programs to carry out the ASEAN Plan of Action on Transnational Crime.[126] The SOMTC will assemble ad hoc working groups or task forces comprised of specialists as needed to assist the SOMTC in carrying out its tasks.[127] The SOMTC is also critical in promoting cooperation and coordination with other ASEAN entities dealing with transnational crime, including the ASEAN Senior Officials on Drug Matters (ASOD), the ASEAN

[124] ASEAN PLAN OF ACTION TO COMBAT TRANSNATIONAL CRIME, *supra* note 116 at 5
[125] *Id.* at 6
[126] *Id.*
[127] *Id.*

Chiefs of National Police (ASEANAPOL), the ASEAN Directors-General of Customs and Immigration, and the Heads of Consular Affairs of the Ministries of Foreign Affairs.[128]

Additionally, it is a common practice for the SOMTC to look for ways to strengthen cooperation with international agencies tasked with combating transnational crime, such as the ASEAN Dialogue Partners, by selecting a national focal person or agency that can coordinate regional and national cooperation in this area.[129] Further, the SOMTC includes the (HSU), which was founded in April 2004 to facilitate the exchange of information and experience, the development of common standards and procedures for investigating trafficking in persons cases, and collaboration on operational cases, particularly those involving victim protection and rescue.[130]

As a result, the SOMTC can focus on specific types of crime such as trafficking in persons, terrorism, cybercrime, arms smuggling, and illicit trafficking of wildlife and timber to assist ASEAN member countries in cooperation with one another.[131]

5.3.3 The ASEAN Secretariat

Through the formulation of the Work Programme, this body assists the SOMTC in initiating, planning, and coordinating activities, strategies, programs, and initiatives to facilitate regional cooperation in combating transnational crime.[132] In addition, the ASEAN Secretariat assists SOMTC in identifying opportunities for close collaboration with relevant agencies and

[128] ASEAN PLAN OF ACTION TO COMBAT TRANSNATIONAL CRIME, *supra* note 116 at 6
[129] *Id.*
[130] Senior Officials Meeting on Transnational Crime (SOMTC) (Dec. 20, 2020), available at: https://asean.org/senior-officials-meeting-on-transnational-crime-somtc/
[131] *Id.*
[132] ASEAN PLAN OF ACTION TO COMBAT TRANSNATIONAL CRIME, *supra* note 116 at 6

organizations in Dialogue Partner Nations, other nations, and international organizations.[133] The ASEAN Secretariat also helps the SOMTC carry out priority initiatives under the ASEAN Plan of Action to Combat Transnational Crime by arranging the funding for ASEAN activities and projects that share costs.[134] The ASEAN Secretariat will continue to assist in creating resource mobilization strategies to secure funds from the ASEAN Dialogue Partners, foreign funding organizations, and other sources.[135] To combat transnational crime, these international institutions include the LJN and its specialized agencies, the Colombo Plan Bureau and INTERPOL. Finally, the ASEAN Secretariat assists with resource mobilization and procuring technical assistance from international organizations and the dialogue partners of ASEAN.[136]

5.3.4 Europol

Europol promotes and strengthens the efforts of member nations' relevant authorities and facilitates their cooperation in preventing and combating transnational organized crime, terrorism, and other forms of serious crime when two or more member states are involved.[137] Its work is focused on gathering, storing, processing, analyzing, and exchanging information and discoveries ('intelligence work') and informing and assisting relevant authorities in member nations.[138] In addition, Europol can assist national investing agencies in acquiring specialist knowledge, providing consultations and strategic insights, and submitting general assessments on the condition

[133] ASEAN PLAN OF ACTION TO COMBAT TRANSNATIONAL CRIME, *supra* note 116 at 6
[134] ASEAN, *ASEAN Documents on Combating Transnational Crime and Terrorism,* (2012) at 26, available at: https://asean.org/wp-content/uploads/2021/01/ASEAN-Documents-on-Combating-Transnational-Crime-and-Terrorism-3.pdf
[135] *Id.*
[136] ASEAN PLAN OF ACTION TO COMBAT TRANSNATIONAL CRIME, *supra* note 116 at 6
[137] BERND HECKER, *The EU and the Fight against Orgnised Crime, in International Law and Transnational Organised Crime,* 81 (PIERRE HAUCK & SVEN PETERKE (ed.), Oxford U. Press, 1st ed.: 2016)
[138] *Id.*

of work. Europol accomplishes this mission by using an automated information collection system known as the Europol information and analysis system.[139] Europol, on the other hand, lacks independent executive and investigative powers. Article 88(III) of the TFEU permits Europol to take operational measures only in conjunction and consultation with the authority of the concerned member state.[140] Europol is, in reality, frequently a member of 'Joint Investigation Teams' and thus, a component of the national police and customs offices' operational duties.[141]

There are tens of thousands of pieces of data that were entered into the Europol system by the United Kingdom that needed to be retained until December 31, 2020, even after Brexit.[142] It is critical to note that the UK has lost access to the Europol Information System and the system enabling the member states to conduct hit/no-hit data searches in Analysis Projects.[143] Europol is not required to delete material obtained from the United Kingdom prior to January 1, 2021, and has not done so.[144] However, Europol has renamed such information in the system to reflect the fact that Europol now manages it. As a result, the United Kingdom may encounter difficulties in combating transnational organized crime.

5.3.5 Eurojust

Eurojust's mission, guided by Europol's analysis and working closely with the European Judicial Network, is to facilitate the most effective coordination of action for investigations and

[139] DIETRICH NEUMANN, *Europol, in* ULRICH SIEBER ET AL (EDS), *Europäisches Strafrecht,* (Baden-Baden, Nomos, 2nd ed.: 2014) at para 44; *See also* H. SATZGER, *International and European Criminal Law,* (Munich, C. H. Beck: 2012) at para 8
[140] B. HECKER, *supra* note 137 at 81
[141] *Id.* at 82
[142] Statewatch, *EU: Europol holding on to UK data post-Brexit,* (statewatch: Apr. 8, 2021), available at: https://www.statewatch.org/news/2021/april/eu-europol-holding-on-to-uk-data-post-brexit/
[143] *Id.*
[144] *Id.*

prosecutions, to simplify criminal investigations involving transnational criminality, and to simplify the execution of letters rogatory.[145] Eurojust is responsible for all sorts of criminal activity that fall under its purview. Eurojust may, for instance, urge competent authorities to conduct investigations to establish criminal facts, to launch prosecutions, or to negotiate an agreement with another member state to perform the required investigation or prosecution.[146] Additionally, the agency aids member states in coordinating their investigations, forming joint investigative teams, processing requests for assistance, and facilitating the exchange of all information deemed essential for the efficient execution of obligations.[147] Moreover, the national members coordinate the communication between competent authorities in member states regarding Eurojust-aware investigations and prosecutions that affect member nations.[148]

Currently, Eurojust functions merely as a center of service and coordination. Article 86 TFEU, on the other hand, states that the agency could become a European prosecutor.[149]

5.4 National Level

Thailand has several affiliated agencies that work together to prevent and dismantle transnational criminal organizations. These agencies include the Royal Thai Police, the Office of the Attorney General, the Department of Special Investigation, the Anti-Money Laundering Office, the Office of the National Anti-Corruption Commission, the Office of the Narcotics Control Board, and the Court of Justice.

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[145] H. SATZGER, *supra* note 139 at para 8
[146] B. HECKER, *supra* note 137 at 82
[147] *Id.*
[148] *Id.*
[149] On the proposal for a Council regulation on the establishment of the European Public Prosecutor, *see* COM (2013) 534 final and ROBERT ESSER, *Die Europäische Staatsanwaltschft: Eine Herausforderung für die Strafverteidigung,* Strafverteidiger 494, 496ff (2014)

5.4.1 Royal Thai Police

This is the principal organization for the prevention and suppression of all types of crimes, with the roles and authority of the police force. The Royal Thai Police[150] have long been a focal point for crime prevention and suppression. The Foreign Affairs Division[151] established the Transnational Crime Coordination Center (TCCC) to directly prevent and combat transnational crime. In 2003, the Royal Thai Police and the Australian Federal Police established a shared commitment to combating transnational crime and advancing police affairs collaboratively. In 2006, a memorandum of understanding was signed and a criminal data collection center was established to study trends and manage cases. In addition, it serves as a coordination hub for the transnational crime prevention practices of the National Police and other relevant domestic authorities.

However, the Royal Thai Police have various agencies involved in countering transnational organized crime. For instance, the Immigration Bureau[152] is regarded as the most important agency used by the Royal Thai Police for investigating and apprehending criminals and those associated with transnational criminal organizations operating through other channels. Another example is the establishment of specialized Royal Thai Police units, such as the Cyber Crime Investigation Bureau,[153] to prevent and punish the numerous technical crimes that occur today. Due to the complex and challenging investigative nature of corporate crime offenses and the foundational offenses that comprise a conventional offense, there are several different types of crimes.

[150] Royal Thai Police, available at: https://www.royalthaipolice.go.th/
[151] Foreign Affairs Division, available at: https://www.interpol.go.th/?page_id=180
[152] Immigration Bureau, available at: https://www.immigration.go.th/en/
[153] Cyber Crime Investigation Bureau, available at: https://www.ccib.go.th/

Transnational organized crime cannot be fully prosecuted by only the Royal Thai Police organization. As a result, specialized agencies are required to prevent and prosecute specific types of crimes that have a significant impact and cost on the country.

5.4.2 Office of the Attorney General

Prosecutors are responsible for directing social justice and preserving the interests of the state. In criminal proceedings, the prosecutor is the plaintiff on behalf of the state, having the powers and duties under the Criminal Procedure Code and other laws in the field of civil cases.[154] Moreover, prosecutors have the authority to provide legal advice to government agencies and bureaus and the power to prosecute on behalf of the government in all courts.[155] According to human rights standards, the prosecutor also has the power to protect the rights and freedoms of citizens.[156] Prosecutors then provide services or legal assistance to citizens, such as mediation, prosecutorial assistance, and litigation, on behalf of any person who cannot file a lawsuit himself because the law prohibits it.[157] The prosecutor provides defense assistance to the accused officers in civil and criminal cases with respect to acting during the performance of their duties.[158] Furthermore, the prosecutor assists any person by providing legal defense when acting in accordance with the orders of the government officers who have served lawfully.[159]

Moreover, prosecutors have the authority to pursue criminal cases that have an impact on international relations. For example, prosecutors are the central authorities for carrying out

[154] Section 14 of the Public Prosecution Organization and Public Prosecution Act, B.E. 2553 (2010); SOMJAI KESORNSIRICHAROEN, *The Role and Function of Public Prosecution in Thailand,* at 280-306, available at: https://www.unafei.or.jp/publications/pdf/RS_No53/No53_28PA_Kesornsiricharoen.pdf
[155] S. KESORNSIRICHAROEN, *supra* note 154
[156] *Id.*
[157] *Id.*
[158] *Id.*
[159] *Id.*

extradition or cooperating with foreign countries in investigations through mutual assistance in criminal matters. The Office of the Attorney General, the Royal Thai Police, the Department of Special Investigation, the Narcotics Control Board, the Anti-Money Laundering Office, and the Office of the National Anti-Corruption Commission all have an agreement to enhance coordination for the prevention and suppression of the offense of participating in transnational organized crime.[160] This agreement thus applies to transnational organized crime cases that the organizations have agreed to handle.[161]

In a case regarding an offense of the Anti-participation in Transnational Organized Crime Act B.E. 2556 (2013), already committed outside the Kingdom of Thailand and subject to punishment under Thai Law, the Attorney General or his designated person has the authority to receive a complaint or accusation.[162] In this regard, it does not deprive officers in other laws of their authority to receive such complaints or accusations.[163] For example, suppose the offense of participating in transnational organized crime falls under the Attorney General's authority.[164] In that case, a police investigator, an administrative investigator, or a special case inquiry official shall forward the matter to the Attorney General within thirty days of receiving it for further action under his authority.[165] Nevertheless, when an offense of participation in transnational organized crime falls under the authority of the Office of the National Anti-Corruption Commission,[166] such investigators are required to notify the National Anti-Corruption Commission within the same

[160] The Agreement of Operations in Cases among State Organizations in line with the Anti-Participation in Transnational Organized Crime Act B.E. 2556 , (24 September 2556(2013))
[161] *Id.*
[162] Article 2 of the Agreement of Operations in Cases among State Organizations in line with the Anti-Participation in Transnational Organized Crime Act B.E. 2556
[163] *Id.*
[164] The first paragraph of Article 3 of the Agreement of Operations in Cases among State Organizations in line with the Anti-Participation in Transnational Organized Crime Act B.E. 2556
[165] *Id.*
[166] The second paragraph of Article 3 of the Agreement of Operations in Cases among State Organizations in line with the Anti-Participation in Transnational Organized Crime Act B.E. 2556

timeframe that they receive a case for further proceedings.[167] As a result, investigators should consider the powers of the Attorney General and the National Anti-Corruption Commission to avoid erroneous prosecution when investigating an offense of participation in transnational organized crime.

