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FIN-00531 Helsinki
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NEW TYPES OF CRIME

**Proceedings of the International Seminar held in connection
with HEUNI's thirtieth anniversary
Helsinki 20 October 2011**

Edited by Matti Joutsen

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FOREWORD

The European Institute for Crime Prevention and Control, affiliated with the United Nations, was established in December 1981. In celebration of its 30th anniversary, an International Seminar was organized in Helsinki on 20 October 2011.

When the seminar was being planned, there was considerable discussion on what the theme should be. Instead of celebrating past achievements, HEUNI decided to place the focus on the present and the future, and look at “New Types of Crime”.

This publication brings together the contributions of acknowledged international experts on crime issues. The articles deal in particular with trafficking in persons, corruption, economic crime, and the collection of crime data.

The staff of HEUNI would like to warmly thank all the experts and the participants for their excellent contribution.

The International Seminar also marked the retirement of HEUNI’s long-serving director, Mr Kauko Aromaa. In many ways, the discussions at the International Seminar reflect his wide-ranging interests and influence on solid international criminological research.

Helsinki, 8 May 2012

Matti Joutsen

Director, HEUNI

OPENING REMARKS

Fredrik Wersäll
President, Svea Court of Appeal, Sweden
Chairperson, HEUNI Advisory Board

Welcome to this seminar, which is being held to recognise and celebrate the 30 year anniversary of HEUNI. I would also like to recognise that the Director of HEUNI, Kauko Aromaa, shall soon retire from his position.

The seminar is about HEUNI's current profile, or essential parts of it. We, as members of the Advisory Board, have enjoyed the privilege of seeing it develop over time, and are excited about this opportunity to see the kind of fruits that the work has produced.

The small size of the institute has often raised doubts as to the feasibility of having it try to tackle such large and demanding issues. Experience has, however, demonstrated that such fears have been unfounded. It seems that HEUNI's small size has eventually become an asset, since it has not allowed dwelling too much on past successes. Of course, the price has been the need to downgrade some possibly worthwhile types of activity.

The European working environment has simultaneously undergone a radical change, and for instance some of the previous HEUNI activities have been gradually taken over by massive, powerfully organised new kinds of European cooperation forms, which a small institute can scarcely beat or with which it can not successfully and meaningfully compete.

In this situation, the strategy has been to join and in a way infiltrate the larger competitor. It is not, however, excluded that also complementary functions can be taken over by a small and flexible institute that has the advantage of being able to move more quickly than the massive platforms of cooperation and exchange, and of being able to pick up also topics that are not core mainstream ones, and thus possibly anticipate what is one day going to become mainstream.

HEUNI is a small but professional organisation. It has been able to fulfil the needs for research in the criminal policy area in Europe, by fruitful cooperation with UNODC, UNECE, Eurostat and other bodies on different issues such as crime-related statistics, including European standards for victim surveys and surveys of violence against women. The topics of research are often on the political agenda. Examples are trafficking, transnational crime and corruption.

The work of HEUNI is well reflected on the agenda for this meeting. We look forward to a very interesting seminar, with contributions from distinguished researchers and lively discussions.

Tiina Astola
Permanent Secretary
Ministry of Justice of Finland

Forty years ago, Finland began a total overhaul of criminal law. Two of the key goals were to review what behaviour should be punishable, and to ensure that the level of punishment allotted to each type of crime was appropriate for a modern society. For the next thirty years, countless meetings were held, proposals were discussed and reports were written. The result was a major package of reforms of both the general and the special part of the criminal law.

An observer could be forgiven for thinking that, once all of this work was out of the way, our legislators could relax, and – barring some minor cosmetic changes here and there – Finland’s criminal law would remain more or less untouched for at least a few years.

That didn’t happen. Each year, the Law Drafting Department of our Ministry of Justice continues to produce several proposals for amendment of our criminal law, for the consideration of Parliament. Although most of these amendments concern details – important details, but details nevertheless – some of them do introduce entirely new offences to Finnish criminal law, such as participation in the activity of a criminal organization, promotion of the activity of a terrorist group, interference in a computer system, arrangement of illegal immigration, abuse of genetic technology offence, unauthorized use of foreign labour, and insider trading. We are under constant pressure to consider more, currently for example trading in influence, and identity theft.

Where does this pressure come from? It would be too simplistic to answer, for example, that it comes from the European Union. We in Finland are heavily involved in the work in Brussels on the drafting of new decisions and we know quite well that calls for entirely new criminalizations do not simply come out of the blue at European Union meetings.

The pressure in fact comes from two directions: from the real (and rapid) technological, demographic, sociological and economic changes in our society, and from individuals who identify these changes and argue that they pose a threat that should perhaps be countered through criminal law.

These changes are often difficult to see, and the individuals who point them out provide us with a valuable service. It is often difficult to identify something as a problem in society, especially if the victims are not aware that they are being victimized (as is often the case with computer crime), the victims may not be aware of their rights (as is often the case with human trafficking for the purpose of forced labour), or the impact may be diffused throughout society (as is often the case with corruption and economic crime). For this reason, there is good reason to discuss not only individual offence categories, but also information gathering, measurement, conceptualization and analysis.

Different countries have different perspectives and interests, and in a globalizing world it is important that we have a forum for discussing these interests. We must be prepared to intervene when “old” offences are being committed in new ways, and when completely new forms of harmful behaviour begin to appear. At the same time we should be cautious of overreacting. It is possible that some elements in our society urge us to outlaw behaviour simply on the grounds that it is new and different from what people are used to. If, after careful analysis, we do conclude that new forms of behaviour are harmful enough to require a response from society, we must be prepared to consider approaches other than criminal law. And if, reluctantly, we decide that the “*ultima ratio*” of criminalization should be invoked, we should take care to ensure that the behaviour is clearly defined, and the threat of punishment will indeed have the desired preventive impact. Ultimately, modern society changes quickly, but criminal law does not; this is as it should be.

We at the Ministry of Justice are grateful to HEUNI for organizing this international seminar on new forms of crime. It is important to us to increase our awareness of the impact that different changes have on our societies, around Europe and indeed around the world.

And one more thing. I would like to take the opportunity, here in the seminar very briefly, to thank Director Kauko Aromaa for his valuable work as the head of the now 30 year old HEUNI. As the Institute’s third Director, he has guided it since the beginning of the millennium and, since he will retire very soon, this seminar will be his last in this capacity. So thank you very much, Kauko. I believe that at the small reception later on this evening we will have time to look back and remember old times. However, the focus in the seminar is very much in the present and also in the future. I wish you all an interesting day and hope to see you at the reception in the evening.

John Sandage
Director, Division of Treaty Affairs
United Nations Office on Drugs and Crime

Distinguished guests, ladies and gentlemen, friends and colleagues, it gives me great pleasure to be present at this HEUNI 30 year seminar.

As many of you well know, the European Institute for Crime Prevention and Control, HEUNI, was established originally through agreement between the United Nations and the Government of Finland, signed on 23 December 1981. On consulting the original agreement, I realized finally, after a number of years, where the “H” in HEUNI comes from – as the agreement actually refers to the establishment of the *Helsinki* Institute for Crime Prevention and Control, affiliated with the United Nations. The agreement is clear though that the institute was always intended to be the *European* establishment in a network of regional institutes. This network was created by a resolution of the United Nations Economic and Social Council in 1971 that requested the Secretary-General to develop and extend regional institutes for training and research in the prevention of crime and the treatment of offenders.

The network, which is today known as the *United Nations Crime Prevention and Criminal Justice Programme Network* comprises some seventeen programme network institutes, including regional sisters of HEUNI in Asia and the Far East (UNAFEI), Latin America (ILANUD), and Africa (UNAFRI), as well as a number of both national and international centres of research and excellence in the field of crime prevention and criminal justice.

HEUNI has consistently been a leading light amongst the programme network institutes. Indeed, when I look at the main functions of the Institute, as expressed in its founding document – in particular para 4, which refers to conducting, *within the limits of its resources*, research serving the objectives of the Institute – I am moved to say that HEUNI has far surpassed its founding objectives, and continues to do so. Even a most cursory review of the activities that HEUNI has carried out in cooperation with UNODC over the last years suggests that HEUNI has never seen the reference to ‘resources’ in this clause as a particular limitation. For a comparatively small institution, the number and range of outputs that it has produced over the last years is impressive and inspiring. Allow me, if you will, to mention just some of the highlights:

- During the twelfth United Nations Congress in Brazil 2010, HEUNI was responsible for the organisation of a workshop on best practices in the treatment of prisoners in the criminal justice system. The outcomes of that workshop have been key to informing work on the revision of the *United Nations Standard Minimum Rules for the Treatment of Prisoners*.
- In 2008 and 2009 HEUNI acted as the UNODC partner for data collection and analysis on trafficking in persons for the whole of

Europe for the UNODC/UN.GIFT *Global Report on Trafficking in Persons*. More recently, HEUNI have also participated in the development of a *Needs Assessment Toolkit on the Criminal Justice Response to Human Trafficking*.

- In the area of anti-corruption, HEUNI recently organized a training workshop, together with the Academy of Law of the Ministry of Justice of the Russian Federation for officials involved directly in a range of aspects of anti-corruption work within the country.
- Finally, in the important area of data and research, in addition to contributing to numerous UNODC expert working groups in this area, HEUNI has supported UNODC in the identification of international and European standards for the collection of crime and criminal justice statistics, in the context of an EU-funded project in the Western Balkans. HEUNI also has a long history of producing analytical and statistical reports in cooperation with UNODC, including in 2010, the report “*International Statistics on Crime and Justice*” and, in 2008 and 2003, detailed studies on results from the *United Nations Survey of Crime Trends and Operations of Criminal Justice Systems for Europe and North America*.

In short, it is probably easier to list those areas of UNODC work in which HEUNI has *not* had some involvement in the past years, rather than to list those areas to which it *has* contributed. UNODC is extremely grateful for the significant achievements of HEUNI over the past three decades and for our productive cooperation and joint work which continues to this day. HEUNI, together with the other programme network institutes, brings a wealth of experience and knowledge that can be brought to bear on the challenge of better understanding crime and in elaborating the most effective response. The unique position of the institutes – being affiliated with the United Nations but maintaining a certain academic freedom – offers new perspectives that complement and enhance the core mandates given to UNODC by Member states.

As we consider the timely topic of “new crime types” at this 30 years seminar, I would like to offer one view on the link between international and national action in this area. A high level segment of a meeting of the Conference of Parties to the United Nations Convention against Transnational Organized Crime last year also took “new and emerging” crimes as a priority for its debate. During this debate, speakers emphasized that criminal groups had expanded their activities to include *cybercrime*, *trafficking in cultural property*, *piracy*, *trafficking in natural resources*, *trafficking in counterfeit medicines*, and *trafficking in organs*. The Conference recognized that in addition to developing adequate legislative and operational responses in order to combat emerging, and *re-emerging*, forms of crime, comprehensive *crime prevention policies* to address the root causes of crime are also necessary. Indeed, as we work at the international level to strengthen mechanisms for forms of international cooperation such as mutual legal assistance, extradition, law

enforcement cooperation, and agreement on criminalization in national law, we must not forget that almost all “new crime types” have a direct impact on individual victims, whether the person who loses their credit card details to cybercriminals, the victim of human trafficking who loses their freedom, or the victim who loses their life in the unlicensed medical procedures associated with trafficking in human organs. All transnational crime, and many new forms, rely on networks of individuals willing to take risks and for whom there appear to be benefits in doing so. Those living in impoverished and disadvantaged communities may feel they have little option but to become involved, and organized crime often preys upon families and young people in such communities, giving them little opportunity to refuse to become involved.

Effective responses to new forms of crime must take account of this perspective, as they link action at the international level with national crime prevention diagnoses and strategies. In the area of cybercrime, for instance, in addition to work at the international level on a comprehensive study on the nature of and response to cybercrime, UNODC is developing a package of technical support for use at country level with all relevant actors, including law enforcement, ministries of justice, telecommunications, and the private sector. This includes not only assessment and capacity building in the areas of legislation, law enforcement investigations, and institutional structures, but also key prevention activities, such as raising public awareness of cybercrime victimization.

It is only through concerted partnerships at international and national level between the United Nations, governments, institutions such as HEUNI and the crime prevention and criminal justice programme network, as well as with the private and non-governmental sectors, that we can begin to address the challenges of new forms and manifestations of crime.

I would like to thank HEUNI for being part of the United Nations programme network and for playing a key role in meeting such challenges. I warmly congratulate Director Aromaa on his admirable leadership and numerous achievements over the last decade. HEUNI and UNODC both owe a debt of gratitude to the knowledge and wisdom he has brought and the focus he has placed on research, data and evidence-based programmes. We will miss his leadership but look forward with confidence to the future, remaining secure in the knowledge that HEUNI will continue to play a vital role in the work of the United Nations and the crime prevention and criminal justice community at large.

SESSION 1: TRAFFICKING IN HUMAN BEINGS

ADDRESSING HUMAN TRAFFICKING AS A FORCED LABOUR CONCERN: THE POLICY IMPLICATIONS

Roger Plant

Former Head of the ILO Special Action Programme
to Combat Forced Labour

It is a pleasure to be here in Helsinki and Finland for the first time in my life, after several near misses. It is of course an equal pleasure to celebrate HEUNI's 30 year anniversary. This is less than half my own age, but in these uncertain days institutions often have far shorter life spans than individuals. So hearty congratulations.

I'd also like to thank HEUNI for its creative research on labour trafficking and exploitation. I remember meeting Kauko Aroma some years ago in Stockholm at a meeting hosted by the Swedish Ministers of Justice and Labour, one of the first efforts to place the labour dimensions of human trafficking on Nordic policy agendas. Kauko took the issue up in earnest, and said he would launch a serious study on the issue in Finland and neighbouring countries. I left the ILO before we could work out a way to collaborate on this research. But he kept his promise, and just a few weeks ago I was able to see the impressive results.

I'd like to start by saying a few things about the Finnish study, before others perhaps say more about it.

The HEUNI report covers trafficking for forced labour in the three countries of Estonia, Finland and Poland, and confirms the difficulties in identifying situations of exploitation. The research uncovers what are seen as situations of labour exploitation in a wide range of sectors, from agriculture through to shipyards and construction, service sectors, commerce, seasonal jobs and domestic work. It is a familiar pattern of low or no salaries, constant supervision and control, removal of passports, long working hours, limited freedom of movement, and contracts in a language the workers do not understand. In Finland, we are told that stereotypical thinking and lack of awareness hinder the identification of trafficking cases, in that they are dealt with as "extortionate work discrimination instead of trafficking". In Poland, only serious cases are identified as trafficking for forced labour, and the victims have problems getting help. In Estonia, awareness of trafficking for forced labour is low among not only the authorities but also the general public. Overall, the study concludes that "the cases that come to the attention of the authorities represent merely the tip of the iceberg".

Several years ago, I felt that the ILO programme against forced labour was almost out there alone, in insisting that labour trafficking in Europe and elsewhere was as serious a matter as sex trafficking. Gradually the awareness grew. Countries started training their labour as well as criminal justice agents in how to look out for labour trafficking. The OSCE, under the able leadership of Eva Biaudet and also her predecessor, held important conferences on the subject. Countries like the UK began to collect data on labour trafficking cases through their National Referral Mechanisms. UK figures, for the first two years of its NRM up to March this year, were 331 cases of trafficking for labour exploitation and 506 for sexual exploitation. And as Europol observed last month, in its annual review of human trafficking and action against it in the European region, “The investigation of labour exploitation is now firmly on the agenda of many countries to recognise, adapt to and combat new forms of trafficking”.

All well and good. But this is a meeting about “new crimes”. And if we look at labour trafficking through the lens of criminal law enforcement, one thing stands out a mile. It is very rarely prosecuted. And it is very hard to get convictions.

Every year, the US Government comes up with global law enforcement data against human trafficking, in its *Trafficking in Persons Report*. For the past few years it has provided figures for prosecutions and convictions, for sex and labour trafficking respectively. The 2011 report, if the figures are accurate, shows how little effective law enforcement there has been on the latter. And in Europe, where there has been so much recent attention to the problem of labour exploitation, there were only 47 prosecutions and 38 convictions for labour trafficking in the entire continent for 2010. These are all tiny figures, compared with the ILO’s global estimates of over 12 million people subjected to forced labour around the world at any given time.

So the available law enforcement data calls for some serious reflection. Are there actually very few cases of labour exploitation, which are serious enough to amount to the criminal offences of forced labour or human trafficking? Or are existing methods of police and criminal investigation failing to capture these cases? Are better indicators needed, to guide the efforts of prosecutors and law enforcement? Is the burden of proof too rigorous to secure convictions for the offence? And if it is difficult to prosecute labour trafficking and exploitation as criminal offences, should we not look at other ways of dealing with these abuses? What is the role of labour justice, labour inspectors, and labour courts where they exist? And what other remedies can be available, either for law enforcement, or for the protection and compensation of victims? How can NGOs become more involved, in partnership with government agencies? And what can be the role of employers’ organizations or trade unions?

I’ll try to focus your minds today on three main issues. First, the conceptual challenges in getting the right kinds of law on the statute, so that police and prosecutors can know what they are talking about, and judges and juries can

know when and what to convict. Second, a broad glimpse of the patterns of labour exploitation today, mainly in Europe. And finally, some ideas about how different agencies and types of law enforcement can complement each other, sometimes in cooperation with business and labour and other civil society groups.

Conceptual and policy challenges

All of Europe and much of the world now covers, in some way, forced labour, slavery-like practices, labour trafficking or labour exploitation in its national laws. It can be in specific anti-trafficking laws, in criminal codes, or in migration and labour law. The surge of interest, provoked by the Palermo Trafficking Protocol has brought much needed attention to various forms of worker exploitation on modern labour markets, particularly the exploitation of vulnerable women, men and also children recruited for employment overseas. Yet there is little consensus as to the appropriate response, or as to which agencies of government are responsible. The issues tend to fall into the cracks between criminal justice, the enforcement of employment and labour law, migration policies, and visa arrangements.

Because human trafficking is generally seen as a serious crime, needing a strong criminal law enforcement response, the lead agencies in action against it tend to be the police, criminal investigation and prosecution, and criminal justice. They want to find hard crimes, and they don't want to dabble in grey areas and subtle forms of deception. They probably feel that this is best left to academics and diligent researchers.

But there is a fundamental issue at stake, which legislators have never quite come to grips with. Does trafficking *require* coercion, or at least the intent to coerce? Or is it a matter of moving people into sub-standard living and working conditions, even if there is a strong element of "self-exploitation", and the so-called victims would rather put up with these than return to their places of origin? Should the anti-trafficking paradigm limit itself to clamping down on force, violence and deception? Or should it be used more widely and creatively, to tackle the employment practices which seem to be propagating "two tier" labour markets in European countries, and gradually whittling down the labour protections that have been carefully constructed in social market economies?

Forced labour has been dealt broadly by the ILO, in a Convention dating back to 1930 but still considered valid today, as a situation in which people enter work or service against their freedom of choice and cannot get out of it without punishment or the threat of punishment. Out of almost 190 international labour Conventions adopted by the ILO over a 90 year period, forced labour is the only issue in ILO standards that deals directly with a matter of criminal justice. Article 25 of the 1930 forced labour Convention provides clearly that "the illegal exaction of forced or compulsory labour shall be punishable as a penal

offence, and it shall be an obligation on any Member ratifying this Convention to ensure that the penalties imposed by law are really adequate and are strictly enforced”.

The concept of *exploitation* is an important component of the Palermo Trafficking Protocol. It requires legislative attention to the criminal offence of trafficking for *exploitation*, for which there is little precedent in international law, let alone court decisions. Only Karl Marx seems to have spent a lifetime grappling with the concept. But several countries have now legislated against living and working conditions considered incompatible with human dignity, providing for appropriate penalties. Both Belgium and France have provisions in their criminal legislation which consider the offence of human trafficking to involve the imposition of living and working conditions considered “contrary to human dignity”. Under Germany’s Penal Code as amended in 2005, the new offence of trafficking for labour exploitation, applicable only to foreigners, includes the concepts of slavery-like conditions and debt bondage. One criterion for this offence is the payment of wages markedly less than those paid to German nationals. Brazil’s Criminal Code provides for penalties against “slave labour”, which can involve both coercion and debt bondage, and also extremely sub-standard living and working conditions.

There has also been much discussion about the degree or severity of exploitation. It is a very subjective term, which has not generally been covered in labour standards, let alone in criminal law. Common sense suggests that people are exploited when others derive unfair advantage, or make unfair profits, at their expense, by subjecting them to arduous and morally unacceptable conditions of work. But there are obvious gradations of this. No legislature or judiciary will find it easy to determine which practices should be dealt with through long prison sentences, which through fines, or which through the closure of enterprises.

The US anti-trafficking law has been gradually refined to capture the different forms of deception and coercive exploitation. A 2008 amendment created a new criminal statute prohibiting fraud in foreign labour contracting. It imposes criminal liability on persons who, knowingly and with intent to defraud, recruit workers from outside for employment within the United States by means of materially false or fraudulent representations. Israel’s 2006 anti-trafficking law is conceptually based on the notion of different crimes of increasing degrees of gravity or “gradations in exploitation”. It begins with exploitation rather generally defined as the lesser offence, forced labour in the middle; and trafficking for a wide array of offences including slavery and forced labour, which carried the highest penalties.

To address these conceptual challenges, the ILO cooperated with the European Union, developing indicators to cover all the often subtle elements of deception, coercion and exploitation involved. Following the definition of human trafficking in the Palermo Protocol, experts were asked to provide a list of indicators (or typical elements) of coercion, deception, exploitation and vulnerability which they know are relevant in modern cases of trafficking in

Europe. Experts eventually agreed on a list of 67 indicators, respectively covering deceptive recruitment; coercive recruitment; recruitment by abuse of vulnerability; exploitative conditions of work; forms of coercion at destination; and abuse of vulnerability at destination.

The various combinations can help understand the variety and complexity of modern human trafficking. The method involves a proactive approach, digging in to a hidden problem that may eventually merit criminal investigation and prosecution, rather than relying on the available criminal statistics (which are highly likely to under-represent the reality of the problems). And while these indicators were originally developed for purposes of data collection and analysis, a number of countries are now seeking to adapt them to the needs of law enforcement, and integrated approaches to prevention and protection.

Many analysts, including the ILO in its global estimates of forced labour and trafficking, have distinguished between the different offences of forced labour, slavery and slavery-like practices, and human trafficking. Not everyone likes these distinctions. With the current impetus to legislate against human trafficking, some governments insist that forced labour and trafficking are one and the same thing. The ILO estimate assumes that trafficking is a process, which requires a recruiting agent, movement away from the place of origin, and coercive exploitation at the place of destination. Others have argued that movement is irrelevant. These can be largely semantic concerns. What really matters is that the laws and law enforcement mechanisms be in place, to identify and punish the most serious forms of abuse.

Global trends

I don't need to say much on this point. I think most people in the room today have a good idea of the forms of modern labour exploitation.

Last month, Europol issued its annual assessment of human trafficking trends in the European region. It found that, since the most recent expansion of the European Union, situations amounting to forced labour had increased. The main economic sectors involved were agriculture and farming; the construction industry; the service sector, including hotels and restaurants and cafeterias; the manufacturing sector; and domestic service. Child trafficking was also on the increase, for begging, street crime, drugs, and also welfare benefit fraud. The latter was a growing concern, because of the large profits that could be made by each of the criminal gangs involved.

The trafficking methods were seen to vary. Many persons are lured with bogus offers of legitimate employment: others agree on the type of work they are expected to perform, but are deceived as to the actual circumstances in a destination country. Meanwhile, some victims do not realize they are being exploited, particularly those who have worked in exploitative conditions such as agriculture or textile manufacture in their countries of origin.

Much of this is related to what in bureaucratic language are rather gratuitously called “atypical” employment practices. In fact they are becoming more and more typical and widespread. They involve posted worker or temporary work schemes, officially bringing in migrants to work in a particular sector of the economy, where wages are normally low, work conditions are arduous, and nationals are generally unwilling to do the work. A common feature is the use of labour brokers, or complex forms of subcontracting, so that farmers or supermarkets can more or less wash their hands of responsibility for employment contracts.

There is growing concern that unscrupulous recruitment practices – by small-scale labour brokers through to larger and registered agencies – are driving vulnerable migrants into situations of debt bondage and forced labour. The cocktail is a mix of excessive charges and transaction costs for visas, travel and placement expenses in the country of origin; and confiscation of papers, threats of denunciation and sometimes physical coercion in the country of destination.

In last month’s report Europol talked about “hubs of crime” for trafficking networks in Europe, including Bulgarians, Roma, Nigerians and Chinese. The Nigerians and Chinese were singled out as particularly dangerous, the former more involved in sex trafficking, the latter more often in labour exploitation. In its words, Chinese organised crime groups operate throughout the EU in a less conspicuous manner, and the number of exploited Chinese nationals is unknown. Successive phases of trafficking are carried out by fluid and diverse structures. Traditional environments for labour exploitation include Asian restaurants, textile workshops and tanneries, together with an emerging pattern of prostitution both within and outside the Chinese community. A lack of awareness on the part of the victims and high levels of seclusion mean that the trafficking often goes unreported.

The ILO’s forced labour programme spent years researching this Chinese labour exploitation in Europe, using Chinese and other Mandarin speaking researchers to penetrate these so-called “hidden communities”. I strongly recommend the book published last year – *Concealed Chains: Labour Exploitation and Chinese Migrants in Europe* – for anyone who wants to understand better the complexities of this labour exploitation.

The book traces the original recruitment methods in China, the relationship with traffickers and smugglers, and the living and working experience in the destination countries. But there was a vibrant debate among researchers as to whether this was coercion and forced labour, or rather a voluntary “self-exploitation” in which the Chinese workers deliberately put up with dreadful living and working conditions to build up savings for the future. Recruitment was rarely if ever involuntary. Migrants knew of the hardship that could come from clandestine entry into Europe, and of the duress that can result from this. Huge fees were paid to smugglers, but there was rarely a direct link between the person to whom the migrants were indebted and the employer who exploited them. And as the employer did not use the debt as a direct instrument to gain control over the migrants, this could hardly be qualified as debt

bondage in the legal sense. Rather, employers were taking advantage of vulnerable workers. While free consent and forced labour were at opposite ends of the spectrum, a broad range of exploitative employer practices lay in the middle of the spectrum. And in both China and destination countries, the report highlighted the need for special attention to the regulation and monitoring of labour brokers and intermediaries.

So the boundaries between legality and illegality are obscure. Some of the schemes are official, but can become ridden with abuse. For example, the US State Department has long been equating with labour trafficking the sponsorship systems in the Middle East, in which migrant workers from African or Asian countries are tied to one person, who can trade the visa in an informal market for a profit. But you can find similar schemes in Australia, Canada, Ireland and the United States, which are now being scrutinized by human rights NGOs. At the root of the problem lies the use of labour brokers, who may charge a single worker more than US\$ 10,000 in a country of origin.

So to conclude on trends, there is a handful of prosecutions, some of which are successful. The Netherlands has tried hard to crack down on labour trafficking, investigating cases and training its police and labour authorities. But judges generally acquitted until the Supreme Court dealt with a so-called “Chinese case” in October 2009. Since then there have been more convictions, with courts looking at objective criteria of exploitation rather than struggling to prove “intent to exploit”. In the UK by contrast, earlier this year a jury acquitted defendants in what seemed a watertight case, when Lithuanian and Polish workers had been recruited through adverts, had to pay back advances with interest, had passports removed and in some cases suffered violence. The workers had been lawfully in the UK, and were harvesting produce believed to be destined for large supermarkets.

So what can be done?

First, you need a clear legal framework, covering abusive recruitment, and also coming to grips with this problem of excessive fee charging. Business and labour have to be at the table, ensuring that the problems are transparent and realistic. But you also need a monitoring agency, which does not necessarily go down the route of criminal enforcement, but has the power to do so in the most serious cases.

I often like to cite an example from my own country. For years there were concerns about informal agencies in the UK called “gangmasters”, the labour brokers who provided cheap labour for seasonal work in agriculture, construction, packaging and processing, and other activities. They were unlicensed and unregistered, they often employed irregular migrant labour, and they escaped monitoring and control by the authorities. It was a serious loophole in employment law. But then a terrible tragedy in early 2004, when over 20 Chinese migrants recruited by these gangmasters died in a shell-fishing

accident in northern England, motivated public opinion to do something about it. Business, labour and government came together to discuss the response. A private members bill was introduced to parliament. The Gangmasters (Licensing) Act, 2004, creates the offence of acting as a gangmaster without the authority of a license. The following year a Gangmasters Licensing Authority (GLA) was set up to protect workers in the sectors of agriculture, shellfish gathering, food processing and packaging. Its main task has been to license the labour providers, though it also has the powers to bring prosecutions in serious cases. It revoked almost 60 such licenses in the first three years of its operations. In 2008, it launched a programme of targeted enforcement through surprise raids throughout the UK. It has also brought its first criminal prosecutions, and launched consultations with major supermarket chains on means to combat labour exploitation in the UK.