Nevertheless, the nature of an offense involving participation in transnational organized crime may necessitate the use of unique measurements by investigators. The Attorney General has therefore issued regulations outlining the criteria, procedures, and conditions to be applied for the benefit of an investigation into a transnational organized crime offense of this nature. Appropriate regulations are deemed to be imposed on the storing, using, and destroying of information,[168] undercover operations,[169] controlled delivery,[170] and pursuit of suspects[171]. Because the Anti-Participation in Transnational Organized Crime Act B.E. 2556 (2013) aims to ensure effective enforcement of the law and to bring offenders and masterminds to punishment, in order to request direct support for an investigations, the heads of the state organizations must coordinate with one another.[172] As a result, the Office of the Attorney General will serve as the focal point for

[167] The second paragraph of Article 3 of the Agreement of Operations in Cases among State Organizations in line with the Anti-Participation in Transnational Organized Crime Act B.E. 2556, *supra* note 166.
[168] Regulation of the Attorney General on Keeping, Using and Destroying Information under the Anti-Participation in Transnational Organized Crime Act B.E. 2556, Section 17, B.E. 2556, available at: https://www3.ago.go.th/legald/wp-content/uploads/2021/11/6_Eng_Section-17.pdf
[169] Regulation of the Attorney General on Undercover Operation under the Anti-Participation in Transnational Organized Crime Act B.E. 2556, Section 19, B.E. 2556, available at: https://www3.ago.go.th/legald/wp-content/uploads/2021/11/7_Eng_Section-19.pdf
[170] Regulation of the Attorney General on Controlled Delivery under the Anti-Participation in Transnational Organized Crime Act B.E. 2556, Section 20, B.E. 2557, available at: https://www3.ago.go.th/legald/wp-content/uploads/2021/11/8_Eng_Section-20.pdf
[171] Regulation of the Attorney General on Trailing a Suspect under the Anti-Participation in Transnational Organized Crime Act B.E. 2556, Section 21, B.E. 2556, available at: https://www3.ago.go.th/legald/wp-content/uploads/2021/11/9_Eng_Section-21.pdf
[172] Article 10 of the Agreement of Operations in Cases among State Organizations in line with the Anti-Participation in Transnational Organized Crime Act B.E. 2556

organizing a joint gathering of state organizations to identify the problems and obstacles in joint operations and increase efficiency.[173]

5.4.3 Department of Special Investigation

On October 3, 2002, the Department of Special Investigation (DSI)[174] was founded. It is charged with conducting investigations and enforcing the Special Case Investigation Act, B.E. 2547 (2004). [175] Furthermore, a governmental organization is necessary for combating transnational organized crime because this Act designates criminal cases as transnational offenses or activities of criminal organizations as falling under the authority of the Department of Special Investigation.[176] There are 22 exceptional cases[177] listed at the end of the Act. They cover various types of transnational organized crime offenses. The offenses include violations of the Law on Public Loans that are Fraudulent, violations of the Playing Share Act, violations of the state's job unit price offer, violations of the Currency Act, and violations of the Anti-Money Laundering Law. However, the DSI also has an agreement to provide coordination to prevent and suppress the offense of participating in transnational organized crime with other state organizations. As a result,

[173] Agreement of Operations in Cases among State Organizations in line with the Anti-Participation in Transnational Organized Crime Act B.E. 2556
[174] History of DSI, available at: https://www.dsi.go.th/en/Detail/History-of-DSI
[175] The Special Case Investigation Act B.E. 2547 (2004), available at: https://www.dsi.go.th/Files/Laws/พ.ร.บ.การสอบสวนคดีพิเศษฯ%20ฉบับภาษาอังกฤษ.pdf
[176] The Special Case Investigation Act B.E. 2547 (2004), Section 21(1)(c) prescribes that "[s]pecial Cases required to be investigated and examined according to this Act are the following criminal cases: (1) Criminal cases according to the laws provided in the Annex attached hereto and in the ministerial regulations as recommended by the BSC where such criminal cases shall have any of the following natures: (c) It is a criminal case which is a serious transnational crime or committed by an organized criminal group."
[177] *See* Laws Provided in the Annex Attached to the Special Case Investigation Act B.E. 2547 (2004), at 52

the DSI must perform based upon the Special Investigations Act and other related laws to prevent and suppress transnational organized crime in Thailand.[178]

5.4.4 The Anti-Money Laundering Office

The Anti-Money Laundering Office (AMLO) plays a key role in Thailand and is responsible for the enforcement of anti-money laundering and counter-terrorism financing laws.[179] In 1999, this state organization was founded upon the adoption of the Anti-Money Laundering Act, B.E. 2542 (1999).[180] The Anti-Money Laundering Office is an independent government agency. Money laundering is one of the offenses criminalized under the UNTOC Convention that AMLO must pursue with investigations and prosecution of money laundering offenses.[181] Moreover, AMLO also has an agreement to facilitate coordination for preventing and suppressing the offense of participating in transnational organized crime with other state organizations.[182] Therefore, the Anti-Money Laundering Office (AMLO) must take action based upon the Anti-Money Laundering Act and other related laws in order to prevent and suppress transnational organized crime, especially money laundering offenses.

[178] The Agreement of Operations in Cases among State Organizations in line with the Anti-Participation in Transnational Organized Crime Act B.E. 2556, *supra* note 160
[179] AMLO, *Background,* available at: https://www.amlo.go.th/index.php/en/2016-05-21-21-37-20/background; Counter-Terrorism and Proliferation of Weapon of Mass Destruction Financing Act, B.E. 2559 (2016), available at: http://cds.customs.go.th/data_files/2b901b601eeac55244df7a515266a2b3.pdf
[180] *Id.*; Anti-Money Laundering Act B.E. 2542 (1999), available at: http://cds.customs.go.th/data_files/6f86d5231634b0130986712786cfae8f.pdf
[181] Article 6 of the UNTOC Convention; The United Nations Convention against Transnational Organized Crime, New York, opened for signature, adopted by the resolution A/RES/55/25 of Nov. 15, 2000, entered into force Sept. 29, 2003, 2225 UNTS 209 [hereafter the Palermo Convention, UNTOC]
[182] The Agreement of Operations in Cases among State Organizations in line with the Anti-Participation in Transnational Organized Crime Act B.E. 2556, *supra* note 160

5.4.5 The Office of the National Anti-Corruption Commission

The National Anti-Corruption Commission (NACC) is the constitutionally independent organization tasked with preventing and punishing corruption among public officials.[183] The commission's primary goal is to combat corruption by investigating cases of unusual wealth or abuses of power committed by government officials or politicians for personal gain.[184] The NACC has the authority and responsibility to examine facts, summarize cases, and report them to the Attorney General for prosecution before the Criminal Division for Persons Holding Political Positions of the Supreme Court of Justice.[185] To comply with international legal requirements and anti-corruption accords, the NACC must also engage in foreign affairs and become a center for international cooperation for anti-corruption purposes.[186] The NACC is the national organization responsible for coordinating the sharing of corruption-related information during international cooperation.[187] It collaborates with a range of organizations in Thailand and other countries.[188] Cooperation between the NACC and other nations is conducted through informal channels that parallel the formal channels of mutual legal assistance established by the central authority.[189]

In addition, corruption is one of the transnational organized crime offenses that are acknowledged by the UNTOC[190] and UNCAC[191] Conventions. However, the Office of the National Anti-Corruption Commission also has an agreement with other state organizations to

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[183] SUNANTA JAMPA-NGOEN,, *Cooperation between the NACC and the Central Authority (The Attorney General) in a Croos-Border Corruption Case,* UNAFEI, at 130-131, available at: https://www.unafei.or.jp/publications/pdf/GG8/28_GG8_IP_Thailand_Sunanta.pdf
[184] *Id.* at 130
[185] *Id.*
[186] *Id.*
[187] *Id.* at 131
[188] *Id.*
[189] *Id.*
[190] Article 8 of the UNTOC Convention, *supra* note 181
[191] The United Nations Convention against Corruption, New York, adopted by General Assembly resolution A/RES/58/4 of Oct. 31, 2003, entered into force Dec. 14, 2005, 2349 UNTS 41; Doc. A/58/422 [hereafter the Merida Convention, UNCAC]

facilitate coordination in preventing and prosecuting the crime of participation in transnational organized crime.[192] Thus, the Office of the National Anti-Corruption Commission must carry out its responsibilities under the relevant laws to prevent and suppress transnational organized crime.

5.4.6 The Office of the Narcotics Control Board

This board's primary objective is to prevent and repress the illegal use of narcotics, psychotropic substances, and volatile substances as defined by law. Drug trafficking is a significant issue that jeopardizes national security and concerns the international community.[193] In all circumstances, the emphasis is on anti-narcotics as a money laundering concern, as property generated from drug trafficking is considered unlawfully acquired.[194] Consequently, this situation pushes drug traffickers to use money laundering techniques to convert such property into property that appears to have been lawfully acquired.[195]

The newly enacted Narcotic Code principally governs the functions of the Office of the Narcotic Control Board.[196] However, each agency has the jurisdiction to prevent and prosecute offenses that vary according to their legal functions. Nevertheless, some organizations are essential to some common activities, such as drug trafficking offenses or corrupt acts by public officials that frequently entail the laundering of money obtained from such offenses.[197] Moreover, the Office of

[192] The Agreement of Operations in Cases among State Organizations in line with the Anti-Participation in Transnational Organized Crime Act B.E. 2556, *supra* note 160
[193] JENNER, MATTHEW S., *International Drug Trafficking: A Global Problem with a Domestic Solution*, Indiana Journal of Global Legal Studies: Vol. 18 : Iss. 2 , Article 10. (2011)
[194] UNODC, *Drug traffick,* E4J University Module Series: Organize Crime, available at: https://www.unodc.org/e4j/zh/organized-crime/module-3/key-issues/drug-trafficking.html
[195] UNODC, *Drug traffick,* E4J University Module Series: Organize Crime, *supra* note 194
[196] Department of Corrections Ministry of Justice, *New Narcotics Bill in use this December,* (30 November 2021), available at: http://en.correct.go.th/new-narcotics-bill-in-use-this-december/
[197] NETIPOOM MAYSAKUN, *Money Laundering in Thailand,* UNAFEI, at 86-94, available at: https://www.unafei.or.jp/publications/pdf/RS_No73/No73_13PA_Netipoom.pdf

the Narcotics Control Board also has an agreement with other state organizations to facilitate coordination in preventing and prosecuting the crime of participation in transnational organized crime.[198] As a result, the Office of the Narcotics Control Board must carry out its responsibilities under the relevant laws to prevent and suppress transnational organized crime.

5.4.7 The Court of Justice

The Court of Justice is a significant judicial structure for the transnational organized crime cases brought before Thai courts. Notably, the law created a jurisdiction for the trials through the Civil and Commercial Code, the Penal Code, and other pertinent statutes. Thus, the Court of Justice's involvement in countering transnational organized crime is viewed as an organization charged with convicting those charged with transnational organized crime offenses.[199] This circumstance includes identifying associated difficulties such as extradition,[200] prisoner transfers,[201] and criminal proceedings transfers[202]. These processes are crucial to the UNTOC Convention's efforts to prevent and combat transnational organized crime.[203] As a result, as a significant body with the authority to decide cases, the court is regarded as the judiciary's primary tool for combating transnational criminal organizations.