Second, indicators are essential. I explained the purpose of the Delphi indicators on exploitation, as developed by the ILO. These need to be further refined, and adapted to national contexts on the basis of real cases. Law enforcement will have a better idea as to when to prosecute, and what other remedies are available.

Third, labour inspectors need to be involved. Some European countries target their awareness raising and training programmes at labour inspectors. It may seem obvious that labour inspectors should be at the forefront of anti-trafficking activities. They can be the best early warning system, and are usually able to enter workplaces without a warrant. But there can be many problems, over mandate, or over sharing of information with other law enforcement authorities. The normal mandate of labour inspectors is to monitor work conditions and apply national labour legislation. Health and labour inspection can be an integral part of criminal law enforcement. In other cases labour justice is separate from criminal justice, and applies penalties or fines provided for by labour law, even including the closure of enterprises. Conversely, there are countries where labour offences are specifically covered in penal law. Spain's Criminal Code has a special section covering crimes against the rights of workers, addressing such issues as exploitation by other human beings, with specific penalties.

But labour inspectorates sometimes have a limited mandate, with regard to the kind of premise that they can inspect. And the involvement of labour inspectors in action against clandestine or "undeclared" labour has its own risks, as far as victim protection is concerned. The ILO has warned against measures that compel labour inspectors to conduct immigration enforcement activity as part of their workplace inspection agenda. This intimidates migrant workers from exposing or resisting abusive conditions. It also imposes law enforcement responsibilities for which labour inspectors are neither competent nor trained, and can ultimately drive an important portion of immigrant labour further into non-regulated and clandestine employment conditions.

A basic code of practice for labour inspectors, illustrated by country examples, could be a good start. This could be taken up by a body such as the

International Association of Labour Inspection (IALI), which has adopted an action plan against forced labour and trafficking.

Fourth, there is a need for greater awareness among the public at large, and better coordination of anti-trafficking efforts. Public opinion needs to accept that abusive practices of labour exploitation can amount to crimes, and should be punished as such. This requires major media efforts, well researched and balanced documentaries, and a commitment to responsible journalism.

Judges will always have some discretion in a democracy. It helps if the definition of an offence is not left too vague or abstruse. It certainly helps if the criminal and other legislation can capture the fraudulent practices that can make up the offence of labour trafficking, or at least contribute to it. But when labour exploitation is a “continuum”, from lesser to more serious forms of abuse, there are different ways of dealing with them.

It is wrong to draw overly rigid distinctions between criminal, labour and other forms of administrative justice. They can work together, sharing information and evidence, and jointly deciding on the appropriate response. There have been cases where special investigative and prosecution units have incorporated both police and labour inspection. In other cases, as in Austria, labour inspectors are obliged to share information on likely trafficking cases with criminal justice authorities.

The profits from labour trafficking, as from sex trafficking, can be very large. The instruments of customs or tax enforcement can be used to clamp down on unfair or undeclared profits. This is also important for compensation. The main concern of persons subjected to labour exploitation is usually to get back the wages out of which they have been unfairly cheated. Creative litigation and law enforcement is needed, to find the mechanisms through which the offenders are adequately fined, and the victims have some chance to receive due compensation even when (either voluntarily or not) they have returned to their countries of origin.

In conclusion, criminal law enforcement is an important and necessary part of the response to labour trafficking. But the anti-trafficking movement and partnerships should help open eyes to the wider problems of labour markets and migration and address the creeping forms of exploitation which, if not seriously tackled, can indeed become a source of profit for petty criminals and in the worst cases organized crime.

LABOUR EXPLOITATION: DEVELOPING OUR CRIMINOLOGICAL UNDERSTANDING TO LABOUR EXPLOITATION

Jon Spencer
School of Law,
University of Manchester
United Kingdom

Introduction

It was in 1995 that I had my introduction to working with colleagues in HEUNI and I have always found those professional relationships to be illuminating, challenging, stimulating and truly collegiate and many of those colleagues I now count as my friends. So, it is an honour to be asked to make a contribution to the thirtieth anniversary celebrations of HEUNI and to this volume of collected essays.

The scholarly work undertaken by HEUNI over the past thirty years has largely been pushing at the boundaries of applied criminology. For example in the early 1990s HEUNI was concerned with the establishment of policing and criminal justice systems in the post-Soviet societies that were in close proximity to Europe and in providing an understanding of how the process of ‘assistance’ was given and received (Hebenton and Spencer 2001). Applied criminological research was conducted by Aromaa and Lehti (1996) on the experiences of new businesses in post-Soviet countries, once again demonstrating HEUNI’s commitment to applying criminological research to inform the making of policy. The HEUNI approach was not simplistic or determined by governments but one that critically applied criminological theory and perspectives based on rigorous research to the real problems encountered by citizens and governments.

Over the recent years one of the points of focus for the work of HEUNI has been in attempting to bring a criminological rigour to the question of human trafficking. Recent work published by HEUNI (Jokinen *et al* 2011 and Spencer *et al* 2011) point towards the importance of taking a critical criminological approach to the issue of human trafficking. Importantly both of these publications move away from a concentration on human trafficking for sexual exploitation and take the broader perspective of trafficking for labour exploitation.

There are a number of areas in which criminology can make a contribution to the wider understanding of human trafficking, for example the structure of

networks that move people across borders or how the market is organised for trafficked labour. However, the one which this essay focuses on is that of policy making in the area of human trafficking and the implementation of policy. Within the policymaking literature there is a debate about how policy is *actually* made, and without rehearsing the debate here, I follow the line of argument detailed by Turnbull (2006) that we should understand the policymaking process as one that is about answering questions rather than a rational exercise in problem solving.

Criminology and criminal justice policy making

The presentation of labour exploitation as a problem, for example the United Kingdom Human Trafficking Centre (UKHTC) which is a part of the UK's Serious Organised Crime Agency, defines trafficking in a formalised manner, drawing on UK law and the Palermo Protocol and categorizes trafficking into four types; sexual exploitation, forced labour, domestic servitude and organ harvesting. Such an approach to human trafficking, one that problematises and categorizes, begs a series of question not least that it has no sense of the interconnectedness between the 'victims' and the traffickers. There is no analysis of how migration is an essential element of the trafficking process and how the decision to migrate is one that is balanced against the risks of remaining and the risks of migrating. The UKHTC account appears to present victims and traffickers as one dimensional and therefore lacks a framework within which to ask more searching questions about the process of trafficking.

Labour exploitation raises many questions; moral questions about the practices of producers and consumers and their engagement with markets that drive prices downward with the inevitable consequence of exploitation of the labour of the vulnerable and poor. Questions that concern economic relationships between consumers, producers and those that labour in our own countries and in those that are far away. There are questions about what is the most effective way to police such infringements on human dignity. There are also questions of policy formulation and implementation; how the problem is understood has a significant effect on how policy is constructed and formulated. Criminology needs to engage with these policy making processes to understand how the questions in the policy making process are framed and how these questions are answered in the delivery of policy. It is on this issue that the remainder of this essay will focus.

There are a plethora of policies and laws that address directly or tangentially the issue of human trafficking. These policies and laws are the outcome of a series of negotiated answers by a coalition of interests. The UK provides a good example of how international criminal justice organisations, for example the United Nations, provide a direct influence on the framing of the policy questions. In the UK the Human Trafficking Protocol of the Palermo Convention (see for example UNODC 2004) has been incorporated into the 2003 Sexual Offences Act, specifically paragraphs 57-60. The Protocol also

provides a structure to the approach taken by law enforcement in addressing the issues of human trafficking in the UK. However, this also creates a series of blind-spots (see Dorn 2010) that result in particular perspectives being discounted or remaining ‘unseen’. There are no detailed qualitative research accounts of interviews with traffickers, there are few research accounts of interviews with those who do not define themselves as victims and only partial accounts of those who are defined as victims. The research appears to be biased towards providing affirming accounts of the official view of human trafficking and a significant element of this official view is a process of criminalisation.

One outcome of the above is that law enforcement agencies within the UK have taken a sexual exploitation approach to human trafficking (Spencer and Broad 2010), and this is not surprising because as Doezema (2005) has argued the Palermo Protocol places the emphasis on human trafficking for sexual exploitation and UK policy questions have been framed around the Palermo Protocol. However, it is not just policy making that has taken a narrow view of human trafficking and making a link to sexual exploitation¹ but criminology has also taken this view with much of the criminological literature being focused on sexual exploitation. However, as Agustin notes there is a process whereby what is the appropriate topic of investigation in one discipline, in this case migration studies, finds that the focus of investigation moves out of the field of vision and into another discipline’s view when there is a shift in circumstances:

“In recent years, the field of migration studies has opened up to diverse theories; ... it is strange that a whole category of migration should be discursively shunted’ or perhaps tidied away’ into another domain. I refer to women who leave their countries and later are found selling sex in someone else’s, at which point they disappear from migration studies (where they would be migrants) and reappear in criminological or feminist theorising (where they are called victims).” (Agustin 2006:29)

This separation of academic investigation results in a compartmentalisation of trafficking and the criminological concern is one relatively small aspect of the trafficking activity, that of sexual exploitation. The problem with such an approach is that it creates many blind-spots, one of which is labour exploitation. A consequence of this is that policy becomes formulated around questions that are concerned with sexual exploitation rather than questions that are concerned with different forms of ‘unfree’ labour (Skeldon 2011). The formulation of policy questions and answers that focus almost exclusively on sexual exploitation from a law enforcement perspective results in a form of understanding that creates categories of victims and pays little attention to the perpetrator, the circumstances around migration or the experiences of migrants in general. All of these approaches would allow for a more sophisticated theorisation of the issue of trafficking and the many different facets to the

¹ There are many reasons why there has been a concentration on sexual exploitation – See Spencer and Broad 2010 for a more detailed account.

activity would become more transparent. Following from this policy making would be broader and better informed and so more relevant to the issues faced by migrants whether in the sex industry or exploitation in other licit and illicit activities. What is critical is how the discipline of criminology engages with the key theoretical debates and other social science disciplines.

David Downes famously said that criminology is a ‘rendezvous subject’, that is a discipline that connects with others in a dynamic manner to bring about new understandings of ‘old’ problems. Translating these new perspectives into policy formulations is not easy, as Garland and Sparks (2000) note there is a problem with ensuring that a criminological perspective has a place in government decision making; governments operate within a ‘context of instrumental rationality’ and one that is influenced by emotions, political imperatives and perceived demands of the electorate (Garland and Sparks:19). Therefore there are occasions when criminological insights are not conducive to the policies that government perceives as being required to tackle a particular problem.

Developing a criminological approach to human trafficking

Human trafficking is neither a new phenomenon nor one that has not, previously, been subject to forms of moral indignation (Spencer and Broad *forthcoming*) and the creation of a problem based on relatively little evidence (see for example Weitzer 2007). However, we can approach the problem of human trafficking by taking account of the work in migration studies that begins to provide some answers to the question why people migrate. There is a debate as to how best understand the data on migration and to give meaning to the reasons respondents give as to why they migrate. Much political debate understands the decision to migrate as a relatively straightforward one; people migrate because they want to avail themselves of a better life in a different country. This rather simplistic approach takes little account of the global processes that stimulate migratory flows. Boswell *et al* (2011) argue that:

“Political debate frequently seems to revolve around different empirical assertions about the causes, effects and consequences of migration. Such assertions may involve claims about the numbers of immigrants entering or leaving a particular country, how long they are staying, what kind of work they undertake, their impact on the welfare system or the ability of migrants to ‘integrate’ into the societies in which they live.” (Bosworth *et al* 2011:1).

These different empirical assertions are an important of the policy making ‘narrative’ as Bosworth *et al* define it, that is a narrative that defines the terms of the policy problem and establishes the solution. These policy narratives are influenced by the global explanations of the human trafficking problem and the international solutions proposed.

There are a number of narratives in the policy making process. For example the UKHTC has a particular story to tell in relation to trafficking and they claim the 'specialist' or 'expert' knowledge and because of this they are in the position to best inform the way forward. For others engaged in the policy debate the knowledge is not perceived to be so irrefutable but rather more contentious because of the problems embedded in the narrative. As Goodey (2008) argues the responses in policy terms to trafficking at the international, EU and national levels have been constructed using very sketchy data and this has located the issue in the 'migration-crime-security' nexus (Goodey 2008:438). Using Turnbull's arguments that policy is usually a set of answers to one, or a series, of questions, this suggests that the thorny questions of migration policy have found some answers within a law enforcement framework and this approach to the policy narrative creates a number of blind spots.

There will always be blind spots in policy making by the very nature of the enterprise, but it is important to identify them if possible because they are not always blind spots. What is important is to identify those issues that are not being talked about:

"If 'everybody knows' how things 'really' work, why do the [policy analysis] models persist in leaving out such knowledge, and why do such inaccurate models persist? It would seem that tacit knowledge plays a key role in maintaining supporting silences in public discourse." (Yanow 1995:111)

The areas that are not discussed in many cases are those areas where there is knowledge but it is 'knowledge denied' (van Duyne and Vander Beken 2009). This denial of what is known is in the view of van Duyne and Vander Beken (2009) a problem of attempting to make policy from what we know. This is a problematic strategy when what we know does not easily sit within the narrative structure; at this point to accommodate the narrative the difficult elements are denied, forgotten or simply ignored. For example, the difficulty of obtaining accurate data on the prevalence of trafficking. As Goodey (2008) argues it is difficult to get accurate data for the number of people trafficked in accordance with the definition of the Palermo Protocol. The difficulties in collecting accurate data are known (see for example Kelly and Regan 2000) but in spite of all the difficulties in assessing the number of victims there are very many official estimates of the number of victims and the scale of the problem, which is often inflated to epidemic proportions. This fits with the official law enforcement narrative of human trafficking being a large and significant problem that requires additional law enforcement expertise and of course increased resources to support the experts. The 'problem' of trafficking is further refined to focus on sexual exploitation and so the potentially more significant issue of labour exploitation becomes ignored and its lack of recognition is one of those 'supported silences' (Yanow 1995).

The challenge for a criminological approach is twofold; first, to introduce into the discussion of human trafficking some intellectual rigour and second, to

counter the dominant narrative by not supporting the silences. The first challenge relies on researchers to engage with a range of other disciplines when investigating human trafficking. The first question for criminologists is simply, 'Is the study of human trafficking a relevant field of investigation?' There are two approaches to this question. It is a relevant area for investigation because trafficking is a criminal offence and criminology is concerned with the study of crime and criminals. However, a critical approach is required to the problem of human trafficking so that the process of criminalisation is understood and that the 'official' narrative is subjected to scrutiny. A consequence of this is that the research agenda needs to have a wider perspective; the focus on the victims of human trafficking for sexual exploitation should be widened to include research that engages with labour exploitation, an understanding of how the markets function in different forms of exploitative and 'unfree' labour, including the sex industry. This approach would challenge the current orthodoxy by locating sexual exploitation within the framework of labour exploitation and not as something different to it and thus worthy of specific individualised narrow research. This approach would also ensure that there was criminological research into the traffickers, who in all the noise about sexual exploitation have been ignored. Their 'story' is one that requires a telling because they provide an insight into how markets and networks operate and what motivations lay behind their actions. In many cases, in the UK for example, the convicted traffickers are themselves migrants and so have a story tell of their migration experiences and their route into trafficking.

A wider research view of trafficking addresses the second challenge, that of addressing the dominant narrative. A challenge to the law enforcement narrative is important because it will develop new lines of information into the policy making process; more subtle and detailed data will assist in making policy at the international, EU and national level that does not simply criminalise but takes account of the contribution from migration studies, economics and political studies in understanding the nature of and risks of migration (Jaeger *et al* 2007), the economics of trafficking (Wheatson *et al* 2011) and the relationship between trafficking and the political economy (Phillips 2009). The contribution of these social science disciplines to the criminological understanding of human trafficking is important because they provide a wider context in which to understand who are victimised, criminalised and engage in trafficking as a means of criminal enterprise.

Conclusion

In this essay I have argued that it is important to widen the criminological lens through which human trafficking is viewed and to challenge the 'official' narrative. In doing so it will ensure that victims are better provided for, traffickers are not demonised but their offending understood within the broader terms of migration and the exploitation of criminal opportunities that instability and economic hardship can cause. An applied criminological approach will

ensure that there is an analysis of the experiences of migrants (mainly men) who become involved in certain types of crime in destination countries. An analysis that considered how those who purchase from the traffickers, whether it be for forms of debt bondage or labour exploitation, would provide a more detailed understanding of how such networks are constructed. Are the trafficking networks based on ethnicity, geography or family? It would also provide a greater understanding of how markets function and how they can be more effectively disrupted. An understanding of the networks would improve the attempts to counter enforced migration in the source countries and so protect victims. Such an analysis would provide the opportunity to investigate in more detail the decision to migrate and begin to provide a perspective that does not view all migrant experiences as being the same. The experiences of women are different to those of men, the experiences of Roma migrants will be different to migrants from Iran. The decision to migrate internally within the EU is a different decision to one that requires making a hazardous journey in a boat from the North African coast to Lampedusa as an undocumented migrant.

True to form HEUNI has been investigating such issues and working to broaden the criminological agenda in relation to human trafficking and labour exploitation. Work by Lehti and Aromaa in 2002 was engaging in the problem of how to assess the size of the 'trafficked population', but this is not the only publication on this topic. Others followed and in 2006 Aromaa and Lehti argued that the figures for international human trafficking overestimated the figures for adult prostitution but underestimated the trafficking in minors (Aromaa and Lehti 2006). Recent work from HEUNI by Jokinen *et al* engages with the issues of labour exploitation and forced labour. This body of work provides an example of how the official narrative can be challenged and a more sophisticated and detailed analysis brought to bear. It is the task of criminologists to widen and take forward the agenda established by HEUNI in its 30 years of work.

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BERRY PICKERS – VICTIMS OF TRAFFICKING?

Anniina Jokinen
Researcher, HEUNI

Every year Finnish forests fill with wild berries and mushrooms that can be freely picked by anyone. The possible income from selling the berries is considered to be tax free. In the last 10 years, more and more wild berry pickers from Asia and Eastern Europe have been recruited to pick wild berries in the forests of Northern Finland. They work extremely long hours in the forest picking berries up to 15 or 16 hours a day and are accommodated in very poor conditions. They sell the berries usually to the same companies that have organised their trip to Finland.

In order to travel to Finland, most people have had to borrow money in their home country and they are thus in debt when they arrive here. No one knows what promises they are made about the possible income and conditions when they are recruited.

Depending on the year, there might be a plenty of berries in the forest – or not. If it is a bad year, it is completely possible that the income from selling the berries does not even cover the plane tickets and the expenses they have to pay in Finland for accommodation, food and transportation. Many of these features can also be seen as indicators of trafficking in persons for the purpose forced labour as we have pointed out in a recent HEUNI report on trafficking for forced labour. This issue has been raised also by the Finnish Ombudsman for Minorities who is also the National Rapporteur on trafficking in persons.

Now, they can do all this with a simple tourist visa, since wild berry picking is not considered to be a job by the Finnish authorities. The wild berry pickers are in fact considered to be independent entrepreneurs, self-employed and thus their working conditions and terms of employment are not monitored by the Finnish labour inspectors. For the same reasons, also employment and labour offences covered in the Finnish Criminal Code do not concern these people because they are not employed. This seems problematic.

This view has been challenged by many who argue that organised wild berry picking could and should be considered to be a job. The workers get tools and instructions from Finnish recruitment and berry companies, to whom they sell the berries and pay for their accommodation etc. If they were considered to be employed by these firms, labour offences and labour law could be applied to their situation and their terms of employment could be monitored by the labour inspectorates.

In 2010, the Finnish Ministry of Foreign Affairs issued a guideline according to which people applying for a visa for wild berry picking should present an invitation and contract of purchase from a Finnish berry company. The inviting company has to be able to cover the expenses of the person's trip, accommodation and tools in case it is a bad year, so that the person coming to Finland does not run into debt and can cover their expenses. What are the impacts of this policy, we don't know as of yet.

Finally, it should be noted that according to the ILO, work or service does not need to be defined as work by the national law for it to be defined as forced labour. If we look at the situation of these berry pickers in its totality, you could argue that at least some of the features of trafficking are present. If the berry pickers are in debt when they come to Finland, they are very dependent on the berry company to guarantee their livelihood. If on top of this they have to pay excessive fees for accommodation, food, tools and transportation, are in debt, and they have been made false or misleading promises about the income, nature of the work and its circumstances, one could argue that maybe they are in fact victims of trafficking and not just self-employed entrepreneurs.

MONITORING EFFORTS AGAINST HUMAN TRAFFICKING

Eva Biaudet
Ombudsman for Minorities, Finnish National Rapporteur

It is with great pleasure that I am here at HEUNIs 30th Anniversary Conference, speaking on the final report on monitoring human trafficking security. For those of us who have had the opportunity to participate, it has meant a continuation on a lifelong work against exploitation of persons, now in its' most serious form. Modern day slavery, human trafficking, is a difficult theme because it brings upon us both guilt and shame – witnessing violations against other human beings in our own societies - and not having all the means and efforts to stop it. I would like to thank you for keeping this issue on the agenda of HEUNI. I am certain that we all will be able to see the fruits of our work both nationally and internationally. To continue on a positive note, certainly Roger Plant and others who have worked against this crime for more than two decades, have seen big changes to the better. I have witnessed plenty of changes and direct impact on the work of authorities, in only a few years. There are lots of things to do and we already have learned about what kind of mechanisms are necessary to bring about more effective combating of this crime against human rights. Still, it takes many efforts and true multi-stakeholder responsibility, as well as cooperation, in order to achieve success over time.

Today I am here in my capacity as the Finnish Ombudsman for Minorities and National Rapporteur on Human Trafficking and Related Phenomena. It was some two years ago that changed my perspective from that of an international diplomatic organisation to that of a national monitor – evaluating the implementation of international regulations, national legislations and practises of authorities as well as NGOs. Adding to my previous work as an MP, I have now looked at our efforts in combating this crime, protecting and assisting the victims of it and the perhaps still very humble efforts to prevent this modern day slavery from three perspectives: the political, the international and the implementation and grass roots level. And it has been a healthy exercise.

Having returned to Finland from the OSCE at the end of 2009, my strongest sensation was that trafficking in human beings really does look the same everywhere. That the modus operandi of the criminals was the same, the psychology of how the victim is controlled was the same, how the victims lack self-esteem and ignorance of her rights was the same, how the stigma and prejudice with authorities such as the police, judges and even social workers was the same. This depressed me of course, having lived in the false belief that the strong social infrastructure, the egalitarian values and the uncorrupted authorities would protect us from this modern day slavery. And indeed they do

provide us with a better platform for fighting against all kinds of exploitation, but there is the added blindfold that prevents us from seeing the reality and too many times from believing the victim. The “culture of disbelief” that I learned about from studies with social workers in the UK was indeed also very true among my own mostly very competent authorities.

In June last year, the Finnish National Rapporteur’s first report to Parliament was published. In this report I evaluated the anti-trafficking measures that had been adopted. Indeed during the past years many significant improvements had taken place. The Finnish Criminal Code was completed with sections that enable victims of trafficking to be issued a reflection period and residence permit and a proper victims’ assistance system has been established in order to protect and assist presumed victims.

In my first report we examined how the rights of trafficked persons are being implemented and what type of obstacles the Finnish system may entail. The most important observation of this report was that human trafficking and related serious exploitation are more common than we often realise, because victims are not identified adequately. They are not identified at all - we are of course discussing a clandestine crime - but more often victims are not identified as victims of trafficking or of serious exploitation. The authorities may fail to recognize the fact that the person is a victim - particularly in prostitution. As a consequence victims are denied their statutory rights, such as services of the system of victim’s assistance or they lose their status as party in the subsequent trial.

As the Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human beings (adopted in 2005 by the Committee of Ministers) states, a failure to correctly identify a trafficking victim probably means that the victim will continue to be denied his or her fundamental rights. Hence the prosecution also might lose a necessary witness to gain a conviction of the perpetrator.

Many persons, including minors, who are in the victims’ assistance system, have been victimized already in a country other than Finland. However, not all suspected victims of human trafficking have received proper assistance, because the case has not been seen to fulfil the statutory definition in our Criminal Code. This has raised my grave concerns when clear indicators of sexual exploitation or labour exploitation existed. Use of threats, restricting the victim’s freedom of movement and different types of debt bondage occurred in those cases we examined. In the process the authorities had attached undue significance to the fact that the persons had been victimised abroad and that the law enforcement authorities had not been able to detect the perpetrators. Accordingly the victims were returned to the country of victimisation. The fact that the person in question was a minor, a child, had not changed this procedure. The decision by our authorities was taken on the basis of the Dublin Regulation which determines the EU State that is responsible for examining an asylum application. This regulation which is designed to share the responsibility for asylum procedures and to avoid duplication makes it indeed

possible to refuse entry to asylum seekers and return them to file a similar procedure in the country of first entry. Unfortunately, presumed victims of trafficking may, if not adequately identified and assisted in the state of identification, be returned to the traffickers they try to flee from and hence become re-victimised.

My office analysed all the so-called Dublin decisions issued between January and August 2009 where the applicants had been returned to Italy and Greece. Although the number of analysed cases was limited we found results that gave cause for this concern. Several of the applicants had reported sexual exploitation, violence or political persecution in their home countries. Because of the harsh conditions they had decided to leave for Europe aided by a smuggler. The conditions of smuggling were often inhumane and the persons were not able to describe their journeys. Some reported that the smugglers had taken their travel documents. They also mentioned that they owed money. In nearly all cases we examined the applicants had also been subjected to physical or sexual violence. Many reported violence from authorities. The documents clearly indicated that human trafficking had already taken place in more than half of the cases, the exploitation had taken place in prostitution or work in a bakery or on a farm, or they had been forced to carry drugs.

What seems to have emerged as a challenge in the cases analysed is that the Dublin procedure does not enable an identification of possible human trafficking. In many cases the documentation showed that authorities took no measures concerning ambiguities in the applicants travel arrangements, becoming victims of sexual violence or other violence, abductions, or deception as to the nature of the promised work. The decision was mostly concerned with reception conditions for asylum seekers in Greece and Italy and the need to investigate the crime where it had been committed. It is important to note, however, that although the Dublin Regulation makes it possible to also return minors to another EU country, it does not eliminate the requirements in international obligations and national legislation to assess the best interest of the child in all action taken by the administrative authorities.

What I have learned - following grass roots implementation of the combat against human trafficking – is that it is absolutely necessary to create a system for the protection of and assistance to victims, based on particular legislation and procedures, that is not dependent on whether the traffickers can be identified, prosecuted or convicted. Each State should offer support to a victim in their territory independently of the criminal procedure. Indicators of human trafficking should be sufficient reason to provide assistance. The identification process is time-consuming and complex but due to the serious nature of the crime and to our continued failure to protect men, women and children - often foreigners and with little understanding of their rights - it is necessary to become better at recognising indicators and act upon them. We already have enough international evidence on this to learn!

Child protection measures must also be included. The target level should be the level of the domestic child protection measures. Children should be treated as

if they were our own. Many victims also have children who are in need of child protection measures. Measures addressing domestic trafficking are important and particular attention should be given to the risks for young girls and boys.

Many countries have put different anti- trafficking mechanisms in place. Many countries already have National Action Plans and have appointed National Coordinators and even National Rapporteurs. They all have distinct features that complement one another and there is evidence that action against trafficking and related exploitation can benefit and become more targeted and efficient by using these mechanisms. I would myself once more like to emphasize the impact that we have, as an independent and transparent National Rapporteur. We not only gather data, but we also analyse existing data and information, and evaluate anti-trafficking policies and actions taken. We have not been very keen on supporting efforts of cross- border technical data gathering without adequate analysing of the figures, that tell us so little of reality. Comparing such analysis could on the other hand give us plenty of information. But let's first establish National Rapporteurs in all EU countries, as indeed we all have committed to do. In Finland this work, following our first report to Parliament, the serious examination of this report by Parliament, and the thorough recommendations to authorities from Parliament, has clearly pushed us forward to a more efficient and evidence-based anti-trafficking work.

It is necessary not to lie back and be satisfied when legislation is set up, but to also follow the implementation and coordination between actors. It is on the contrary essential that also other actors, such as Parliamentarians, NGOs and the media (which we should not forget) continue to ask the tough questions, make authorities accountable for their deficiencies in identifying and protecting victims and put priorities in place when it comes to resources. Trafficking is a serious crime against humans, against our human dignity and equality. Trafficking erodes these basic values. Every failure to protect a victim - be it a man, woman or a child - is a failure of society. The victims cannot be blamed for this crime. Many times too often they still are.