[198] The Agreement of Operations in Cases among State Organizations in line with the Anti-Participation in Transnational Organized Crime Act B.E. 2556, *supra* note 160
[199] Article 11 of the UNTOC Convention, *supra* note 181
[200] UNODC, *Mutual Assistance and Extradition in Thailand,* available at: https://www.unodc.org/documents/southeastasiaandpacific/2009/02/TOC/9._Mutual_Assistance_and_Extradition_in_Thailand_(eng).pdf
[201] Department of Corrections Ministry of Justice, *Transfer of Sentenced Persons,* available at: http://en.correct.go.th/information-statistics/information/transfer-of-sentenced-persons/
[202] Court of Justice Thailand, *The Court of Justice System,* available at: https://www.coj.go.th/th/content/page/index/id/91994
[203] Article 11 of the UNTOC Convention, *supra* note 181; Anti-Participation in Transnational Organized Crime Act B.E. 2556

5.4.8 Other Related Organizations

Thailand is now dealing with the major problem of transnational crime. Implementing policies to promote tourism is a central policy of every government. Unfortunately, the procedure has become a way for members of criminal organizations to exploit such gaps to operate within the tourist sector, which has a more flexible and less rigorous immigration vetting process than that found in other countries. The admittance of criminals who conduct criminal activities and utilize them as hiding places as well as a way to launder assets gained from misdeeds has resulted in Thailand strengthening its law enforcement measures and responsibilities, as well as the duties of the police involved. Due to the pattern and nature of transnational criminal organizations' offenses, where modern technology is used to commit crimes that are difficult to detect and apprehend, it must be considered a shared obligation of all relevant organizations to oppose transnational organized crime. Thailand's mechanisms to resist transnational crime also comprise numerous other pertinent institutions, including the Department of Corrections,[204] the Customs Department,[205] the Excise Department,[206] and the Revenue Department.[207] These organizations are critical to the proper prevention and suppression of transnational organized crime committed within Thailand.

5.5 Conclusion

These international, regional, and national organizations are all active in the prevention and suppression of transnational crime. Collaboration between organizations is therefore necessary

[204] Department of Corrections (Thailand), available at: http://www.correct.go.th
[205] The Customs Department, available at: https://www.customs.go.th/index.php?lang=en&
[206] The Excise Department, available at: http://interweb.excise.go.th/home.php?lang=en
[207] The Revenue Department, available at: https://www.rd.go.th/english/index-eng.html

because each organization is well-suited for combating transnational organized crime at various levels. Thus, this is the proper path to take for there to be coordination in exchanging cognitive information as well as cooperative training to prevent and suppress current transnational crimes. As a result, many countries are focused on transnational organized crime offenses, which involve cross-border aspects in multiple countries, and this coordination and exchange of information regarding criminal organizations, both in terms of offenses and other pertinent information, will significantly improve the overall effectiveness of combating transnational crime.

Chapter 6

Challenges in Combating Transnational Organized Crime in Thailand

6.1 Introduction

Globalization has induced rapid changes in the economy, society, and technology. This transformation has presented challenges and obstacles for crime prevention and law enforcement.[1] In addition, Thailand has experienced severe issues with organized crime and its fight against it on a domestic and transnational level.[2] As a result, criminal activities have become more complicated because organized criminal groups have now spread out across many countries. Consequently, this circumstance has made it difficult to find relevant evidence needed to bring criminals to justice in various countries.

Even though the United Nations Convention against Transnational Organized Crime (UNTOC) has been put into practice in several countries, including Thailand, transnational organized crime (TOC) still threatens international economic and security systems.[3] Consequently, States Parties must comprehend the need to promote cooperation in resolving the issue through compliance with the UNTOC Convention's obligation. In Thailand, however, the fight against TOC is fraught with obstacles. These challenges are examined through five dimensions of TOC-

[1] ROTMAN, EDGARDO, *The Globalization of Criminal Violence,* 10 CORNELL J. L. PUB. POL'Y 1 (1) (2000)
[2] Global Organized Crime Index, *Thailand,* ocindex, available at: https://ocindex.net/country/thailand
[3] National Security Council, *Transnational Organized Crime: A Growing Threat to National and International Security,* available at: https://obamawhitehouse.archives.gov/administration/eop/nsc/transnational-crime/threat

related issues comprising a lack of collaborative efforts, a legal framework, administrative measures, political concerns, and corruption.

6.2 The Impact of Organized Crime on Thailand

This section examines challenges in Thailand's fight against TOC from five perspectives. Among these obstacles are a lack of collaborative efforts, a lack of a legislative framework, administrative measures, political concerns, and corruption.

6.2.1 A lack of cooperative efforts

According to the UNTOC Convention, all State Parties are required to establish a uniform standard for convention enforcement. However, there are still difficulties in meeting the UNTOC Convention requirements on various topics. Numerous State Parties still need to fulfill the criteria that define their responsibilities. As a result, State Parties and Thailand would need to strictly comply with their primary obligations, which would be particularly important in these areas. They would include extradition, confiscation and seizure, transfer of sentenced persons, transfer of criminal proceedings, criminal liability of legal persons, and enforcement of law obligations or rights of a third state.

6.2.1.1. Extradition

Extradition is the first point. When compared to the general criteria for extradition to the principle of extradition under the UNTOC Convention,[4] most of them contain identical content.

[4] Article 16 of the United Nations Convention against Transnational Organized Crime, New York, opened for signature, adopted by the resolution A/RES/55/25 of Nov. 15, 2000, entered into force Sept. 29, 2003, 2225 UNTS 209 [hereafter the Palermo Convention, UNTOC]

Still, some areas would remain open for discussion and would need to be altered to minimize extradition complications. Essentially, states would have no international obligation to extradite to one another unless a convention explicitly required otherwise.[5] As such, these treaties between governments would frequently be a type of bilateral agreement marked by reciprocity.[6] Each party would need to extradite to the other by establishing the terms of extradition in the treaty.[7] If the State Parties to the UNTOC Convention did not have an extradition treaty between them, it would be held in force, but it would also be required to meet the internal conditions of each state, which would be different. As a result, Thailand could face circumstances in which the States Parties would not have an extradition treaty. Therefore, the UNTOC should set criteria for such situations and require the States Parties to submit to the listed instances without exception and attempt to minimize the use of legal discretion to consider extradition between them.

In the absence of bilateral treaties between the States Parties to the UNTOC Convention, the UNTOC Convention would continue to be regarded as the fundamental basis for extradition. There would be additional impediments to the submissions, such as the prohibition on extradition, observed according to the United Nations Model Treaty on Extradition.[8] Regarding the exclusion of extradition in cases of political offenses, if a person had committed a political offense, the political offense would not be subject to extradition.[9] Although it would be difficult to consider

[5] Amnesty International, *International Law Commission: The Obligation to Extradition or Prosecute (Aut Dedere Aut Judicare),* (2009), available at: https://www.amnesty.org/fr/wp-content/uploads/2021/07/ior400012009en.pdf
[6] ROBERT O. KEOHANE, *Reciprocity in International Relations,* International Organization Vol. 40 No.1 (The MIT Press, Winter 1986) at 1-27, available at: https://www.jstor.org/stable/2706740
[7] United Nations, *Revised manuals on the Model Treaty on Extradition and the Model Treaty on Mutual Assistance in Criminal Matters,* E/CN.15/2004/CRP.11 (May 11, 2004), Part One, at n.12.
[8] Article 14 of Report of the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, U.N.Doc.A/CONF.144/28 (1990) at 64, as adopted by G.A. res. 45/116, annex, 45 U.N. GAOR Supp. (No. 49A) at 211-15, U.N. Doc. A/45/49 (1990), and subsequently amended by G.A. res. 52/88 [hereinafter Model Treaty on Extradition]
[9] PRASIT PIWATTANAPANICH, *Extradition Exceptions,* (Junniti: January-February 2010) at 41-47

the criteria for establishing whether offenses were politically wrong because additional conditions could surround offenses claiming to be political in nature, they would be included in the same offense. Hence, defining which crimes would be political offenses would need to be as clear as how the court interpreted the extradition at the request of the requesting state. Such offenses would thus continue to form the primary impediment to the extradition. Therefore, the circumstances should be resolved by identifying the character or type of crime that would include a specific political offense.

Furthermore, there have been instances where arrests or extraditions have been made without the use of extradition laws. The visa was withdrawn, and the individual was deported because he/she was deemed as an arriving alien under the terms of immigration law. This instance precluded the court from investigating the capture or control, as those terms were specified in the extradition statute. This circumstance would be because immigration agencies would be regarded as having authority over the repatriation of the immigration laws. As a result, the legal immigration authorities could be returned outside the Kingdom of Thailand without submitting an extradition request. Thus, this would be deemed a gap in the enforcement of the law's extradition provisions. In this scenario, immigration authorities should be urged to behave appropriately under extradition principles by not avoiding enforcing the immigration regulations over which they have control.[10]

Since TOC operates through a network of countries, extradition might be complicated in cases involving more than one sought jurisdiction. In addition, the criteria of the extradition would need to be prioritized regarding how the extradition would be considered to avoid jeopardizing

[10] PRASIT EKBUTR ET AL, *Globalization and international criminal law* (Bangkok: Thammasat University Research and Consulting Institute: 2008) at 185

any international relations. Consequently, the court would be critical in evaluating whether an individual would be eligible for extradition on extradition grounds. As a result, courts should take an active role in fact-checking rather than relying on practice in typical situations.

6.2.1.2. Confiscation and seizure

Second, the terms of confiscation,[11] freezing, or seizure of assets[12] have been outlined in Article 2 of the UNTOC Convention. The principle of confiscation, freezing, or seizure of assets employed or obtained within the state must be subjected to legal processes. Victims of TOC could raise issues about how confiscated or forfeited assets could be returned to a victim, especially if the crime was committed across a state border. In addition, when arrests would be made, the participants in the criminal groups would often have divergent intentions, yet any state would have the authority to decide the case, confiscate, freeze, or seize any property. When such assets would be surrendered, what subsequent steps should be taken? However, the UNTOC Convention did not specify how much of the assets acquired would be used to assist the individuals harmed.

Since the assets of TOC are frequently numerous, it would be critical to understand who would control the mechanism for dividing such property and the appropriation procedure in the event of confiscation, freezing, or seizure of illegitimate properties or assets. If the property had multiple owners and some did not commit the infraction, additional action would need to be carried out.

[11] Article 2 (g) of the UNTOC Convention is defined 'confiscation' that includes forfeiture where applicable, shall mean the permanent deprivation of property by order of a court or other competent authority.
[12] Article 2 (f) of the UNTOC Convention is defined 'freezing' or 'seizure' that shall mean temporarily prohibiting the transfer, conversion, disposition or movement of property or temporarily assuming custody or control of property on the basis of an order issued by a court or other competent authority.

6.2.1.3. Transfer of sentenced persons

Third, the transfer of prisoners would occur when foreign nationals would be convicted of a crime in Thailand, and Thai nationals would be convicted of a crime in a foreign country.[13] The transfer of prisoners would be permitted only if a transfer treaty existed between Thailand and the other country.[14] The transfer procedure could then be initiated, or prisoners could initially request a transfer to their home country.[15]

According to the provisions of the UNTOC Convention,[16] States Parties could consider participating in bilateral or multilateral agreements regarding the transfer of prisoners to their territory for offenses covered by the Convention. Such agreements would permit prisoners to serve their sentences in their home countries. However, the provision of the UNTOC would be merely a broad framework for the State Parties to use in establishing standards for the transfer of prisoners, which would essentially be conceivable when they had reached an agreement.[17] Additionally, crimes committed between two or more countries would be considered transnational. As a result, the notion of prisoner transfer would be required for international cooperation. Nevertheless, there could be complications if the offense committed was punishable under the laws of one country but not under the laws of another.

In Thailand, the Procedure for Cooperation between States in the Execution of Penal Sentences Act B.E. 2527 (1984) has established the criteria for the transfer of prisoners.[18] The prisoner must serve a minimum period of imprisonment and be required to pay any fine imposed

[13] Article 17 of the UNTOC Convention, *supra* note 4
[14] Department of Corrections Ministry of Justice, *Transfer of Sentenced Persons,* available at: http://en.correct.go.th/information-statistics/information/transfer-of-sentenced-persons/
[15] *Id.*
[16] Article 17 of the UNTOC Convention, *supra* note 4
[17] *Id.*
[18] The Procedure for Cooperation between States in the Execution of Penal Sentences Act B.E. 2527 (1984), available at: http://thaicorrections.com/wp-content/uploads/2018/09/THE-PROCEDURE-FOR-COOPERATION-BETWEEN-STATES-IN-THE-EXECUTION-OF-PENAL-SENTENCES-ACT-B.E.-2527.pdf

as part of the criminal sentence before the transfer.[19] Moreover, the transfer of Thai prisoners in foreign countries to undergo continuous punishment in Thailand or the transfer of foreign prisoners in Thailand to undergo continuous punishment in foreign countries would be under the requirements prescribed in Section 6.[20] However, there would be an exception if the punishment in the transferring state was not the same as the offense with any count of punishment under the receiving state's law, as this criterion would not have been stipulated in a prisoner transfer treaty.[21] As a result, the transfer of prisoners in Thailand would be governed by the terms of the governing treaty; prisoners with less than a year left on their sentence or those convicted of certain crimes, such as political or military offenses, would not be eligible.