Much improvement has indeed happened even if the challenges grow at an even faster pace. The enemy is carrying on a business with profits that are hard to overestimate, only because we allow this market of commercial sexual exploitation and inhuman labour conditions to exist. So far, Europe has not been very successful on curbing the demand. However, it is positive that the strong labour market actors in Finland have taken on this challenge to fight and recognise also the most serious exploitation of foreigners in our labour market, here in Finland. Again it needs to be said that secluded workplaces in homes or in remote areas are particularly difficult to detect, and more attention should be given to low threshold services that provide legal advice and information about other services in particular for persons in an irregular situation. Discussions on how to break the evil circle of exploitation for seriously exploited persons in irregular situations, and ensure their empowerment and social mobility, is still not an issue with Finnish politicians. The protection of undocumented persons

who live and work in Europe has not become a political issue here as of yet, although the Ombudsman for Minorities has called for access to education for children. A global clinic provides very basic health care services for undocumented persons in Helsinki today.

The report on trafficking in human beings for the purpose of forced labour in Finland, Estonia and Poland, published by HEUNI earlier this year, shows some important facts. It confirms many of the findings that my office has made. The study shows that many of the cases of exploitation of migrant labour in Finland, in fact, have included traits of trafficking. The workers have been threatened, they have worked extremely long hours, for little or no pay, the workers have been indebted already before coming to Finland and they live in very poor conditions. However, it seems that authorities and others fail to see this as indicators of trafficking and only treat it as violations of labour rights or as work discrimination. The HEUNI study argues that there is a need to see the totality of the situation of the exploited workers - not just the separate indications of salary violations or long working hours. There is a need to see also the more subtle forms of control of movement that make it impossible for the worker to leave the abusive workplace. Trafficking for forced labour, therefore, does not mean only situations where there is extreme force or violence.

My second National Report is a kind of midterm report with a more narrow perspective than the first, that was directed to Parliament and that contain recommendations that are being implemented a few years ahead. This year I particularly draw attention to the failures in identification and protection of victims of sexual exploitation, victimized in prostitution in Finland. We are currently also supporting the police in their efforts to create more adequate operative guidelines, and how to pay better attention to indicators of presumed trafficking. In this effort, continuous training of law-enforcement authorities, the police and the prosecutors, is of greatest importance. As monitor, we do have access to all information, and we are making particular efforts to detect at what point decisions are taken not to further investigate cases as human trafficking. And we do all know - what is not investigated is not found. Instead, lesser crimes are investigated, such as pimping, where unfortunately the rights of victims are weak in law. We have found that, contrary to international experience, only a very small part of the victim assistance is directed to victims of sexual exploitation. Less than 10 persons have come from exploitation in prostitution in Finland.

As national Rapporteur I am very pleased, however, that our recommendations from the previous report were accepted to a large extent and new legislation improving protection, and hopefully also hence identification of victims is being prepared as well as changes in criminal law. It is a most worrying situation when foreigners, in particular exploited women, do not receive adequate protection in our country even when it comes to such serious crimes as trafficking. However, I am an optimist also on this account. Our work in raising awareness among the public and among decision-makers has been quite

successful and Finland is finally in practice preparing for ratification of the important Council of Europe Convention on Human Trafficking. The Convention must bring about stronger efforts in victim protection, improving victim protection in the Dublin process among other things.

I want to congratulate HEUNI on its 30th anniversary. It is a great pleasure to co-operate with you and I personally would like to thank Kauko Aromaa, for his important work for many years. All the more, I appreciate your important work fighting human trafficking and related exploitation! HEUNI has been key in keeping trafficking high on the political agenda - please continue to do so!

HUMAN TRAFFICKING FOR THE PURPOSE OF ORGAN REMOVAL: RECENT DEVELOPMENTS IN THE NETHERLANDS AND DEVELOPMENTS IN THE FIELD OF INTERNATIONAL REGULATIONS

Florence Hol, LLB
The Netherlands

Introduction

This paper is the outcome of research into recent developments in the Netherlands and developments in the field of international regulations concerning human trafficking for the purpose of organ removal and organ trade.

This research has been conducted at the Bureau of the Dutch Rapporteur on Trafficking in Human Beings, commissioned by the Dutch National Rapporteur on Trafficking in Human Beings, Mrs. C.E. Dettmeijer-Vermeulen. There has been a National Rapporteur on Trafficking in Human Beings in the Netherlands since 1 April 2000 and the Rapporteur's main task is to report on the nature and extent of human trafficking in the Netherlands, and on the effects of the anti-trafficking policy being pursued. The Dutch Rapporteur works independently and reports to the Dutch government.¹

The Dutch National Rapporteur has published two reports, one in 2007 and one in 2009 in which human trafficking for the purpose of organ removal is discussed.² It was evident from these reports that there is very little information available on the actual occurrence of human trafficking for the purpose of organ removal and on organ trade. There was evidence that transplant tourism and human trafficking for the purpose of organ removal do occur in the Netherlands and that people are prepared to accept payment for donating a kidney. The need to be vigilant was emphasized.

The current research builds further on these two reports and charts the present situation in the Netherlands regarding human trafficking for the purpose of organ removal and organ trading.

¹ The website of Dutch Rapporteur on Trafficking in Human Beings is <http://english.bnrm.nl/>.

² Dutch National Rapporteur on THB (2007), Chapter 9 and Dutch National Rapporteur on THB (2009), Chapter 13.

First of all in section 2.1 there is a brief outline of the legislation concerning human trafficking for the purpose of organ removal and organ trading. Then the recent developments in national legislation concerning human trafficking for the purpose of organ removal and organ trading will be described. Special attention is given to the amendment of the Health Insurance Act. Reimbursement for transplants in countries outside of the European Union and the European Economic Area are no longer possible as a result of this amendment, unless the donor is a spouse, registered partner or relative of the insured person. Further the Subsidy Regulation for live transplants, which compensates the donor for costs incurred as a result of the donation, will be discussed.

Section 2.2 deals with the occurrence of trafficking of human beings for the purpose of organ removal in the Netherlands, as well as the possible involvement of Dutch people. The Dutch National Rapporteur on Trafficking in Human Beings has received one signal, in recent times, of a possible instance of human trafficking for the purpose of organ removal. The signals and indications of the existence of organ trafficking and transplant tourism are really increasing. These signals will be handled in section 2.3.

The shortage of donors is the root cause of human trafficking for the purpose of organ removal and organ trading.³ Therefore it is important to outline the government's approach to the shortage of donors. The recent developments in this approach will be handled in section 2.4.

The dominant idea in the Netherlands is that altruism should be the motivation for donating an organ. However, there are more and more calls from all sides to encourage organ donation by offering financial incentives. This will be looked into in section 2.5.

Attention is given to commercial surrogacy in section 2.6 and whether this phenomenon could fall under Article 273f of the Dutch Criminal Code on human trafficking for the purpose of organ removal.

Finally, section 3 examines the most recent developments in international regulations and other international documents that are of importance to human trafficking for the purpose of organ removal.

Developments in the Netherlands

National regulations

Human trafficking for the purpose of organ removal as well as organ trading are criminal offences in the Netherlands.⁴ In this section I will begin with a

³ Dutch National Rapporteur on THB (2007), § 13.2.2, p. 545 and § 13.3.2, p. 550.

⁴ See article 273f of the Dutch Criminal Code and article 32 of the Organ Donation Act (Wet op de orgaandonatie).

brief outline of the legislation concerning human trafficking for the purpose of organ removal and organ trade. For an extended discussion on the legislation in question I can recommend the Fifth Report of the Dutch National Rapporteur.⁵ The recent developments in national legislation concerning human trafficking for the purpose of organ removal and organ trade will also be covered.

Brief outline of national regulations

Human trafficking for the purpose of organ removal is, according to Article 273f of the Dutch Criminal Code, a criminal offence in the Netherlands since 1 January 2005. It is a criminal offence according to Article 273f part 1 subparagraph 1 of the Penal Code to recruit, transport, move, accommodate or shelter anyone by coercive means (using violence, threats of violence, extortion, deception etc.) for the purpose of removing their organs. To commit such an offence, the actual exploitation or the removal of an organ is not necessary.⁶ Sub-paragraphs 2, 4, 5, 7 and 9 of paragraph 1 also have to do with human trafficking for the purpose of organ removal. A Dutch person abroad who is guilty of human trafficking for the purpose of organ removal is also liable to punishment under Article 273f when this is considered an offence in the country concerned.

The supply of organs is regulated by the Organ Donation Act.⁷ The most important condition in this Act for organ donation is the explicit prior permission of the donor⁸ and “provision of the organ free of charge”.⁹

Deliberate removal of an organ during life or after death without prior permission being given is a criminal offence under Article 32 of the Organ Donation Act. Also intentionally bringing about or encouraging another person to grant permission to a third party to allow the removal of an organ during life for a fee in excess of the costs is a criminal offence. Furthermore it is a criminal offence for those who openly offer a commercial fee for the receipt of an organ and also those who openly offer themselves as donor or as “negotiator” for a commercial fee.

Health insurance

The Seventh Report of the Dutch National Rapporteur discussed a case of transplant tourism where a Dutch kidney patient had undergone an organ

⁵ Dutch National Rapporteur on THB (2007), pp. 193-194, 197-198.

⁶ Cleiren & Verpalen 2010, (T&C Sr), art. 273f Sr, aant. 9 (Commentary H. van Maurik).

⁷ Wet van 24 mei 1996, houdende regelen omtrent het ter beschikking stellen van organen (Wet op de orgaandonatie).

⁸ Article 8 Organ Donation Act.

⁹ Article 2 Organ Donation Act. Dutch National Rapporteur on THB (2007), § 9.2.1, p. 193.

transplant in Pakistan.¹⁰ This transplant was covered by a Dutch health insurance company. The Health Insurance Act stipulated that the health insurance company had to pay the costs of the transplant regardless of whether the organ was paid for or not.¹¹ That conflicted with the ethical and legal norms in the Netherlands where an organ should be provided for free.¹² That is why the Minister for Health, Welfare and Sport, in a letter to Parliament on 3 November 2008, announced the intention to “supplement the regulations in such a way that the health insurance company would have to refuse compensation in cases where there is serious doubt about the ethical acceptability of a transplant.”¹³ Pursuant to this intention the Health Insurance Act, Article 2.4, first paragraph, part c, came into effect on 1 January 2010.¹⁴ This article now states that transplants outside the European Union countries and countries that are party to the Agreement of the European Economic Area are not reimbursed, unless it is a donation from a spouse, registered partner or relative of the person insured.¹⁵ The rationale is that in these cases there will be no question of extra financial compensation.¹⁶ The threshold has been raised for Dutch people to undergo transplants abroad against payment as a result of this change. The payment of compensation for transplants by the health insurance company is now more in line with the criminal status of organ trading.¹⁷ For organ transplants within the European Union countries and countries that are party to the Agreement of the European Economic Area there is no provision for the health insurance company to refuse a reimbursement in case of serious doubt about the ethical acceptability of a transplant. In these cases the reimbursement for the transplant is dependent on the policy conditions of the health insurance company.

¹⁰ Dutch National Rapporteur on THB (2009), § 13.3.1. See the broadcast of the television programme Netwerk of 21 January 2008.

¹¹ Dutch National Rapporteur on THB (2009), § 13.3.1, p. 548. *Aanhangsel Handelingen II* 2007/08, nr. 1741.

¹² Besluit van 31 augustus 2009, houdende wijziging van het besluit zorgverzekeringen in verband met aanpassingen in de te verzekeren prestaties en in de regels voor het eigen risico per 1 januari 2010, *Stb.* 2009, 381.

¹³ *Kamerstukken II* 2008/09, 28 140, nr. 62.

¹⁴ *Stb.* 2009, 381, *op. cit.*, 12.

¹⁵ Artikel 2.4, eerste lid, onderdeel c, van het Besluit zorgverzekering: transplantaties van weefsels en organen slechts tot de zorg behoren indien de transplantatie is verricht in een lidstaat van de Europese Unie, in een staat die partij is bij de Overeenkomst betreffende de Europese Economische Ruimte of in een andere staat indien de donor woonachtig is in die staat en de echtgenoot, de geregistreerde partner of een bloedverwant in de eerste, tweede of derde graad van de verzekerde is.

¹⁶ *Stb.* 2009, 381, *op. cit.*, 12.

¹⁷ Article 32 Wet op de orgaandonatie.

Reimbursement of the costs resulting from the donation

The Subsidy Regulation for living donation that came into effect on 1 June 2009 is also worth mentioning.¹⁸ This regulation is to meet the costs that are incurred as a direct result of the donation, as far as there is no other reimbursement for these costs.¹⁹ The compensation to donors for expenses incurred has a more structured basis with this regulation and firmer ground in public law.²⁰ In this way a barrier has been lifted for living donation.²¹

Incidents of human trafficking for the purpose of organ removal

Although human trafficking for the purpose of organ removal has been made a criminal offence since 1 January 2005 under Article 273f of the Dutch Criminal Code, the question remains whether this form of human trafficking actually occurs in the Netherlands or whether it involves Dutch people.

The Bureau of the Dutch Rapporteur on Trafficking in Human Beings has received some signals that in 2006 and 2007 there were possible cases of human trafficking for the purpose of organ removal.²² Since these cases the Bureau of VieJa²³ and CoMensha²⁴ have received information on one possible case in 2010 of human trafficking for the purpose of organ removal. This involved an Iranian political refugee who had been smuggled into the Netherlands via Istanbul. He was locked up in a room in the Netherlands and threatened with organ removal. The man managed to escape and told his story to the police. After this he was allotted a place to stay and an asylum application procedure was started.

¹⁸ Regeling van de Minister van Volksgezondheid, welzijn en Sport van 12 mei 2009, nr. GMT/IB/2929135, houdende tegemoetkoming in kosten voor het ter beschikking stellen van een orgaan bij leven (Subsidieregeling donatie bij leven), *Stcrt.* 2009, 97.

¹⁹ See for examples of compensations for which the donor is eligible: *Kamerstukken II* 2010/11, 28 140, nr. 77, p. 9.

²⁰ *Stcrt.* 2009, 97, *op. cit.*, 18, p. 4.

²¹ *Stcrt.* 2009, 97, *op. cit.*, 18, p. 4.

²² Dutch National Rapporteur on THB (2009), § 13.3.3. Two signals came from the police in 2006 and 2007 concerning the possible involvement of human trafficking for the purpose of organ removal and another case was registered by CoMensha in 2007.

²³ Vieja Utrecht is an organisation concerned with what is involved in an effective response to domestic violence, such as advising, prevention, indication and registration, care and guidance and developing expertise. See: <http://www.vieja-utrecht.nl/>.

²⁴ CoMensha is the Dutch coordination centre on human trafficking and functions as a national contact point for the central application, placement and registration of victims of human trafficking. See <http://www.comensha.nl/>.

There are no new (possible) cases of human trafficking for the purpose of organ removal known to the police²⁵ and according to the public prosecution office they have never launched prosecution procedures for human trafficking for the purpose of organ removal.²⁶

In Belgium two cases of illegally removing organs²⁷ came to the attention of the public prosecutor, but according to the Centre for Equal Opportunities and Opposition to Racism no legal proceedings have materialized.²⁸

Incidents of organ trade and transplant tourism

Risk of human trafficking

From the above it appears that there are hardly any signs that human trafficking for the purpose of organ removal does occur in the Netherlands or involves Dutch people. Yet it is important to remain vigilant regarding human trafficking for the purpose of organ removal. It is therefore important to monitor practices that carry risks for human trafficking for the purpose of organ removal.

This section will consider whether there are signs that organ trade and transplant tourism occur in the Netherlands or involve Dutch people. Organ trade is not the same as human trafficking for the purpose of organ removal, but in practice they can overlap in the same set of facts.²⁹ The risk with organ trading is that the commercialization of organs can compromise the voluntary nature of the donation.³⁰ Where there is organ trade there is thus also the risk of human trafficking for the purpose of organ removal. That is why it is important to consider signals of organ trading.

An outline of evidence of organ trade in the Netherlands or involving Dutch people, at the time of writing this report, will be given below.

Organ trade and transplant tourism in the Netherlands and involving Dutch people

Although there is not yet a clear picture on the extent of organ trade and transplant tourism in the Netherlands or involving Dutch people, more and

²⁵ According to the expertise centre human trafficking and frontier-running of the National Police Services Agency (KLPD).

²⁶ According to the press officer of the national office of the public prosecutor, Wim de Bruin.

²⁷ Human trafficking –illegal removal of organs, art. 433 quinquies § 1,5° SW.

²⁸ Centrum voor gelijkheid van kansen en voor racismebestrijding, *Jaarverslag Mensenhandel en -smokkel 2009, In schijn van wettelijkheid*, Brussel: oktober 2010, p. 47.

²⁹ Dutch National Rapporteur on THB (2007), § 9.9.2.

³⁰ See Dutch National Rapporteur on THB (2009), § 13.2.2 and § 2.5 (financial incentives) of this paper.

more light is being cast on the subject. Organs appear to be offered and sought after in public more frequently, doctors seem to find it easier to talk about possible cases of transplant tourism that they come across during their work, and there is more and more research done on the extent of organ trade and transplant tourism.³¹

More and more people advertise their kidney for sale via the internet and sometimes in the newspapers as well.³² In early 2011 a major Dutch newspaper reported that recently 24 people had definitely advertised their kidney for sale by placing ads on websites such as Marktplaats and Speurders (Dutch eBay sites).³³ In the advertisements financial compensation is requested and sometimes a definite amount was mentioned, e.g. 40,000 or 60,000 Euro.³⁴ The advertisements are usually removed from the sites after a while. Sometimes there are also advertisements placed by kidney patients looking for an organ.³⁵

Early in 2011 there was an uproar over transplant tourism by Dutch people in Belgium. In 2010 28 Dutch people, who were on the waiting list in Belgium, received a Belgian organ transplant.³⁶ Member of Parliament Dijkstra (D66) questioned the Minister for Health, Welfare and Sport about this.³⁷ However, this case was not about paying for organs.

³¹ For research concerning organ trade see for instance: I. Geesink, C. Steegers (2011) and F. Ambagtsheer (2007). Michael Bos of the Gezondheidsraad (Health Council) has also done research on the worldwide organ economy.

³² See for instance the advertisement 'Nier aangeboden, prijs: nader overeen te komen' of 13 April 2011 on Tweedehands.net, <http://diensten.tweedehands.net/overige-welzijn/nier-aangeboden.html> (Last consulted on 10 May 2011), the advertisement on Speurders.nl, www.nuij.nl/nier-te-koop-nier-aangeboden-gezond-nier.10684265.lynkx (Last consulted on 10 May 2011), the newspaper article 'Nier te koop uit geldnood', *Telegraaf*, 18 March 2010, and the newspaper article 'Nier verkopen enige uitweg voor Roos Lee', *Algemeen Dagblad*, 8 January 2011.

³³ 'Nederlanders zetten hun nier te koop op internet', *Algemeen dagblad*, 8 January 2011 en 'Nier verkopen enige uitweg voor Roos Lee', *Algemeen Dagblad*, 8 January 2011.

³⁴ See the advertisement 'Nier aangeboden, prijs: nader overeen te komen' of 13 April 2011 on Tweedehands.net, <http://diensten.tweedehands.net/overige-welzijn/nier-aangeboden.html> (Last consulted on 10 May 2011), the advertisement on Speurders.nl, www.nuij.nl/nier-te-koop-nier-aangeboden-gezond-nier.10684265.lynkx (Last consulted on 10 May 2011), the newspaper article 'Nier te koop uit geldnood', *Telegraaf*, 18 March 2010, and the newspaper article 'Nier verkopen enige uitweg voor Roos Lee', *Algemeen Dagblad*, 8 January 2011.

³⁵ See for example the article 'Gezocht: donornier, bloed O-positief', *dé Weekkrant*, 10 June 2009.

³⁶ See 'Nederlanders kapen Belgische organen weg', *De Volkskrant* 17 January 2011.

³⁷ Aanhangsel Handelingen II 2010/11, nr. 1376.

Addressing the shortage of donors

The Netherlands still has a major shortage of donors.³⁸ This shortage is the root problem of organ trading and human trafficking for the purpose of organ removal.³⁹ It is thus important to form a picture of the government's approach to the donor shortage, to understand the consequences for human trafficking for the purpose of organ removal.

The Master Plan for Organ Donation was drawn up in 2008 by the Organ Donation Coordination Group.⁴⁰ The Coordination Group examined options for financial incentives for living donations. The Coordination Group concluded that this had to be rejected because there was insufficient support among the people and also for ethical and legal reasons.⁴¹ According to the Minister for Health, Welfare and Sport Schippers, some progress has been made in other areas as a result of the Organ Donation Master Plan, such as approach taken in hospitals, supplying information to the general public on living donation.⁴² This approach, however, has not yet solved the shortage of donors. In response to this Members of Parliament have met with Minister Schippers.⁴³ During this meeting Member of Parliament Dijkstra announced that the Democratic Party D66 would come with a bill to introduce an active donor registration system.⁴⁴ In this system you may freely choose whether or not to become a donor or not, but it is compulsory to register that choice. The Organ Donation Coordination Group had advised in the Organ Donation Master Plan that the Netherlands should adopt this system.⁴⁵ However Minister Schippers has stated that she finds the assumption that a person wants to be a donor if he or she doesn't lodge an objection a violation of the right of self-determination and could only be justified if the violation led to an undeniable and significant increase in the number of donors. According to her the

³⁸ According to the preliminary annual report 2010 of the Dutch Transplant Foundation there were 1300 patients on the transplant waiting list for an organ on 31 December 2010. See www.transplantatiestichting.nl/cms/mediaobject.php?file=VoorlopigjaarverslagNTS2010.pdf (Consulted on 26 April 2011). According to the Dutch Kidney Foundation there are currently 926 people waiting for a kidney transplanta, and the annual death rate among the dialysis patients is 20 %. See www.nierstichting.nl/nieren/onzenieren/feiten-en-cijfers (Consulted on 26 April 2011).

³⁹ Dutch National Rapporteur on THB (2009), § 13.2.2., p. 545, § 13.3.2, p. 550..

⁴⁰ Coördinatiegroep Orgaandonatie, *Masterplan Orgaandonatie, De vrijblijvendheid voorbij*, 11 juni 2008. See Dutch National Rapporteur on THB (2009), § 13.3.2.

⁴¹ Coördinatiegroep Orgaandonatie, *Masterplan Orgaandonatie, De vrijblijvendheid voorbij*, 11 juni 2008.

⁴² *Kamerstukken II* 2010/11, 28 140, nr. 77, p. 5-9.

⁴³ *Kamerstukken II* 2010/11, 28 140, nr. 78.

⁴⁴ *Kamerstukken II* 2010/11, 28 140, nr. 78. At the moment the Netherlands has a passive donor registration system.

⁴⁵ Coördinatiegroep Orgaandonatie, *Masterplan Orgaandonatie, De vrijblijvendheid voorbij*, 11 juni 2008.

uncertainties about the effects of a system change are too large to warrant doing so.⁴⁶

Financial incentives?

Principle of non-commercialization

Dutch law and regulations take a definite stance against commercial fees for organ donation.⁴⁷ In international treaties and regulations altruism is also seen as the prime factor that should lead to organ donation.⁴⁸ Donation must be voluntary and for free. There are various arguments for the non-commercialization principle. One of those is that by paying, body material becomes marketable, and that is an infringement of human dignity.⁴⁹ Another argument is that donors will withhold information on illnesses because of the payment, whereby the safety and quality of the donation becomes risky.⁵⁰ What is of greatest importance with regard to human trafficking for the purpose of organ removal is that commercialization can compromise the voluntary nature of donations. In the Seventh Report of the Dutch National Rapporteur it was postulated that “social determinants of the organ donor – poverty, debts, a vulnerable social position or illiteracy – are a reflection of the social inequality between donor and recipient and compel the donor to sell organs.”⁵¹ In this way the organ giver would have no autonomy or choice and there would be coercion and exploitation involved.⁵² There is a risk of human trafficking for the purpose of organ removal if there is commercial organ donation.

Call for organ donation with financial incentives

The Netherlands still has a major shortage of donors.⁵³ There is an increasing call from different sides to end the ban on compensation for organ donation.

In early March 2011, the book “*Nier te koop – Baarmoeder te huur*” (Kidney for sale – Womb to rent) by Ingrid Geesink & Chantal Steegers was published. Geesink and Steegers are researchers at the Rathenau Institute, an independent

⁴⁶ *Kamerstukken II* 2010/11, 28 140, nr. 77, p. 1-2.

⁴⁷ See Dutch National Rapporteur on THB (2007), pp. 193-194, 197-198 and Dutch National Rapporteur on THB (2009), pp. 539, 547-550.

⁴⁸ Dutch National Rapporteur on THB (2009), § 13.4 and § 3 (international regulations) of this paper.

⁴⁹ I. Geesink, C. Steegers (2011), p. 21.

⁵⁰ *Ibid.*, pp. 21-22.

⁵¹ Dutch National Rapporteur on THB (2009), p. 545. See D.A. Budiani-Saberi, K.A. Karim (2009).

⁵² Dutch National Rapporteur on THB (2009), p. 545.

⁵³ See §2.4 (addressing the shortage of donors) of this paper.

research institute advising the government.⁵⁴ The book explores the global market in body tissue. It shows that parts of our bodies can and do earn money and that Dutch people travel abroad to pay for body tissue. According to the authors we are being forced to adjust our ideas on paying and donating because of this. They suggest alternative forms of donation and possible financial incentives in their book. A possible compensation for organ donors that they mention is lifelong exemption from health insurance premiums.⁵⁵ The Council for Health and Care (RVZ) had already proposed this exemption as a suitable form of remuneration in 2007.⁵⁶ The authors of the article “Wet tegen orgaanhandel is dode letter” (The law against organ trade is idle words) also suggest this form of reward.⁵⁷ According to them doctors are being confronted with patients suspected of paying for kidney transplants performed abroad. These potential cases of transplant tourism are not reported and registered and therefore also not penalized. Because of this, the illegal organ trade can continue. The authors argue therefore that the government should consider regulating the organ market instead of prohibiting it. According to them there does not have to be a conflict of interests between compensation and voluntariness. Good screening and compensation that is not paid in one go, and also not given in cash, such as a lifelong exemption from health insurance premiums, would prevent involuntariness. Research shows that exemption from the payment of health insurance premiums is seen by the population as the most acceptable form of compensation.⁵⁸

There have also been debates in Parliament as a result of the book “*Nier te koop – Baarmoeder te huur*” (Kidney for sale – Womb to rent).⁵⁹

Other forms of human trafficking?

In the preceding sections we assumed that the standard “conventional organs” for organ trade and human trafficking for the purpose of organ were kidneys, heart, lungs and liver. Due to the severe shortage of these organs, patients seem

⁵⁴ I. Geesink, C. Steegers (2011).

⁵⁵ See I. Geesink, C. Steegers (2011), p. 56, and the newspaper article of C. Houtekamer, ‘Het lichaam is geld waard, maar niet bij ons; Daarom wijken sommige kopers voor een nier, bot of een eikel uit naar het buitenland’, *NRC Handelsblad*, 4 March 2011.

⁵⁶ Raad voor de Volksgezondheid & Zorg. *Financiële stimulering van orgaandonatie. Een ethische verkenning*. Signalering ethiek en gezondheid 2007/3. Den Haag: Centrum voor ethiek en gezondheid, 2007.

⁵⁷ G. van Dijk, F. Ambagtsheer, W. Weimar (2011), pp. 778-781.

⁵⁸ See L. Kranenburg (2007), and M. C. Van Buren, et alia (2010), pp. 2488–2492.

⁵⁹ On the 22th of March 2011 Members of Parliament discussed with the Rathenau Institute the trade in human materials. During the parliamentary debate on organ donation on the 24th of March 2011 Members of Parliament have asked the Minister to comment on the book ‘*Kidney for sale - Womb for rent*’ of the Rathenau Institute

prepared to pay for them. Besides the trade in these “conventional organs” there is an increasing market for other parts of the body.⁶⁰

One of these markets is for wombs. Commercial surrogacy is on the increase thanks to developments such as the internet, the globalization of society and improved reproductive techniques.⁶¹ Dutch policy is focused on preventing commercial surrogacy⁶² and the promotion of it is also a criminal offence.⁶³ Some Dutch prospective parents therefore use surrogate mothers from countries such as India, Greece, Ukraine and the United States.⁶⁴ In many cases it is poor women who are surrogate mothers. The question is to what extent these women have made a voluntary choice. As with organ trafficking, the social determinants of the woman, such as poverty, debts, a vulnerable social position and illiteracy, can force them to become surrogate mothers. Furthermore Indian women usually come under great pressure from their husbands and family.⁶⁵ Moreover it seems that it is particularly in the poorer countries that the rights of the surrogate mothers are not always well regulated⁶⁶ and most of the money goes to the mediators and the doctors.⁶⁷ There is thus a risk, with commercial surrogacy, that women are forced to become surrogate mothers and can be further exploited therein. Dr. Roel Schats, medical chief of the IVF Centre at the VU University Medical Centre, even said “that it is a form of modern slavery to use Indian women as breeding machines without any form of care included.”⁶⁸

This raises the question whether forced surrogacy falls, or should fall, within the scope of human trafficking for the purpose of organ removal in Article 273f of the Dutch Criminal Code. A number of points deserve attention in considering this question. The promotion of surrogacy is a criminal offence under Articles 151b and 151c of the Dutch Criminal Code. According to the

⁶⁰ See I. Geesink, C. Steegers (2011).