However, prisoner transfers are part of international criminal cooperation based on humanitarian and compassionate values, thus allowing criminals to return to their domestic sentences, climate traditions, and environments close to their families who would be able to visit

[19] The United Nations Office on Drugs and Crime, *Standard Minimum Rules for the Treatment of Prisoners,* (UNODC), available at: https://www.unodc.org/pdf/criminal_justice/UN_Standard_Minimum_Rules_for_the_Treatment_of_Prisoners.pdf

[20] Section 6 of the Procedure for Cooperation between States in the Execution of Penal Sentences Act B.E. 2527 (1984):

> The transfer of Thai prisoners in foreign countries to undergo continuous punishment in the Kingdom, or the transfer of foreign prisoners in the Kingdom to undergo continuous punishment in foreign countries shall be under the following criteria:
>
> (1) The transferring State and the Receiving State shall enter into a treaty for cooperation between States in the execution of penal sentences.
>
> (2) The transfer of prisoners shall be approved by the Transferring State and the Receiving State and consented by prisoners to be transferred.
>
> (3) Offenses that Thai prisoners or foreign prisoners have undergone the punishment shall be offenses with any count of punishment under the law of the Receiving State.
>
> (4) Prisoners to be transferred shall not be subject to criminal proceedings for other offenses or in the process of the retrial of criminal cases in the Transferring State.
>
> (5) The transfer of prisoners shall be either beneficial to or in favor of such prisoners.
>
> (6) Regarding the degree of impact of the transfer of prisoners on the issue of crimes and collective feelings of people in the Transferring State and the Receiving State, the nature and Severity of the commission of offenses shall be taken into account.
>
> The provisions contained in (3) shall not apply in the event that such provisions have not been prescribed in a treaty between states of the Transferring State and the Receiving State, or three are conditions otherwise prescribed therein.

[21] *Id.*

them. In Thailand, the benefits for Thai prisoners who have been convicted remain uncertain. In addition, given the current loopholes between the conditions in foreign prisons and those for Thai prisoners in Thailand, the question would be whether transferring foreign convicts to the receiving state to complete their sentences would conceal their identities and facilitate their release.[22]

6.2.1.4. Transfer of criminal proceedings

The UNTOC Convention requires States Parties to consider transferring criminal proceedings to one another for the prosecution of offenses covered by the Convention[23] if such a transfer would be deemed to be in the interests of appropriate justice, particularly in cases involving multiple jurisdictions, with a focus on the prosecution.

Considering the conditions for transferring criminal proceedings against TOC to other states, jurisdiction would be restricted in determining the sequence of the states' rights with jurisdiction if an organized criminal group committed a crime and caused damage to more than one state.[24] If the transferring state and the receiving state had a treaty or framework in place to transfer criminal procedures, such laws could be utilized.[25] However, if the State Parties did not have such a treaty, there could be complications if the damage occurred in multiple states, each with unique injuries;[26] for example, suppose a state with the power to arrest an offender suffered less damage than other states in such instances even if the state had the legal authority to punish the offender due to its jurisdiction, suitability, and other effects. If a prosecution was transferred to another state, the likelihood or tendency to criminalize and heal those injured should be larger

[22] PRASOPSUK BOONDEJ, *Transfer of prisoners,*(Dulpaha 36th Year, Vol.1 (January-February 1989)) at 20
[23] Article 21 of the UNTOC Convention, *supra* note 4
[24] *Id.*
[25] BOUDEWIJN DE JONGE, *Transfer of criminal proceedings: from stumbling block to cornerstone of cooperation in criminal matters in the EU,* (ERA Forum 21: 2020) at 449-464, available at: https://link.springer.com/content/pdf/10.1007/s12027-020-00616-8.pdf?pdf=button%20sticky
[26] *Id.*

than the measure's intent to compel that State Party to transfer the criminal proceedings to a more likely state of conviction.

6.2.1.5. Criminal liabilities of legal persons

This point illustrates the difficulties and impediments associated with the maltreatment of legal entities, which would be considered a subset of TOC in which the legal entities would be frequently constructed as a vehicle for wrongdoing.[27] When organized criminal groups were apprehended, they would often use legal entities in the form of companies to commit crimes.[28] When they were arrested, the manager would receive the penalty instead without being able to take offense at those responsible.[29] As such, specific measures to remove the offense would need to be taken. Suppression would be an issue if the configuration was exemplary and there were no other obligatory precautions.[30] Legal entities with ties to transnational criminal organizations would be large entities with many assets or incomes derived from illegal activity.[31] Hence, fines would be punitive measures that could not instill fear in those who committed infractions.[32] As a result, additional methods for penalizing legal entities should be developed in addition to those for punishing their representatives even if they could not be imprisoned.[33] They could still be closed even if they could not be executed but could be dissolved if needed by law.[34] For instance, if State

[27] United Nations Office on Drugs and Crime, *Module 4: Infiltration of Organized Crime in Business and Government: Liability of legal persons,* available at: https://www.unodc.org/e4j/en/organized-crime/module-4/key-issues/liability-legal-persons.html
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] United Nations Office on Drugs and Crime, *Module 4: Infiltration of Organized Crime in Business and Government, Money-laundering,* available at: https://www.unodc.org/e4j/en/organized-crime/module-4/key-issues/money-laundering.html
[32] Kenneth Mann, *Punitive Civil Sanctions: The Middleground between Criminal and Civil Law,* 101 YALE. L. J. (8) 1795, 1795-1873 (June, 1992), available at: https://www.ojp.gov/ncjrs/virtual-library/abstracts/punitive-civil-sanctions-middleground-between-criminal-and-civil
[33] United Nations Office on Drug and Crime, *Module 7: Alternatives to Imprisonment, Topic two-Justifying punishment in the community,* available at: https://www.unodc.org/e4j/en/crime-prevention-criminal-justice/module-7/key-issues/2--justifying-punishment-in-the-community.html
[34] *Id.*

A participated in drug trafficking to State B, there would be sufficient proof that representatives of State A committed the crimes. Then, if the state was a legal person, it would also still be liable, or if the state was involved in the perception of organized criminal group activities, such as arms trafficking, how culpable would the state be, even if the state was imposed on the protection of the state?

6.2.1.6. Obligation of a Party to the Convention

Article 26 of the 1969 Vienna Convention on the Law of Treaties[35] codifies '*pacta sunt servanda*', the customary international law requiring treaties to be obligatory for treaty signing states. This article had two implications: a treaty was solely binding on States Parties and could not confer the rights and obligations on third states who were not parties to the treaty, as the Latin proverb states '*Res inter alios acta, aliis nec nocet nec prodest*'.[36]

The treaty significantly would be solely applied between the State Parties; a notion confirmed by Article 34 of the VCLT Convention states: "a treaty does not create either obligations or rights for a third state without its consent."[37] Cases in which an offense would occur on the territory of a third state, which could not claim benefits or be compelled to comply with the treaty without the third state's consent.[38] Moreover, such cases would occur in which the treaty could create rights and obligations, or obligations to the third state if the third state consented even if the treaty did not expressly grant the third state obligation rights.[39]

[35] 22 MAY 1969, 1155 UNTS 331. [hereafter the VCLT Convention]
[36] CHATURON THIRAWAT, *international law,* (Bangkok, winyuchon 2nd ed.: 2007) at 175; *Admissibility of Evidence res inter alios acta,* 10 COLUM. L. REV. (8) 759, 759-761 (Dec. 1910).
[37] A treaty does not create either obligations or right for a third State without its consent.
[38] GUZMAN, ANDREW, *The Consent Problem in International Law,* Berkeley Program in Law and Economics, Working Paper Series, (March 10, 2011), available at: https://escholarship.org/content/qt04x8x174/qt04x8x174.pdf
[39] *Id.*

As a result, the treaty's enforcement could have consequences for third states, such as the most favored nation principle, or if the treaty expressly required its parties to withdraw from other treaties' commitments. Additionally, the parties would have made commitments to other countries, or the consequences of their responsibilities would necessarily affect other states' rights and obligations under the treaty.[40]

In another case, the treaty's rules or regulations could be binding on the third state on the basis that this would be customary international law, as defined in Article 38 of the VCLT Convention, which states that "nothing in Articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third state as a customary rule of international law, recognized as such."[41]

The enforcement against third states is also one of the major issues because many countries that have not yet entered the party are considered major powers, such as South Korea.[42] Another case is that a state party would have also made the reservation. Additionally, states who would still need to ratify the UNTOC Convention would not be entitled to attend the meetings of the parties. The Convention could participate exclusively in the capacity of observer states.

6.2.2 Legal framework

In Thailand, organized criminal groups take on various forms and engage in diverse activities. When Thai criminals collaborate with foreign criminals to commit illegal acts in

[40] LAVAN TANADSILPAKUL, *Treaty process*. (Thailand Science Research and Innovation (TSRI): 2007)
[41] *Id.* at 75
[42] The United Nations Treaty Collections, available at https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XVIII/XVIII-12.en.pdf

Thailand, the legal framework of Thailand becomes inadequate or ineffective at detecting the organized criminal groups and their members**.**

6.2.2.1. Measures against drug trafficking

The Narcotics Code B.E. 2564 (2021) was recently enacted and entered into force on December 9, 2021.[43] This Code has a new conceptual framework and policy based on the idea of human dignity by prioritizing three areas: public health, human resource development, and human security.[44]

Significantly, the outcomes of the former conceptual framework on the solution to narcotics control needed to be reviewed.[45] In addition, the Global Commission on Drug Policy under the United Nations reviewed the narcotics problems of various countries during the past years to find out the reasons why the world failed to deal with the problem.[46] On the contrary, the problem has continued to exacerbate and has not declined.[47] The Global Commission on Drug Policy concluded that the main cause of the drug problem's expansion was that producers, dealers, and users were seen as criminals who caused trouble and undermined humanity.[48] However, the goal of combating such drug trafficking is to destroy the major network structure of the narcotics trade and criminal syndicate by seizing any property associated with the narcotics charges and any tools, machines, vehicles, and other property used to commit narcotics offenses.[49]

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[43] PERMPONG CHAOYALIT, *The Draft narcotics Code and the Solution to the National Narcotics Problem,* 37ONCB J. 1(Oct. 2020-March 2021) at 21-34, available at: https://nctc.oncb.go.th/ewt_dl_link.php?nid=960&filename=index
[44] *Id.* at 21-24
[45] *Id.*
[46] *Id.* at 21
[47] *Id.*
[48] *Id.* at 21-24
[49] SITTIPONG TANYAPONGPRUCH, *Transnational Organized Crime in Thailand,* (UNAFEI Annual Report 2000, NCJ No. 2000221: 2002) at 605, available at: https://www.ojp.gov/ncjrs/virtual-library/abstracts/transnational-organized-

As a result, the new Narcotics Code has aimed to counter the drug problems differently and systematically through a legal framework dealing with the drug problem with a new conceptual framework based on human dignity.