⁶¹ *Kamerstukken II* 2009/10, 32 123 XVI, nr. 30, en *Kamerstukken II* 2010/11, 32 500 VI, nr. 83.

⁶² *Kamerstukken II* 2009/10, 32 123 XVI, nr. 30.

⁶³ Articles 151b and 151c of the Dutch Criminal Code.

⁶⁴ *Kamerstukken II* 2010/11, 32 500 VI, nr. 83, and K. Boele-Woelki, et alia (2011).

See the following documentaries about commercial surrogacy: BNN-documentary, *Baby te koop*, Ned 3, 10 March 2011 (9 pm) and Zippa Brand Frank, *Google Baby*, Israël 2009.

⁶⁵ According to Jyotsna Gupta, senior lecturer gender and diversity at the University of Utrecht in ‘te huur’, *Nederlands Dagblad*, 24 December 2010.

⁶⁶ When for instance the surrogate mother has a miscarriage she will not get more than the monthly compensation until that moment. See the article ‘te huur’, *Nederlands Dagblad*, 24 December 2010.

⁶⁷ I. Geesink, C. Steegers (2011), p. 63. According to the article ‘te huur’, *Nederlands Dagblad*, 24 December 2010 doctors exploit surrogate mothers.

⁶⁸ ‘Commercieel draagmoederschap is vorm van slavernij’, *Nederlands dagblad*, 15 March 2011.

Minister for Justice, the aim of these Articles is to prevent “surrogate mothers and prospective parents from finding each other by making mediation a crime and also includes publicizing the availability of a surrogate mother and demand for a surrogate mother.”⁶⁹ These Articles, however, are not applicable to Dutch people who are guilty of promoting surrogacy outside of the Netherlands.⁷⁰ This shortcoming could be solved by letting forced surrogacy fall under the human trafficking criminal offence, but surrogacy is not mentioned in the Explanatory Text and not in any section of Article 273f. As already stated above there is a risk of women being forced into surrogacy and therein being exploited as surrogate mothers. That would be a serious violation of physical integrity. The scope of Article 273f seems to be interpreted more and more broadly by judges.⁷¹ If it were chosen to include forced surrogacy in the scope of human trafficking, then there are questions that would have to be thought about. The first is whether forced surrogacy can fall under human trafficking for the purpose of organ removal, as there is no organ removed. Surrogacy could also fall under labour or services in Article 273f. A second question that could be asked is who exactly are the exploiters of surrogacy. Are they the doctors, the potential parents, the man who “forces” his wife to be a surrogate mother or the mediators? It is important to take the scope of Article 273f into consideration and which practices should fall under it.

Secretary of State Teeven for Security and Justice organized a meeting of experts on 31 March 2011 to discuss the question whether, and if so, in which way (international) surrogacy should be more regulated or differently organized than it is at the moment. During the meeting experts in different fields and from different organizations brought forward ideas on how to solve the problems that occur by potential parents going abroad and to how to prevent and solve this.

International regulations

A complete handling of the international legal framework on human trafficking for the purpose of organ removal and organ trade goes beyond the scope of this paper. For an overview of this I refer you to a study completed in 2009 by the United Nations and the Council of Europe on “Trafficking in organs, tissues and cells and trafficking in human beings for the purpose of the removal of organs”.⁷² This study will be briefly mentioned here.

⁶⁹ *Kamerstukken II* 2009/10, 32 123 XVI, nr. 30.

⁷⁰ See article 5 Dutch Criminal Code.

⁷¹ See L. van Krimpen (2011).

⁷² Council of Europe, *Trafficking in organs, tissues and cells and trafficking in human beings for the purpose of the removal of organs*, Joint Council of Europe/United nations study, 2009. This study is also mentioned the Seventh Report of the Dutch National Rapporteur on THB. Dutch National Rapporteur on THB (2009), § 13.4, p.553.

According to the Bureau of the Dutch Rapporteur on Trafficking in Human Beings the common theme that emerges from the European and international framework is the call to governments to take measures on the shortage of available organs and to solve the waiting lists for patients and to fight against human trafficking for the purpose of organ removal.⁷³

The following will describe recent developments in international regulations and other international documents that are relevant to organ trade and human trafficking for the purpose of organ removal.⁷⁴

United Nations

In 2009 a joint study by the United Nations and the Council of Europe appeared under the title *Trafficking in organs, tissues and cells and trafficking in human beings for the purpose of the removal of organs*.⁷⁵ This study discusses the present situation, the international standards and the consequences of trafficking in organs, tissues and cells and trafficking in human beings for the purpose of organ removal. The study presents a number of conclusions and recommendations that can be summarized as follows:⁷⁶

- the need to distinguish clearly between ‘trafficking in OTC⁷⁷’ and ‘trafficking in human beings for the purpose of the removal of organs’;
- the principle of the prohibition of making financial gains with the human body or its parts should be the paramount consideration in relation to organ transplantation;
- the need to promote organ donation and establish organisational measures to increase organ availability;
- the need to collect reliable data on trafficking in OTC and on trafficking in human beings for the purpose of organ removal;
- the need for an internationally agreed definition of “Trafficking in organs, tissues and cells”.

⁷³ Dutch National Rapporteur on THB (2009), § 13.4, p.553.

⁷⁴ This research builds on the Reports of the Dutch National Rapporteur on THB. Here only the developments since the Seventh report are discussed. For a discussion of the international regulations before these developments see: Dutch National Rapporteur on THB (2009), § 13.4. (The Dutch Report discusses more).

⁷⁵ Council of Europe, *Trafficking in organs, tissues and cells and trafficking in human beings for the purpose of the removal of organs*, Joint Council of Europe/United nations study, 2009.

⁷⁶ See *Ibid.*, pp. 7-8 and 93-98.

⁷⁷ ‘OTC’: organs, tissues and cells.

World Health Organization

Due to a lack of universally recognized terms and definitions the *Global Glossary of Terms and Definitions on Donation and Transplantation* was created in November 2009.⁷⁸ In this Global Glossary existing and newly coined terms and definitions concerning donation and transplantation of cells, tissues and organs were defined.⁷⁹

On 21 May 2010 the Sixty-third World Health Assembly adopted resolution WHA63.22 and so the revised version of the *WHO Guiding Principles on Human Cell, Tissue and Organ Transplantation* was accepted.⁸⁰ In short the resolution also calls upon member states to implement the Guiding Principles, to promote altruistic donations, to combat the practice of seeking financial gain from organ trade and transplant tourism, to promote a fair and transparent system for allocating organs and tissues, to improve the safety and efficacy of donating and transplanting, to strengthen national and multinational organising and coordinating authorities and to promote the collection of data.⁸¹

Council of Europe

As already mentioned above the Council of Europe published in cooperation with the United Nations, in 2009, the study *Trafficking in organs, tissues and cells and trafficking in human beings for the purpose of the removal of organs*.⁸²

In April 1997 the Netherlands signed the *Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine*.⁸³ In 2008 the Dutch Minister for Health, Welfare and Sport indicated that this convention would be ratified in the near future.⁸⁴ This convention has, however, not yet been ratified.⁸⁵

⁷⁸ World Health Organization, *Global Glossary of Terms and Definitions on Donation and Transplantation*, Geneva, November 2009.

⁷⁹ *Ibid.*, p. 3.

⁸⁰ World Health Organization, *WHO Guiding Principles on Human Cell, Tissue and Organ Transplantation*, endorsed by resolution WHA63.22, 21 May 2010.

⁸¹ WHA63.22, p. 2.

⁸² Council of Europe, *op. cit.*, 75.

⁸³ Council of Europe, *Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine*, Oviedo, 4.IV.1997.

⁸⁴ See Nationaal Rapporteur Mensenhandel (2009), p. 592. Beleidsbrief Ethiek van 7 september 2008, *Kamerstukken II 2007/08*, 30 800 XVI, nr. 183, pp. 19-20.

⁸⁵ See <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=164&CM=8&DF=11/10/2011&CL=ENG> (Last consulted on 11/10/2011).

Also the *Additional Protocol to the Convention on Human Rights and Biomedicine, on Transplantation of Organs and Tissues of Human Origin*⁸⁶, signed by the Netherlands in 2002, has not yet been ratified.⁸⁷

The *Convention on Action against Trafficking in Human Beings* from 2005⁸⁸ was ratified by the Netherlands in April 2010 and came into force in August 2010.⁸⁹

European Union

The Directive of the European Parliament and the Council on standards of quality and safety of human organs intended for transplantation of 7 July 2010⁹⁰ is primarily focused on the quality and safety of organs. It was pointed out in the Directive that unacceptable practices in organ donation and transplantation like organ trade and human trafficking for the purpose of organ removal should be prevented. According to the European Parliament and the Council these practices are a serious violation of fundamental rights, human dignity and physical integrity. According to them the Directive will indirectly contribute “to combating organ trafficking through the establishment of competent authorities, the authorisation of transplantation centres, the establishment of conditions of procurement and systems of traceability”.⁹¹ The Member States must comply with the Directive by 27 August 2012.⁹²

In the Directive of the European Parliament and the Council of 5 April 2011, on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA⁹³, there is a broader concept formulated on what human trafficking must include in comparison to what is in the Council Framework Decision 2002/629/JHA. The definition also covers human trafficking for the purpose of organ removal,

⁸⁶ Council of Europe, *Additional Protocol to the Convention on Human Rights and Biomedicine, on Transplantation of Organs and Tissues of Human Origin*, Strasbourg, 24.I.2002.

⁸⁷ See <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=186&CM=8&DF=11/10/2011&CL=ENG> (Last consulted on 11/10/2011).

⁸⁸ Council of Europe, *Convention on Action against Trafficking in Human Beings*, Warsaw, 16.V.2005.

⁸⁹ See <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=197&CM=8&DF=01/05/2011&CL=ENG> (Last consulted on 01/05/2011).

⁹⁰ The European Parliament and the Council, Directive 2010/45/EU on standards of quality and safety of human organs intended for transplantation, Strasbourg, 7 July 2010.

⁹¹ *Ibid.*, consideration 7.

⁹² *Ibid.*, art. 31.

⁹³ The European Parliament and the Council, Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, Strasbourg, 5 April 2011.

what according to the European Parliament and the Council, “constitutes a serious violation of human dignity and physical integrity”.⁹⁴

In April 2010 an EU financed project for living donation of organs (EULOD) was started.⁹⁵ The general objectives of this project are to make an inventory of the living donation practices in the Member States, to investigate and promote living donation as a way of increasing the availability of organs and to develop tools that improve the quality and safety of living organ donations in Europe.

Items of interest and problems

In this paper the recent developments in the Netherlands and the developments of international regulations regarding human trafficking for the purpose of organ removal were described. In conclusion, the problems connected with this topic and the topics that deserve special attention are given below.

- Cases of human trafficking for the purpose of organ removal in the Netherlands or by Dutch people are virtually unknown. Vigilance is still necessary. Firstly, because little information is available on this form of human trafficking and organ trade. Secondly, partly because of the globalization of society and internet a market for organs seems to exist.
- It is important that organ trade and transplant tourism are tracked in a better way. Commercialization of organs can endanger the voluntariness of donation. Where these practices occur there is a risk of human trafficking for the purpose of organ removal.
- In order to track organ trade and transplant tourism in a better way, as also noted in the Seventh Report of the Dutch National Rapporteur, the help and close attention of facilitating, supporting and implementation agencies are needed in connection with organ donations, such as medical personnel and health insurance agencies.⁹⁶ In order to improve the task of reporting and registering possible cases of organ trade an appropriate body could be chartered to take this task upon themselves.
- In addition to trade in the “conventional organs”, such as kidneys, heart, lungs and liver, there are increasing markets for more and more parts of the body. One example of this is commercial surrogacy. It is important to monitor these markets and to investigate if these parts of the body should also fall under Article 273f of the Dutch Criminal

⁹⁴ Ibid., consideration 11.

⁹⁵ See <http://www.eulod.org/>.

⁹⁶ Dutch National Rapporteur on THB (2009), § 13.5.

Code. In this way the Article can keep up with the times and undesirable practices can be prevented.

- The call to stimulate organ donation financially is increasing from many sides. There are some items here that deserve to be taken into account. The financial stimulation of organ donation could reduce the shortage of organs and thus reduce the chance of human trafficking for the purpose of organ donation. Financial stimulation of organ donation means that organ donation would be commercial and there would be a market for organs. Such a market carries the risk of stimulating human trafficking for the purpose of organ removal. These risks could be mitigated by granting donors exemption from health insurance premiums instead of compensation in cash.
- The Secretary of State for Health, Welfare and Sport indicated in September 2008 the intention to ratify the Council of Europe's Biomedicine Convention. To date this Convention and also the Additional Protocol to the Convention on Human Rights and Biomedicine, on Transplantation of Organs and Tissues of Human Origin have not been ratified.

Human trafficking for the purpose of organ removal and organ trading are not phenomena that only occur within the borders of the Netherlands but are worldwide phenomena. The points of interest mentioned above could therefore also be of importance to other states. It is important that states realize that these phenomena are transnational. It is important that states try to come to new solutions with each other and where possible to synchronize their policies and approach with regard to organ donation, organ trading and human trafficking for the purpose of organ removal.

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SESSION 2: ABUSE OF POWER OR CORRUPTION AND ECONOMIC CRIME

ORGANIZED CRIME AND CORRUPTION: THE TWO LARGEST PROBLEMS IN THE WORLD?

Jay S. Albanese, Ph.D.
Professor and Criminologist,
Virginia Commonwealth University
Richmond, Virginia, USA

Is what we do really important in comparison to other issues? Should we be focusing on other problems because they are of greater significance? Organized crime and corruption have dominated the world (and the United Nations) agenda for more than a decade. These issues have been central to the work of policymakers and researchers globally. The question that arises is whether these two topics were actually the right way to spend our time. Are there other subjects and issues that are more pressing, more serious, and more deserving of attention?