6.2.2.2. Anti-money laundering law

Since 1999, five amendments to the Anti-Money Laundering Act B.E. 2558 (2015) have been made. This Act mandates financial institutions to notify the Office of Money Laundering Control of any transaction exceeding two million Thai Baht (approximately USD 56,000) for investigation.[50] Additionally, on February 25, 2022, a Memorandum of Understanding (MOU) was signed to facilitate collaboration between the Royal Thai Police and financial institutions.[51] This MOU thus intended to resolve issues for victims of technical crimes and coordinate operations between the police and bank officials to be more efficient, timely, and commensurate with today's model of technological crime.[52]

6.2.2.3. Capital punishment

Although the death penalty has been a source of contention among Thai lawyers and human rights activist groups regarding its basis for reducing crime, capital punishment is still beneficial in Thailand.[53] According to a study titled 'The Abolition of the Death Penalty: A case study of appropriate offenses'[54], the death penalty should be reserved for those who commit serious crimes

crime-thailand-unafei-annual-report-2000#:~:text=They%20are%20well%20organized%20and,and%20financial%20and%20securities%20fraud

[50] Anti-Money Laundering Act of B.E. 2542 (1999), available at: https://www.samuiforsale.com/law-texts/anti-money-laundering-act.html

[51] The Government Public Relations Department (PRD), *The Association of Public Financial Institutions signed the MOU in conjunction with the Royal Thai Police, the Thai Bankers Association, to implement the online notification system for technological crimes.,* (PRD: Feb 28, 2022) available at: https://www.prd.go.th/th/content/category/detail/id/9/iid/79137 [translation]

[52] *Id.*

[53] S. TANYAPONGPRUCH, *supra* 49 at 605-606

[54] WIPAPON NATIGIRACHORD,, *The abolition of the death penalty: A case study of appropriate offenses,* 41 KASETSART J. SOC. SCI. 576, 576 (2020), available at: https://uca.edu/politicalscience/files/2022/01/Wipaporn-Natigirachord-2020-Thailand.pdf

that resulted in a significant loss to society. On the other hand, Thailand is abolishing the death penalty because this study proposed that other methods should be used instead of the death sentence by examining two processes.[55] This study subsequently recommended changing all death penalty legislation and suspending the death penalty depending on the appropriateness of the death sentence for each type of offense.[56]

6.2.2.4. Plea bargaining

In Thailand, plea bargaining is a relatively recent legal concept. It was thought that anyone who committed a crime deserved to face a certain level of punishment.[57] In comparison, criminal activities are becoming more sophisticated because they are organized into groups, and their operations extend outside the state's borders. The defendant who had been apprehended could contain vital information about their groups that, once revealed, could assist law enforcement in arresting the ringleader(s).[58] There has recently been a discussion about incorporating the plea bargaining concept into Thai law.[59] Studies and seminars have been conducted on the most appropriate way to utilize plea bargaining in criminal cases.[60] However, there would be perceived issues since the Thai Criminal Procedure would permit the filing of criminal charges by an injured party.[61] Consequently, plea bargaining could have some impact on such injured parties.

[55] W. NATIGIRACHORD, *supra* note 54 at 580
[56] *Id.*
[57] S. TANYAPONGPRUCH, *supra* 49 at 606
[58] *Id.*
[59] PISSANU HORAKUL, *A comparative study of plea bargaining with special reference to human rights in India and Thailand,* (Shodhganga: March 27, 2018)
[60] S. TANYAPONGPRUCH, *supra* 49 at 606
[61] *Id.*

As a result, plea bargaining should be employed exclusively in cases involving illegal drugs in which the state would be the injured party.[62]

6.2.2.5. Witness protection scheme

The Thai government fully recognizes the importance of witnesses and that if a witness were to receive inadequate protection, damage to criminal justice could result.[63] The present Constitution[64] recognizes the rights of witnesses in criminal cases to receive protection, appropriate treatment, and necessary remuneration from the state.[65] However, safeguards for witnesses still remain inadequate even though the Witness Protection Act B.E. 2546 (2003) is in existence.[66] The protection of witnesses is a sensitive issue and requires a substantial budget, depending on the offender's influence level.[67] This issue is a significant drawback of the law.

Moreover, it is still difficult for Thai people to have unlimited access to justice. Thai bureaucratic reform and the present Constitution have aroused people's awareness of their rights, but they are still not fully confident in the criminal justice system and witness protection.[68] In particular, offenders who are members of organized criminal groups could permeate all levels and sectors of daily life.[69] Therefore, to testify against such an offender could put their own safety or that of their family at risk. While funding constraints are concerning, this witness protection program is unavoidably necessary to combat TOC.

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[62] S. TANYAPONGPRUCH, *supra* 49 at 606
[63] WANCHAI ROUJANAVONG, *Organized Crime in Thailand,* (Rumthai Press: 2006) at 38, available at: https://www.unafei.or.jp/publications/pdf/RS_No59/No59_40PA_Tanyapongpruch.pdf
[64] Section 4 of the Constitution of the Kingdom of Thailand, available at: https://cdc.parliament.go.th/draftconstitution2/download/article/article_20180829093502.pdf
[65] *Id.*
[66] The Witness Protection Act B.E. 2546 (2003), available at: https://sherloc.unodc.org/cld/uploads/res/document/tha/2003/witness_protection_act_b_e__2546_html/Thailand_Witness_Protection_Act_BE_2546_2003.pdf
[67] W. ROUJANAVONG, *supra* note 63 at 38
[68] *Id.*
[69] *Id.*

Additionally, modern technology is being introduced into trials. For example, to alleviate witnesses' fear of taking the stand and confronting the defendant, who could be an influential person or member of an organized crime group, video conferencing should be used instead of the traditional method. Consequently, witnesses could testify in front of a video camera in a room separate from the trial room. This strategy would assist witnesses in feeling more relaxed and comfortable when testifying.[70]

However, there is the extraordinary case of the principle of using untrained informants to conduct dangerous police operations with few legal safeguards that the Thai government should consider further. This principle is embodied in 'Rachel's Law'[71], which was enacted by the Florida State Senate in 2009 and required law enforcement agencies to provide special training to officers. The officers, who recruited confidential informants, would inform the informants that reduced sentences would not be available in exchange for their cooperation and would allow informants to request a lawyer if they so desired.[72] As a result, Thai law enforcement agencies could protect informants more carefully when required to perform in high-risk scenarios.

6.2.2.6. Punishment in the future

People are worried about cyberspace vulnerabilities and the dark side of information networks because society places more emphasis on information technologies.[73] Hence, expanding lawful digital enterprises would be critical to economic progress. Additionally, markets and commerce have always attracted criminals seeking profits from illicit activities.[74] As a result,

[70] S. TANYAPONGPRUCH, *supra* 49 at 606
[71] IAN LESON, *Toward Efficiency and Equity in Law Enforcement: "Rachel's Law" and the Protection of Drug Informants*, 32 B.C.J.L. & SOC. JUST. 391 (2012)
[72] *Id.*
[73] TATIANA TROPINA, *The Evolving Structure of Online Criminality: How Cybercrime Is Getting Orgnised,* (eucrim: issue 4/2012) at 158, available at: https://eucrim.eu/articles/evolving-structure-online-criminality/
[74] *Id.*

digital networks have become a crucial enabler of cybercrime's expansion in terms of classic crimes committed through the Internet and the development of new forms of computer misuse.[75]

Moreover, as big data, artificial intelligence, blockchain, and the metaverse emerge, criminal groups and law enforcement agencies would focus their efforts on implementation.[76] These developments would aid the expansion of organized criminal groups' illegal activities. As a result, TOC could be challenging to prevent and repress if the Thai government was still considering collaborating with other countries to create strategies to combat it.

6.2.3 Administrative measures

Criminals frequently target Thailand, as well as possibly many other countries. Additionally, crime prevention measures would continue to directly or indirectly influence and administratively reflect various types of crime in the future. As a result, Thailand's approach to specific concerns should be strengthened to increase the effectiveness of crime prevention and suppression.

The first problem that should be discussed is correctional issues. As of July 2021, Thailand had the world's sixth-largest prison population with about 310,000 inmates imprisoned.[77] The statistics would demonstrate that the resources dedicated to prison administration and management were insufficient to meet even the most basic needs. As a result of this circumstance, prisons are overcrowded, pre-trial detention is protracted, prison conditions are too harsh, and effective

[75] TATIANA TROPINA, *supra* note 73.
[76] SANJA MILIVOJEVIC, *Crime and Punishment in the Future Internet: Digital Frontier Technologies and Criminology in the Twenty-First Century,* (Routledge: 2021)
[77] M. SZMIGIERA, *Countries with the largest number of prisoners as of July 2021,* (statista: Jul. 30, 2021), available at: https://www.statista.com/statistics/262961/countries-with-the-most-prisoners/

rehabilitation programs are lacking.[78] Moreover, when the situation comes to criminal behavior, alternatives to imprisonment are frequently more affordable and effective than prisons.[79] In addition, prisons serve as recruitment hubs for organized crime and terrorism due to corruption. Following international human rights standards, having effective prison management and alternatives to jailing would help reduce crime and the number of people who join illegal transnational activities.[80] As such, there could be several ways in which the UNODC could help member states reform their prison systems, such as through legislative and regulatory reform, improving prison management practices and capacities, protecting vulnerable groups,[81] and advocating for human rights.[82]

Nonetheless, a corrections-related epidemic or pandemic, such as HIV/AIDS[83] or COVID-19,[84] would need to be considered and managed appropriately. Once a prison population became overcrowded, the pandemic would spread quickly. However, the presence of the COVID-19 pandemic would be no excuse to release all prisoners from the prison.[85] The problem of overcrowded prisons would be primarily the result of the excessive use of criminal laws, which would have resulted in criminal law inflation. This situation would impose a criminal penalty for an act or omission of an act in the belief that the criminal penalty would control people's behavior

[78] *Cf.* MARK S. FLEISHER & SCOTT H. DECKER, *An Overview of the Challenge of Prison Gangs,* 5(1) Corrections Management Quarterly 1, 1-9 (2001)
[79] United Nations, *Prison management,* available at: https://www.unodc.org/roseap/en/what-we-do/criminal-justice/prison-management.html
[80] United Nations, *Prison management, supra* note 79
[81] United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules), available at: https://www.ohchr.org/en/instruments-mechanisms/instruments/united-nations-rules-treatment-women-prisoners-and-non-custodial
[82] Basic Principles for the Treatment of Prisoners, adopted and proclaimed by General Assembly resolution 45/111 of 14 December 1990, available at: https://www.ohchr.org/sites/default/files/basicprinciples.pdf
[83] MICHAEL WELCH, *Corrections: A critical approach,* (Routledge, 3rd ed: 2011) at 554-562
[84] International Federation for Human Rights, *Prison report in Thailand: sub-standard conditions and inadequate COVID-19 response,* (fidh: March 24, 2022), available at: https://www.fidh.org/en/region/asia/thailand/thailand-prison-report-covid
[85] DAN MCLAUGHLIN, *Coronavirus Is No Excuse to Empty Jails,* (Yahoo!: Apr. 16, 2020) available at: https://www.yahoo.com/now/coronavirus-no-excuse-empty-jails-103030013.html

in society. This has resulted in the imprisonment of perpetrators regardless of whether the offense was nonviolent or was defined as a violation of public administration procedures that did not comply with the international standards for the impeachment of criminal offenses.[86]

Second, insufficient financial resources could significantly limit the law enforcement's ability to combat TOC.[87] This would be because inadequate budgetary management would directly impact law enforcement agencies most notably through a lack of modern equipment or technology and a limited training and education budget. For example, on February 26, 2021, Officer Gary Kunaboot of the San Francisco Police Department California, USA stated during an interview at the Central Police Station that the government was responsible for providing police officers with all the necessary equipment. Officer Kunaboot also worked with other law enforcement agencies, such as the Federal Bureau of Investigation (FBI) and Drug Enforcement Administration (DEA), to arrest individuals involved in the illegal trafficking of gang-related illegal narcotics. Other offenses committed by organized criminal groups in the San Francisco Bay area of California, USA and other states are notoriously called 'organized retail crimes'.[88] The severity of organized retail crime in San Francisco could also be demonstrated through the closure of five Walgreens locations[89] and dozens of ransackings of a Nordstrom department store near the city in a mass smash-and-grab loot run.[90]

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[86] SARANYA SIMA, *The overcrowded prisoners in correctional system.,* (Academic Focus: June, 2020) at 15 available at: https://www.parliament.go.th/ewtadmin/ewt/parliament_parcy/ewt_dl_link.php?nid=69144

[87] SHEELAGE BRADY, *Policing TOC—The National Perspective, in International Law and Transnational Organised Crime,*490 (PIERRE HAUCK & SVEN PETERKE (ed.), Oxford U. Press, 1st ed.: 2016)

[88] Personal interview at Central Police Station with Officer Gary Kunaboot, who has joined the SFPD since 2014 and has also received his awards—Officer of the Month in September 2018 and SFPD Protector of the Year 2021.

[89] TESSA MCLEAN, *Walgreens closing 5 San Francisco stores due to 'organized retail crime',* (SFGATE: Oct. 12, 2021), available at: https://www.sfgate.com/bayarea/article/Walgreens-closing-5-Sf-stores-crime-shoplifting-16527801.php

[90] ANDY ROSE & THERESA WALDROP, *3 arrested after dozens ransack a Nordstrom store near San Francisco, police say,* (CNN: Nov. 22, 2021), available at: https://www.cnn.com/2021/11/21/us/nordstrom-ransacked-california-walnut-creek/index.html#:~:text=Live%20TV-

On the other hand, if organized retail crime happened regularly in the country, Thai law enforcement officials would need help to address it effectively. Many Thai law enforcement agencies, especially at the local level, need more training, current technology, and experience to deal with such crimes. Moreover, not all law enforcement authorities in Thailand or many other countries have a comprehensive strategy for countering organized retail crime or TOC, leading to piecemeal responses.[91] Consequently, the problem is caused by inefficient management of administrative budgets, which would either directly or indirectly affect how well law enforcement officials do their jobs. Strategies based on modern technology would need to be improved to fight TOC.[92] Giving law enforcement agencies more modern and practical tools; for example, big data, could help them solve any crime. As a result, the more data or more accurate data the police would have, the more valid and reliable their response to crime would be, including prediction and prevention.[93] As a consequence, the Thai government should address this issue immediately.

6.2.4 Political issues

First, money politics was widespread in Thailand.[94] Through their agents and political canvassers with power in a given area, politicians utilized the money to purchase votes by paying eligible voters to vote for their candidate.[95] Once elected, these politicians would bargain to be a part of the coalition government or even to hold a cabinet position.[96] When a person became a

,3%20arrested%20after%20dozens%20ransack%20a,near%20San%20Francisco%2C%20police%20say&text=(CNN)%20Three%20suspects%20were%20arrested,%2Dand%2Dgrab%22%20incident.
[91] S. BRADY, *supra* note 87 at 490
[92] CHITPHOL KANCHANAKIT, *Challenges to ASEAN States in Combating Transnational Crime,* 46 J. SOC. SCI. 51, 68-9 (2016), available at: http://www.library.polsci.chula.ac.th/dl/ec2f8e4d305e80f606ae967a3648b43f
[93] BARAK ARIEL, *Advocate: Technology in Policing, in* DAVID WEISBURD & ANTHONY A. BRAGA (ED.), *Police Innovation: Contrasting Perspectives,* (Cambridge U. Press, 2nd ed: 2019) at 496
[94] W. ROUJANAVONG, *supra* note 63 at 39; JAY S. ALBANESE, *Why Corruption is the Largest Problem in the World,* Freda Adler Distinguished International Scholar Award Address, International Criminology (2022) at 103-110, available at: https://link.springer.com/content/pdf/10.1007/s43576-022-00060-3.pdf?pdf=button
[95] *Id.*
[96] *Id.*

minister, they attempted to gain wealth in numerous ways by using their political influence.[97] For instance, they would assist their own enterprises, manipulate the budget, and receive kickbacks from megaprojects.[98] This form of politics was equivalent to another form of business, therefore the alternate term business politics.[99]

Simultaneously, the evolution of an organized criminal group in Thailand would typically begin with committing minor offenses and subsequently progressing to more serious crimes.[100] Such a group would then form spheres of power to advance to other activities.[101] By doing so, they would penetrate politics at all levels to safeguard both their illegal and legal businesses and act fraudulently in various ways.[102] They would also utilize influence and power to promote their legal enterprises to obtain a competitive advantage in the market or manage rivals.[103] The godfather, or a person of influence, who would have a proven sphere of control and profits from illicit operations, would be a crucial player in organized crime in Thailand.[104] Nonetheless, these persons of influence would have a network and patrons ranging from government officials to locals, which would make them a valuable resource in the vote-buying system.[105]

With regard to persons of influence, they would be involved in illegal or semi-illegal enterprises. As part of money politics, these businesses would create funds, which would subsequently be laundered through legal businesses and invested in vote-buying.[106] Some persons

[97] W. ROUJANAVONG, *supra* note 63 at 39; JAY S. ALBANESE, *supra* note 94.
[98] W. ROUJANAVONG, *supra* note 63 at 39
[99] *Id.*
[100] LESLEY D. JUNLAKAN ET AL, *Contemparary Crime and Punishment in Thailand,* globcci (2013) at 309-326, available at: https://globcci.org/wp-content/uploads/2021/07/Crime-Punishment-in-Thailand-2013.pdf
[101] W. ROUJANAVONG, *supra* note 63 at 39
[102] *Id.* at 11-12
[103] *Id.*
[104] *Id.* at 11
[105] *Id.*
[106] *Id.* at 13

of influence would sponsor candidates in various constituencies around their home base.[107] As a result, they would be able to control enough persons of influence through this backing to support a minister, who in turn would defend their illegal businesses.[108] This connection would indicate the interdependence of politicians and influential individuals.

Another factor to consider when addressing TOC is the presence or absence of a political will.[109] Thailand has had a long history of political instability,[110] as evidenced by the 21 coups and 20 constitutions that have occurred since the country's first coup in 1932.[111] The most recent coup occurred in 2014, led by General Prayuth Chan-o-cha, the Royal Thai Army's Commander.[112] As a result, Prime Minister Prayuth's government transformed itself from a military dictatorship to a quasi-democratic coalition owing to a military-dictated constitution and an unbalanced election system.[113] Thailand's coups have also affected the country's economic and social stability and development.[114] TOC, in particular, would take advantage of these situations of conflict and fragility to infiltrate official structures and obstruct the rule of development of the law.[115] Due to this situation, TOC would thrive in areas with lax or absent formal state control, such as those with low contract enforceability, flexible border controls, and insufficient provision of public goods.[116]

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[107] W. ROUJANAVONG, *supra* note 63 at 13
[108] *Id.*
[109] S. BRADY, *supra* note 87 at 491
[110] TOM OBOKATA, *transnational organized crime in international law,* (Hart Pub.: 2010) at 123-124
[111] TOM CHITTY, *Why does Thailand have so many coups?,* (CNBC: Aug. 20, 2019) available at: https://www.cnbc.com/2019/08/20/why-does-thailand-have-so-many-coups.html; Britannica, *The 1932 coup and the creation of a constitutional order,* available at: https://www.britannica.com/place/Thailand/The-1932-coup-and-the-creation-of-a-constitutional-order
[112] THONGCHAI WINICHAKUL, *Thailand's kingdom of enslavement,* (NIKKEI Asia: Oct. 16, 2020) available at: https://asia.nikkei.com/Opinion/Thailand-s-kingdom-of-enslavement
[113] *Id.*
[114] S. BRADY, *supra* note 87 at 491
[115] PAULA MIRAGLIA ET AL, *Transnational organized crime and fragile states,* (OECD: WP 5/2012), at 13-14, available at: https://www.oecd-ilibrary.org/docserver/5k49dfg88s40-en.pdf?expires=1650841262&id=id&accname=guest&checksum=F15833BDCBED5A4AC206FA6E7FBE21AB
[116] *Id.*

Moreover, governments in a large proportion of developing countries, including Thailand, would frequently prioritize development, peace, security, and the protection of human rights over TOC.[117] As a result, the problems associated with TOC in Thailand still remain unresolved.

6.2.5 Corruption

Corruption is another critical issue that should be addressed and alluded to previously. This is because corruption would also be related to political issues.[118] Since 2014,[119] Transparency International's *Corruption Perceptions Index* (*CPI*) has illustrated Thailand's statistics from 2014 to 2022, indicating that Thailand has consistently fallen from being ranked 85th to 110th.[120] As a consequence, this would be worth carefully examining because that would be when Thailand's most recent coup began. Additionally, it is generally known that organized criminal groups and networks maintain strong connections with local and national politicians, government and law enforcement officials, and other sectors, which would enable them to conduct their operations.[121] For example, since 2017, it has been demonstrated that numerous Thai local and national politicians, government officials, and law enforcement officials have been involved in the largest human trafficking scheme[122] (as discussed in Chapter 1). Moreover, these government officials of the recent coup are considered influential[123] because they pressed the most senior human

[117] S. BRADY, *supra* note 87 at 491; C. KANCHANAKIT, *supra* note 92 at 68
[118] W. ROUJANAVONG, *supra* note 63 at 39
[119] T. WINICHAKUL, *supra* note 112
[120] Transparency International, *Corruption Perceptions Index: Asia Pacific, Thailand,* 2014-2021, available at: https://www.transparency.org/en/cpi/2014/index/tha
[121] T. OBOKATA,*supra* note 110 at 130; C. KANCHANAKIT, *, supra* note 92 at 68
[122] Thai PBS World, *Story of Thai policeman in exile and victims of human trafficking revealed in parliament,* (Thai PBS: Feb. 19, 2022), available at: https://www.thaipbsworld.com/story-of-thai-policeman-in-exile-and-victims-of-human-trafficking-revealed-in-parliament/
[123] JAY, S. ALBANESE, *Transnational Crime and the 21st Century: Criminal Enterprise, Corruption, and Opportunity* 126, (Oxford Univ. Press., 1st ed., 2011). The specific crimes of corruption implied in this definition include: influence pedding—using one's influence with public officials to obtain favors or preferential treatment for another, usually in return for payment.

trafficking police officer, the investigation team leader, Police Major General Paween Pongsirin, to seek political asylum in Australia.[124] Along with low salaries for law enforcement and public officials, one critical factor that facilitates corruption in Thailand is the military's disregard for the rule of law.[125] This has been made possible by the military's control of numerous political institutions.[126] Additionally, empirical studies have demonstrated that organized crime, a lack of the rule of law, and corruption all directly affect a country's wealth. When countries are compared on corruption and organized crime characteristics, the quality of the state's institutions, such as the police, prosecution, and courts would be the most critical factor in explaining the levels of corruption, regardless of the country's level of development.[127] As a result, corruption could likely be studied by understanding how corruption would create a market for TOC activities and the issue that would enable their survival and expansion by connecting the critical points between corrupt people, uncontrolled places, and criminal opportunities.[128]

6.3 Conclusion

The challenges of organized crime have been changing its activities from domestic to global. Thailand has attempted to adopt and improve various methods to deal with TOC issues. However, Thailand has had to cope with challenging problems, including a lack of cooperative efforts, legal framework, administrative measures, political issues, and corruption. Inevitably,

[124] GAY ALCORN, *Reveal: Thailand's most senior human trafficking investigator to seek political asylum in Australia,* (The Guardian: Dec. 9, 2015), available at: https://www.theguardian.com/world/2015/dec/10/thailands-most-senior-human-trafficking-investigator-to-seek-political-asylum-in-australia; BBC NEWS, *Thailand trafficking: TOP policeman seeks Australia asylum,* (BBC NEWS: Dec. 10, 2015); *See also* Al Jazeera English, *Documentary: Thailand's Fearless Cop: 101 East,* (Al Jazeera), available at: https://youtu.be/76hxGsXN2EI
[125] T. OBOKATA,*supra* note 110 at 130
[126] *Id.*
[127] JAY, S. ALBANESE, *supra* note 123 at 137
[128] *Id.* at 138

Thailand has not been left unscathed by the problems with organized criminal groups impacting the development and administration of the country as a whole. As a result, Thailand urgently needs to develop measures to combat organized crime, such as law and criminal justice system improvements. This would assist Thailand in fighting TOC more effectively.

Chapter 7

Conclusion and Recommendations

7.1 Conclusion

This research shows that organized criminal groups engage in illegal activities on domestic, regional, and international levels. Although globalization has brought about beneficial advancements, these improvements have also fostered the expansion of organized crime. Organized crime has been wreaking havoc on social, political, and economic events in one part of the world, with direct consequences for the international community and other regions and countries, including Thailand. As a result, the activities of organized crime progressively destroy public well-being, state administration, and national security. In the past few years, the ASEAN region and its member states have received significant attention in the cases of human trafficking for labor exploitation, the production of and trading in narcotics, money laundering, obstructing justice, bribing public officials, and many other illegal activities. Such activities generate enormous income and engender influence for the critical perpetrators of organized criminal groups. The activities also enable them to become well-respected persons of influence in Thai society, where they have become materialistic and are driven by wealth and power regardless of the income source.

Even though the United Nations Convention against Transnational Organized Crime (UNTOC) does not explicitly define transnational organized crime (TOC), it does represent an organized criminal group that commits crimes with transnational elements. The UNTOC Convention is meant to be flexible enough to apply to more advanced organized crime activities on the global, regional, and local levels. As a result, other provisions and definitions in the UNTOC

Convention have become essential as the legal framework for facilitating international cooperation among State Parties in combating criminal activities. Also, countries that sign the UNTOC Convention must establish legislation that makes these actions illegal, such as participation in organized criminal groups, money laundering, corruption, and obstruction of justice. Thailand is one of the signatory states to the UNTOC Convention and aims to collaborate with other countries to combat TOC more effectively.

Transnational crime is considered one of the main threats to the social, economic, public, and private sectors. Although the UNTOC Convention serves as a suppression convention for countering organized crime, organized criminal groups have sought opportunities to profit from catastrophes such as the COVID-19 pandemic. Criminals have deceptively and abruptly taken advantage of the recent pandemic to devise new *modus operandi* and exploited the crisis. As a result, INTERPOL, in particular, has issued new guidelines for law enforcement to draw on the lessons learned and best practices developed globally to assist the law enforcement community in distinguishing crimes caused by the COVID-19 pandemic. Understanding the UNTOC Convention is thus essential for combating TOC.

The development of the UNTOC Convention is significant for comprehension in terms of its concept and actual drafting. In the early legislative steps against organized crime, the dual dimensions of organized crime prosecution have been imposed through national laws. For example, the RICO Act of the United States aimed to define a criminal enterprise to allow law enforcement to gather admissible evidence about the whole picture of what the alleged offender was doing instead of merely proving involvement in different fragmented crimes. Meanwhile, the Italian Penal Code defined mafia-type organizations as preventing or impeding the free exercise of voting rights or procuring votes for persons during elections. It can be seen that these laws aim

to define an entity in national law by what the accused does or what it is and mention membership or participation instead of direct participation in criminal activity. As a result, it is difficult to prosecute criminals because prosecuting participation needs to prove the involvement of criminal organizations by actually being part of them for criminal liability purposes. Based on the former steps, the UNTOC then used them as models for the international community to respond to the TOC by containing detailed regulations for the objective of international procedural cooperation and criminalization provisions.

The terms 'transnational organized crime' are also problematic because it includes 'transnational,' 'organized,' and 'crime' that should be neutral, constant, subjective, and proper. There are two main ways of recognizing the criminal organization as a set of actors or activities. First, a group of actors may refer to large criminal organizations, especially the Italian Mafia and Japanese Yakuza. The corporate model is the first theory to depict organized crime in criminal organizations, particularly the Italian mafia, as having both highly centralized and corporate hierarchical structures. Many scholars argue that this model is extremely simplistic and insufficient to reflect the reality of contemporary organized crime because highly structured and hierarchical organizations run organized criminal groups in many cases. A network model could then be applied to further comprehension of criminal organizations. This model can explain that criminal networks can be recognized quickly and, depending on the changing operational environment, can better infiltrate. A network model is not attached to a long-term relationship because it can rely on each illegal entrepreneur's opportunities to work together with other partners to make their profits. Then, a strong bond is essential to consider their counterparts to work together. From these models, criminal organizations can be seen as a set of actors directly or indirectly involved in criminal organizations.

Conversely, a set of activities refers to the structure of a chain of events, an interaction process in which different individuals and groups participate differently at different stages. So, it is because the nature of the illegal activities by their organization is more important than the types of individuals, groups, or organizations involved. For example, suppose organized crime is examined as a set of activities. In that case, attention will be paid to illegal enterprises that supply illicit goods and services to unlawful markets because the dynamics of the illegal market affect how criminal organizations will flourish or be monopolized. Organized crime is almost analogous to legitimate business because both run organizations aim to maximize profits and feed their employees by providing goods and services for customers. Therefore, as examined in the two main ways of a criminal organization, law enforcement should engage in risk management to approach organized criminal groups to eradicate and monitor them.

Still, it would be essential to know the difference between international and transnational crimes if the alleged crime was to be brought before the criminal justice system and a conflict of state sovereignty was to be avoided. First, international crimes are crimes against peace and global security, such as genocide, war crimes, and crimes against humanity. These crimes cause more significant harm to the international community than others. Also, international crimes are made up of international criminal law, international human rights law, and international humanitarian law, which are all parts of customary international law. In contrast, transnational crimes are offenses that directly or indirectly affect more than one country's interests. For example, when illegally moved drugs across states' borders, which flows into and has significant adverse effects in other countries. Consequently, transnational crimes require understanding "legal pluralism," a situation where two or more legal systems coexist in the same social field to promote practical cooperation among communities.

Although transnational crimes are categorized into various offenses, transnational crimes can be grouped into three broadly applicable categories: the provision of illicit goods, illicit services, and the infiltration of businesses or governments affecting multiple countries. The provision of illegal goods includes drug trafficking, stolen property, and counterfeiting. Human trafficking, cybercrime and fraud, commercial vices, and the infiltration of businesses or governments, such as extortion and racketeering, money laundering, and corruption, are all examples of illegal services. These categories would help organize the confusing array of future transnational criminal activities.

According to the UNTOC Convention, a party to the UNTOC Convention must ratify the provisions and facilitate international cooperation among other signatory states for combating transnational organized crime. The UNTOC Convention also defines some essential terms, including an organized criminal group, a structured group, and a serious crime. The criminalization under this convention is necessary to State Parties because a party to the UNTOC Convention must enact these offenses into its national laws, including participation in an organized criminal group, corruption, obstruction of justice, and money laundering. When a transnational crime is committed in more than one state, it causes multiple jurisdictional issues. Territory, personality, and universality principles are fundamental to prosecuting these crimes. Even though Article 15 of the UNTOC gives a country the right to have jurisdiction over a criminal, there may be a conflict of jurisdictions. Then, the government should consider whether it is in the public's best interest to claim jurisdiction over alleged criminals when other countries are also trying to prosecute them simultaneously.

The branches of international law have significantly established multiple facets to govern the relationship between States, international organizations, and individuals to implement

fundamental rules and principles of international law to address TOC-related issues concerning the various applicable laws. When States deal with the severity of gross human rights violations or humanitarian intervention against organized criminal groups, the use of force principle shall apply. At the same time, international humanitarian law aims to alleviate human suffering during the war by distinguishing those who do not or no longer participate in hostilities. In contrast, international human rights law could be applied in circumstances where both the use of force and international humanitarian law would be used to protect and respect the fundamental rights of those who would be victims or accused. The law of the sea would play an essential role in enforcing and exercising jurisdiction over organized crime activities, including piracy, slavery, human trafficking, drug trafficking, and transportation of WMD when it occurs on the high seas.

Nevertheless, transnational organized crime is different from a core crime. The next generation of international criminal law is evolving to combat organized crime and gang violence, which are embedded in complex and dynamic phenomena. International law principles would govern States, individuals, and organizations to collaborate on comprehensively implementing legal measures to combat TOC.

International instruments such as treaties and agreements are essential for addressing TOC. As a legal reference for model treaties, State Parties could negotiate bilateral and multilateral treaties on particular areas of international cooperation, such as the transfer of foreign prisoners, extradition, mutual legal assistance, and the transfer of criminal proceedings. In addition, international core conventions on TOC, such as drug control conventions, the UNTOC Convention and its Protocols, and the Merida or UNCAC Convention, could be widely accepted as legal mechanisms for addressing TOC.

The Association of Southeast Asian Nations (ASEAN) also has regional efforts and its framework for combating transnational crime. In addition, numerous ASEAN bodies are directly or indirectly involved in developing policies and initiatives to combat transnational crime:

1. The ASEAN Ministerial Meeting on Transnational Crime (AMMTC) adopted the ASEAN Plan of Action to Combat Transnational Crime and agreed in principle to establish the ASEAN Centre for Combating Transnational Crime (ACTC) because the ACTC was another ASEAN regional initiative that aimed to combat transnational crime to facilitate data sharing, assist in implementing program activities that were outlined in the proposed action plan, and serve as a repository of information on national legislation, regulatory measures, and jurisprudence in individual member countries.
2. The ASEAN Regional Forum (ARF) was established to promote constructive dialogue and consultation on shared political and security issues and contribute to regional efforts to build confidence and prevent conflict.
3. The ASEAN Senior Officials on Drugs Matters (ASOD) was formed to cover the objective of the Action Plan, which include prevention, treatment, rehabilitation, enforcement, and research.
4. The ASEAN Finance Ministers Meeting (AFMM) signed the ASEAN Agreement on Customs, which aims to bolster cooperation in combating narcotics and psychotropic substance trafficking and facilitate joint anti-smuggling and Customs control efforts.
5. The ASEAN Chiefs of National Police (ASEANAPOL) must coordinate regional cooperation against transnational crime at the preventive, enforcement, and operational levels. ASEANAPOL also has been a pioneer in exchanging knowledge and expertise in policing, law enforcement, criminal justice, and transnational and international crimes. In

addition, ASEANAPOL has established its database system to facilitate the rapid, reliable, and secure exchange of information among member countries and provide additional access to the INTERPOL.

ASEAN requires the cooperation and experience of developed nations, relevant international intergovernmental organizations, and non-governmental organizations to effectively contribute to regional and global efforts against TOC.

Thailand is one of the countries that directly impact organized crime globally. The geographical location of Thailand as a source, a destination, and a country receptive to transnational criminal organizations contributes to Thailand's vulnerability to transnational criminal organizations. Human trafficking and drug trafficking are the most severe problems in the country that weaken havoc on the economy, social structure, and law enforcement. Thailand has signed the UNTOC Convention to join the fight against TOC, which has expanded its operations worldwide. As a result, Thailand's laws governing the prevention and suppression of TOC have been amended to make it more practical for law enforcement authorities to perform their duties. The Thai criminal legal system for enforcing TOC has the Thai Penal Code and Criminal Procedure Code codified systems or bodies of laws prescribing punishment for crimes and offenses against the general public or another individual. The Thai Penal Code itself does not explicitly impose penalties for TOC. Instead, it provides the fundamental punishment and jurisdiction to govern the criminal justice system. While the Criminal Procedure Code is a body of law establishing the procedures for prosecuting individuals suspected of committing criminal offenses, including offenses committed outside Thailand.

However, some other Acts or Codes specifically aim to punish offenses related to TOC. First, the Anti-Human Trafficking Act B.E. 2551 (2008) is essential in dealing with the human

trafficking problem. Although Thailand has this Act to criminalize human trafficking, the Thai government should continuously amend the Anti-Human Trafficking Act related to provisions, definitions, and measures to systematically punish offenders and protect victims based on human rights principles. Second, the Anti-Participation in Transnational Organized Crime Act B.E. 2556 (2013) was enacted as Thailand signed the UNTOC Convention. This Act expressly defines transnational organized crime to prevent law enforcement officials and scholars from the ambiguity inherent in the broad term transnational in nature under the UNTOC Convention. This Act also explicitly criminalizes the offenses of participation in transnational organized crime, promotes cooperation with other countries, and provides special measures to investigate criminals, such as keeping, using, and destroying information, undercover operation, controlled delivery, and trailing a suspect.

Nonetheless, money laundering and corruption are criminalized under other statutes. First, the Anti-Money Laundering Act, B.E. 2542 (1999) aims to punish criminals and organized criminal groups who commit certain types of crimes using money or property associated with the crime to engage in various kinds of money laundering. While the Organic Act on Counter Corruption B.E. 2561 (2018) has made legal entities criminally accountable for bribes paid to Thai State officials, foreign state officials, and intergovernmental organization officials. The legal entity would also be accountable if the fix were given by a related person, such as an employee, joint venture partner, or agent. That is because this Act specifically expanded the definition of legal entities showing that the Thai government was seeking to address the corruption problem in Thailand.

In addition to drug trafficking, the government of Thailand promulgated the Narcotics Code, which is currently the principal law governing the production, import, export, sale,

possession, and use of narcotics and interagency cooperation in Thailand. The Narcotics Code also imposes severe punishment for serious narcotics offenses and crimes involving criminal organizations. Serious narcotics charges involve the importation, exportation, distribution, or possession of narcotics unless they involve narcotics possession for use. These offenses include the conspiracy to support, aid, or attempt to commit such an offense. Therefore, it can be seen that this Narcotics Code aims to punish crimes relating to organized criminal groups. While the Act on Procedure of Narcotic Case B.E. 2550 (2017) is Thailand's first narcotic procedural law. However, if any provision or procedure of this Act has not been specifically prescribed, the provision of procedure of the Criminal Code or other laws will apply. As a result, such offenses of drug trafficking have the Narcotics Code and the Act on Procedure of Narcotics Case that is meant to deal with these issues.

When prosecuting transnational crime in Thailand, the Mutual Assistance in Criminal Matters Act, B.E. 2535 (1992), and the Extradition Act, B.E. 2551 (2008) assist the law enforcement authorities in cooperating with other countries. The Mutual Assistance in Criminal Matters Act establishes a legal framework for collaboration in the judicial process, including the supply of documents, evidence, witness examination, the forfeiture or confiscation of assets, and transfer of imprisoned persons for witness examination, which is an issue stipulated in international treaties. Meanwhile, the Extradition Act encourages two states to work together to return a fugitive offender living in the requested state to prosecution. However, these two Acts also contained the fundamental principles imposed in the Model Treaties required to guarantee that Thailand has followed international standards.

Transnational organized crime grows in scope both globally and in Thailand, causing the offenses to become more sophisticated and widespread. To deal with transnational organized crime

globally, governments at all levels, including international, regional, and national, must collaborate and develop their tactics with one another. At the international level, the International Criminal Court (ICC), the Terrorism, Transnational Crime and Corruption Center (TraCCC), the International Financial Action Task Force (FATF), the United Nations Office on Drugs and Crime (UNODC), and the International Criminal Police Organization (INTERPOL) are important organizations at this level. Although the ICC does prosecute transnational organized crime, some regional courts exemplify the prosecution of a core crime and transnational organized crime within their jurisdiction. While the TraCCC provides lessons learned for other countries to study, including Thailand, its framework for dealing with corruption and organized crime within the country. The FATF then imposes Recommendations for countries to apply as assessment and punishment systems for money laundering. At the same time, the UNODC is to support member governments in combating illicit narcotics crime, terrorism, and transnational organized crime. The UNODC also aims to support research and analytical work and assist in implementing several international treaties, such as the UNTOC Convention. As INTERPOL, its primary duty is to facilitate the transmission of information requests from national law enforcement agencies via their NCBs to NCBs in other member states via the INTERPOL General Secretariat. INTERPOL also distributes notifications on behalf of conditions, including red, blue, green, yellow, and black notices. These international organizations would help Thailand to tackle transnational organized crime effectively.

At the regional level, ASEAN member states tackle transnational organized crime by applying the ASEAN institutional framework for regional cooperation. The ASEAN Ministerial Meeting on Transnational Crime (AMMTC) makes a forum for ASEAN cooperation in the fight against transnational crime. The AMMTC also coordinates the work of relevant bodies such as

ASOD, ASEANAPOL, the ASEAN Directors-General of Customs, and others. Meanwhile, the Senior Officials Meeting on Transnational Crime (SOMTC) intends to implement the policies and plans approved by AMMTC. The SOMTC also develop the ASEAN Plan of Action on Transnational Crime. Moreover, the SOMTC is critical in promoting cooperation and coordination with ASEAN entities. While the ASEAN Secretariat will assist in creating resource mobilization strategies to secure funds from other partners. The European Union also collaborates with ASEAN countries to combat transnational organized crime. It is significant to understand the EU's operational structures, such as Europol and Eurojust, to improve and manage the region.

At the national level, Thailand has several groups that work together to combat transnational criminal groups. These organizations are the Royal Thai Police, the Office of the Attorney General, the Department of Special Investigation, the Anti-Money Laundering Office, the Office of the National Anti-Corruption Commission, the Office of the Narcotics Control Board, and the Court of Justice. These domestic organizations also have different authorities to combat transnational organized crime. However, they collaborate with others and promote cooperation with international organizations. As a result, these global, regional, and domestic organizations collaborate to focus on combating TOC.

Nevertheless, Thailand has recently faced challenges in dealing with TOC. A lack of cooperative efforts is the primary issue. These issues are related to obligations under bilateral or multilateral treaties or agreements. Because extradition, confiscation and seizure, transfer of sentenced persons, transfer of criminal proceedings, criminal liability of legal persons, and enforcement of law obligations or rights for a third state are indicated to be formal for cooperation between parties. These issues need to reduce unnecessary procedural obstacles and thus enable speedy collaboration.

Second, the legal framework of Thailand becomes ineffective at detecting organized criminal groups and their members. Measures against drug trafficking need to be adjusted because the new Narcotics Code focuses on human dignity by addressing public health, human resource development, and human security. The Anti-Money Laundering law must be amended to coordinate operations between police officers and bank officials more efficiently. According to capital punishment, the death penalty is recommended to be changed and suspended this punishment for each type of offense. Thai law must consider plea bargaining in illegal drug and transnational organized crime cases. In witness protection schemes, Thailand should carefully adjust its strategy to protect witnesses and victims. To be adaptable to punishing the offenses in the future, the Thai government needs to examine the development s of the expansion of organized criminal groups' illegal activities as essential to create appropriate strategies.

Third, the administrative measures focus on disciplinary issues and insufficient financial resources. The overcrowded prisons are due to the excessive use of criminal laws, resulting in inflation in criminal law. This situation considers that the criminal penalty will control people's behavior. In contrast, it increases to imprisonment of perpetrators regardless of whether the offense is nonviolent or a violation of public administration procedures. As a result, this belief may not comply with international standards for the impeachment of criminal offenses. At the same time, insufficient financial resources can limit law enforcement's ability to combat transnational organized crime. It is because inadequate budgetary management directly impacts law enforcement agencies, most notably through a lack of modern equipment or technology and limited training and education.

Finally, political issues and corruption relate to one another. Political problems are widespread in Thailand. According to money politics, these issues lead to the evolution of an

organized criminal group. It begins with criminals that penetrate politics at all levels to safeguard their illegal businesses in various ways. They then use their influence and power to promote their legal business to gain a competitive market advantage or manage competitors. As a result, they become a person of influence with a proven sphere of control and profits from illicit operations and are crucial players in organized crime in Thailand. At the same time, corruption is often the commission of offenders or persons of influence who bribe government officials. To understand corruption, it then should study how corruption creates a market for transnational organized crime activities that will help the Thai government deal with this problem appropriately.

7.2 Recommendations

This research has examined how Thailand combats transnational organized crime at the international, regional, and domestic levels. However, the ineffectiveness of efforts to combat the TOC has resulted in problems that Thailand should consider addressing at each level by implementing the recommendations.

First, Thailand should implement the following recommendations to enhance its capacity to combat TOC at the international level:

1. Combating TOC must be a collaborative effort. To combat TOC, Thailand must collaborate with other signatories of the UN Core Conventions. By doing so, there should be a mechanism to collect and analyze the criminal history and *modus operandi* of criminals, as well as collaboration on the exchange of information pertinent to the operations of organized criminal groups.

2. Thailand should establish an effective strategy to combat transnational organized crime, particularly money laundering of each state's benefits. For instance, Thailand must have a more

stable and transparent financial system that is more attractive to foreign investors. Thailand must first ensure that TOC does not abuse its financial institutions. Thailand, a member of the Asia/Pacific Group on Money Laundering (APG), must adhere to the FATF Recommendations and the blacklist or other blacklists to avoid the risk of sanctions or other actions by the international community. By doing so, Thailand can avoid becoming a shelter for criminals, as nations with ineffective Anti-Money-Laundering policies appeal to organized criminal groups. This is because weaknesses in one country's AML/CFT regime can allow criminals from other nations to successfully launder the proceeds of their domestic crimes.

3. Thailand must not violate human rights principles by considering taking measures stipulated in the UN Core Conventions unless extreme circumstances necessitate the protection of innocent individuals or the general public. Because if Thailand guarantees to adhere to international human rights standards, Thailand would become more attractive to foreign countries seeking to collaborate on TOC issues.

Next, at the regional level, the ASEAN should implement the following measures to assist its member nations and other nations in addressing TOC:

1. Some countries, especially those in the same region, have pushed for the creation of regional criminal courts, like the Special Court for Sierra Leone, to handle cases involving transnational organized crime (TOC) because they have similar problems and concerns that they want to solve. As a result, this example would encourage ASEAN to allow a regional criminal court to prosecute cases, such as TOC.

2. ASEAN should improve communications and intelligence sharing between law enforcement agencies in ASEAN member nations and those in other countries. For regional actors to interact more effectively and develop trust, ASEAN member states should facilitate daily face-

to-face meetings between investigators, customs officials, police officers, and prosecutors from different countries. However, governments may need to reevaluate their current strategies and develop more effective measures to combat TOC.

3. ASEAN should enhance and modernize its legal frameworks in response to the evolution of organized criminal groups. For example, ASEAN could adopt the European Union's framework for implementing valuable and effective TOC strategies.

Finally, if Thailand aims to prosecute persons of influence and organized criminal groups more effectively, the following measures should be implemented:

1. Thailand should guarantee and follow the fundamental human rights principles because this action will protect and respect the rights of victims and accused persons in the criminal justice system. In addition, this measure will earn the confidence of other nations so that they can collaborate with Thailand on criminal matters.

2. Extradition laws should be improved and modernized to facilitate swift extradition, significantly improving simplified extradition procedures to reduce obstacles and complexity in extradition trials. For example, if the wanted person has admitted that he is involved and is willing to argue the case in the requesting state's court and waive the right to deny being the wanted person. At the same time, measures should be taken to ensure that the person being extradited gets a fair trial.

3. To reduce unnecessary procedural obstacles, the laws and procedures governing mutual legal assistance in criminal matters should be expanded to include criminal and related civil cases. This enhancement will aid in expediting mutual legal assistance and increase the effectiveness of the fight against transnational organized crime.

4. The issue of human trafficking needs urgent attention from the Thai government. Therefore, the Anti-Human Trafficking Act should be continuously updated with provisions, definitions, and measures to systematically punish offenders and protect victims of this crime under human rights principles.

5. Thailand requires a prominent framework for Narcotics Code cases that views drug abuse as a public health and health issue rather than a criminal one, as the previous conceptual framework did. Because this is the new framework that Thailand must include in its role in public health, health care, and treatment; furthermore, this Code should take appropriate measures to destroy the significant network structure of drug trafficking and criminal syndicates, extending asset forfeiture measures for the drug trafficking network rather than dealing with the drug labor group.

6. There should be adequate protections for witnesses and victims to ensure their complete confidence in cooperating with law enforcement officials investigating or prosecuting members of organized criminal groups. Even though there is a law about protecting witnesses, it needs to be better carried out, and cases involving organized crime need to be given more attention.

7. Legal liability for legal persons should be established, along with measures to prevent and combat the use of legal persons to commit crimes, especially on the orders of organized criminal groups or as a front for illegal activities such as money laundering. Therefore, the punishment should consist of criminal penalties, fines, and confiscation of the property of legal entities.

8. Thailand should consider enacting the new law as a special procedural law to prosecute organized criminal groups more effectively. Because TOC offenses, which include participation in an organized criminal group, money laundering, corruption, and obstruction of justice, must

follow a different procedure than criminal procedure. This law would help law enforcement agencies to combat TOC more systematically.

9. The Thai Penal Code should be amended to make the obstruction of justice a crime for any action that results in an unjust criminal justice system. This includes the intimidation or bribery of witnesses, victims, or officials, as well as the falsification of documents or evidence. Therefore, these offenses should be punished more severely than similar offenses committed without the intent to obstruct justice.

10. The government of Thailand should consider addressing the issue of overcrowded prisons. This problem results from the excessive application of criminal laws, leading to inflation in criminal law. The Thai government should then review the applicable laws and amend them to punish criminal offenses appropriately.

11. There should be measures to encourage offenders to provide information to law enforcement officials, including serving as witnesses against the principal perpetrator. To effectively combat organized crime, plea bargaining measures may, for instance, reduce charges against minor offenders or retain them as witnesses in exchange for cooperation leading to the arrest of the key or actual perpetrator.

12. The Thai government should consider increasing budgets for basic and advanced training for law enforcement agencies so that they are competent and understandable in their fight against transnational organized crime. Additionally, the Thai government should provide equipment for law enforcement officials to use in their pursuit of organized criminal groups and investigations.

13. A permanent, specialized agency is required to prevent and combat organized crime. This agency should be composed of professionals with expertise in the necessary fields for

investigating and prosecuting organized criminal groups who work together systematically. It should play a significant role in the professional fight against organized crime. Establishing such an agency would improve the capacity of other agencies and the expertise of the experts involved so that they can effectively prevent and fight organized crime.

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