The field of criminology and criminal justice is comparatively new, and there is more that is unknown than is known about crime causation, effective treatment of offenders, and crime prevention. Therefore, it is imperative that we devote our time to the most important issues in the field. Our choices of what to investigate determine in large part what we will learn, or what we will not learn. So have we made the appropriate choice in focusing so heavily on organized crime and corruption?

It is important to be specific about the subject of our intention, and so we must define carefully what constitutes organized crime, and what constitutes corruption. Without precision in definition, we cannot determine effectively their true nature and scope and, of course, definition is a fundamental step in the scientific method.

Definitions of organized crime and corruption vary by country, individual research study, and UN Convention. So there is no universally accepted definition of the problems to which we are devoting our professional lives!

Organized crime has been defined through a consensus of scholars as a continuing criminal enterprise that rationally works to profit from illicit activities that are often in great public demand. Its continuing existence is maintained through the use of force, threats, monopoly control, and/or the corruption of public officials (Albanese, 2011). Corruption is defined as use of

public office for private gain. The specific offences imbedded in this notion include embezzlement, fraud, nepotism, bribery, extortion, and influence peddling. It is therefore possible to be precise in defining these ideas, even if we are not consistent across studies or policies.

As Aristotle pointed out 25 centuries ago, it is one thing to know that different locations have different levels of crime and corruption, but it is quite a different matter to know why.

Knowledge of the former type is descriptive; knowledge of the latter type is explanatory.

It is explanatory knowledge that provides scientific understanding of the world (Salmon, 2006). As the Scottish philosopher David Hume wrote in 1739, there's also a big difference between descriptive statements describing what *is* and prescriptive statements describing what *ought to be* (Hume, 2000). When reviewing research studies and policy development in the areas of organized crime and corruption, it can be seen that we often recklessly move from describing a situation to recommending what should be done about it, when we really have only facts and no information whatsoever about what we *ought* to do about.

In the modern age, ideology often trumps evidence. That is to say, people increasingly hold views despite the evidence, which is the definition of ideology. When individuals come up against evidence contrary to their views, opposing arguments are exaggerated and the bar for proof is raised to levels that can never be met. We see this in contemporary debates over climate change, environment impact, economic crisis, levels of corruption, and the influence of organized crime. Therefore, it is important to be objective, empirically driven, and to move carefully from descriptive to explanatory knowledge.

The world's largest problems

Several organizations have attempted define and quantify what the world's largest problems are. The Arlington Institute (2012) identified the five greatest world problems as:

- Economic collapse: will a fragile current global economy tip the world into a depression?
- Peak oil: petroleum has powered the world for 100 years. Have we reached a peak in oil production?
- The global water crisis: over the last 50 years the world population has tripled, but pollution, poor agriculture practices, and poor civic planning have decreased the water supply.
- Species extinction: certain species that we depend upon for food are going extinct, impacting our own survivability.

- Rapid climate change: global warming is an empirical fact. Will people from different cultures work together or suffer from it?

In a similar way, the Copenhagen Consensus Centre identified 10 challenges that it viewed as the most serious facing the world today. These challenges include:

- Air pollution
- Conflicts
- Diseases
- Education
- Global warming
- Malnutrition and hunger
- Sanitation and water
- Subsidies and trade barriers
- Terrorism
- Women and development

In a similar fashion, the UN Millennium Development goals identified the serious problems demanding our attention as including: the ending of poverty and hunger, universal education, gender equality, child health, maternal health, combating HIV/AIDS, environmental sustainability, and global partnership.

When you consider each of these greatest problems in the world, several things become apparent. First, they all either are entirely man-made or have been pushed to a crisis point by decisions of humans. In addition, these decisions appear to be the result of some combination of ignorance, selfishness, criminality or corruption. Can it be said, therefore, that every one of the world's largest problems exists due to choices and decisions made worse by organized crime and corruption?

The greatest world problems range from health to environment to social instability to civil conflict – all of which are either created or made worse by organized crime and corruption. Therefore, more effective control of organized crime and corruption would reduce (or eliminate) every other world problem!

Making a difference in the world's largest problems?

It therefore appears that we have devoted ourselves to problems worthy of our attention, but our concepts need work, our data are weak, and the impact of our work on law and policy is deficient. When one looks at all peer-reviewed published articles on corruption and organized crime over the last decade (see Table 1), we can note that the number of articles published on corruption for example has risen and totals 4,231 for the decade. In organized crime there has been less research, and many fewer articles, although the number has grown to 824.

Table 1: Peer-Reviewed Published Articles in Professional Journals

Chronology	Corruption	Organized Crime
2000-2005	1,533	380
2006-2010	2,698	444
2000-2010	4,231	824

It should be noted that our efforts to engage in basic research to assess the nature and scope of the problem are very recent. The Corruption Perceptions Index, based on annual surveys, began to appear only 15 years ago (Transparency International, 2011). The even more recent Bribe Payers Index assesses the likelihood that businesses from industrialized countries will pay bribes abroad (Transparency International, 2008). The Global Corruption Barometer captures the experiences and views of more than 90,000 people in 86 countries and territories, and is the only global public opinion survey on corruption (Transparency International, 2010). The International Crime Victimization Survey has been administered irregularly to a group of countries and cities since 1989 (Van Dijk, van Kesteren and Smit, 2007). Each of these measurement efforts have found huge variations in the nature and extent of corruption around the world. The corruption is sometimes small (local police bribes), and sometimes threatening to a nation (major bribery and extortion by government officials at the highest levels).

The costs and consequences of corruption are significant. The World Bank provides low-interest loans, interest-free credits and grants to developing countries for a wide array of purposes that include investments in education, health, public administration, infrastructure, financial and private sector development, agriculture and environmental and natural resource management.

The World Bank, established in 1944, has found that focusing on global investment (the underlying issue) is simply not enough! A simultaneous focus on corruption is needed to insure the investment is used properly, and not misdirected or wasted. The World Bank, an essentially financial institution, has come to recognize that lending money to reduce inequality and encourage investment does not solve the underlying problems – unless you also pay attention to corruption.

Corruption deters investment, hinders growth, and fosters inequality. It erodes the impact of development assistance and increases exploitation of natural

resources. Corruption reduces the effectiveness of public administration and subverts the rule of law and confidence in government and business. In short, corruption increases wealth of the few at the expense of society at large (World Bank, 2000).

The United Nations Human Settlements Programme, UN-HABITAT, is the United Nations agency for human settlements, which is mandated “to promote socially and environmentally sustainable towns and cities with the goal of providing adequate shelter for all.” In 1950, one-third of the world's people lived in cities. By the year 2000, this rose to one-half and will continue to grow to two-thirds, or 6 billion people, by 2050. Cities are now home to half of humankind. In many cities, especially in developing countries, slum dwellers number more than 50 per cent of the population and have little or no access to shelter, water, and sanitation, education or health services. It is recognized that the growth of organized crime has a direct impact on sustainable towns and cities. This is because organized crime has been seen to destabilize the political order, and magnify the impact of economic crises through housing market speculation, for example. Organized crime also has been found by UN Habitat to draw in youth as a source of cheap labour (UNODC, 2011; UN Habitat, 2011). Therefore sustainable cities are impossible without the control of organized crime and corruption.

Conclusions

Development agencies now see organized crime and corruption as central to their efforts. Development assistance is not enough. Anti-corruption and anti-organized crime efforts are also needed, if training, technical assistance support are to be invested wisely. Problems do not disappear with adequate resources and good intentions – there is a need to focus on organized crime and corruption which underlie all the world's greatest problems.

Research also needs to better follow its own methods. When reviewing the studies on organized crime and corruption, scientific method is often breached or short-circuited by expedience (often attributed to funding limitations). Far too often, researchers and evaluators are involved in situations where scientific method is compromised (when sample size or scope of the project should be changed, rather than the underlying methods employed). Research, training, and technical assistance investments which lack comparison groups, impact analysis, follow-up over time, or a dedicated push for policy changes based on empirical facts, leaves us unable to answer the most important question of all: Are we making any difference? And without an assessment of impact, both money and interest eventually run dry, as institutions move on to other problems, because progress, change, or impact could not be demonstrated. Therein lies the greatest challenge for our work in the future, now that we have identified organized crime and corruption as two of the greatest problems in the world!

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NEW PENAL PROVISIONS IN SWEDEN ON BRIBERY: SUMMARY, SOU 2010:38

Bo Svensson, Sweden

Coordinated provisions

The current provisions in the Penal Code on bribery are contained in three sections in separate chapters of the Penal Code. These provisions have been justifiably criticised as being hard to understand.

The Inquiry is now making proposals for changes according to which the provisions on bribery will be arranged in five sections, which will all be contained in a single chapter of the Penal Code, viz. Chapter 10 with the proposed title of “On Embezzlement, Other Breaches of Trust and Bribery”. Section 5 of the Chapter deals with breach of trust, section 5a with active bribery, section 5b with passive bribery, section 5c with gross active and passive bribery and section 5d with negligent financing of a bribe.

Furthermore, the report contains proposals on a Swedish code on gifts, rewards and other benefits in the business sector. The code is part of self-regulation in the business sector.

These proposals aim to achieve modern efficient and easily accessible regulations on bribery with clearer definitions of what is a punishable offence.

The proposed coordinated provisions in the Penal Code, together with the proposed code, will provide businesses and individuals with clearer guidance as to what constitutes permissible and impermissible influence on the exercise of public authority and public procurement. The code will also provide businesses with guidelines as to what is acceptable and unacceptable as regards benefits provided by businesses with a view to promoting their commercial activities.

The penal provisions are to be complemented by a business law code.

It is not possible in a legal text to give detailed and concrete guidelines as to when a benefit is a bribe. The legal text on bribery must instead, as at present, be restricted to short provisions of a general nature on the prerequisites that must be met for criminal liability.

The code on benefits produced by the Inquiry, together with representatives of the business community, will be an important “source of law” for the courts and others who are to apply the new provisions (see below).

The new provisions on bribery are formulated as follows.

Category of persons

The current Chapter 20, section 2, of the Penal Code lists those who can be punished for passive bribery (taking a bribe). The same category of persons can be punished, under Chapter 17, section 7, for active bribery (giving a bribe). This technique of listing, together with the fact that the provisions on bribery are contained in three different chapters, makes the current legal texts difficult to read with numerous cross-references.

The explicitly defined category of persons for passive and active bribery leads to problems of differentiation. Changes in society also mean that the list has to be regularly adjusted to take into account new categories of persons. People who should reasonably be subject to the legislation on bribery are currently not included in the list.

According to the current arrangements, for instance, a self-employed person with independent contracts is not included in the above-mentioned list. It is thus not an offence for a freelance journalist to accept money from the business sector or from a political organisation to write or not to write a news article about a mismanaged company or about who is providing funds to a political party.

The Inquiry proposes that the current special list be removed. Consequently, all employees and contractors will be covered by the penal provisions of the legislation on bribery. Instead, there will be some restriction of the category of persons through the requirement that an action shall have an improper influence on the way that the employee or contractor has carried out his or her work or contract.

Improper influence

Chapter 17, Section 7, and Chapter 20, Section 2, of the Penal Code refer to “a bribe or other improper reward”. The wording of the law makes it appear as if it is the reward, i.e. money or other benefits, which is *per se* improper. However, the provision should not be interpreted in this way. The impropriety relates to the transaction as a whole.

The Inquiry proposes that the penal provisions be clarified in such a way that it is evident from the wording of the law that a prerequisite for the offence of bribery is that the action influences the exercise of public authority or a public procurement or the recipient’s way of performing his or her duties or commission. It should also be clear that this influence must appear in an overall assessment as being improper.

In the assessment of whether an action was intended to improperly influence the work or commission of the recipient, the following factors are of primary importance:

- the nature and value of the benefit
- the connection between the benefit and the recipient's work or commission
- the recipient's position in relation to the provider of the benefit and to the recipient's employer or client.
- the way in which the benefit was given, for example, if this took place openly or clandestinely, if the benefit was given to only one employee or to many employees and if the benefit was provided at the initiative of the recipient
- general custom and usage in the industry as regards benefits.

Breach of trust - Chapter 10, Section 5, of the Penal Code

The new criminal provisions are targeted on various typical cases. The first typical case concerns bribes given or received by employees in various companies and organisations with a view to benefiting the donor or some other party to the detriment of the company or organisation. In other words, it involves an agreement where the donor, the recipient or someone else benefits at the expense of a third party.

An example of this is a sales manager who accepts a bribe to sell the company's products at an excessively low price. Conduct of this kind is currently covered by the criminal provision in Chapter 10, Section 5, on breach of trust.

The Inquiry proposes that the wording of this provision be clarified to make it clear that it refers to passive bribery. In these cases, the recipient is sentenced as the perpetrator and the donor as the accessory. The provision is mainly intended to protect the interests of the principal and does not normally entail any problems of differentiation.

Bribes in the exercise of public authority and public procurement – Chapter 10, Section 5 a (1), of the Penal Code

The second typical case consists of bribes given with the intention of influencing the exercise of public authority or a public procurement. An example of this would be a judge who accepts money to pronounce a judgment in favour of the donor in conflict with current legislation.

The Inquiry proposes a new provision targeted on this typical case. The provision is primarily intended to protect trust in important public functions. Neither of these typical cases lead to any real problems of differentiation.

Unfair competition and related matters – Chapter 10, Section 5a, (2) of the Penal Code

The third typical case consists of bribes given to be able to buy or sell goods or services, which in this way eliminates free competition. The Inquiry has not been tasked with proposing any new rules on violation of competition but deems that it is almost unavoidable, in the absence of any such rules, that certain conduct with elements of unfair competition, be covered by criminal liability for the offence of bribery.

The fourth typical case concerns benefits given in connection with anniversaries, or as a component in business relationships or marketing. The donor hopes that the recipient will reciprocate by the donor receiving beneficial treatment from the recipient's company, and that the recipient understands this. In some contexts, it is completely legitimate to provide benefits of this kind, while in other cases it must be regarded as sufficiently reprehensible to be criminal.

To cover these typical cases, the Inquiry proposes criminal liability for actions intended to improperly influence an employee's or contractor's way of performing his or her duties or commission.

Bribes in competitions – Chapter 10, Section 5 a (3), of the Penal Code

It has emerged in cases abroad which have attracted a lot of attention that participants in competitions have accepted bribes not to do their best, which has benefited the provider of the bribe who has bet on the outcome of the competition. It is not improbable that bribes of this kind have already occurred in Sweden, even though to a limited extent. In the light of trends in the gaming market and the large amounts involved, the Inquiry considers that there is a risk of crime of this kind becoming a common occurrence in Sweden too.

Participants in competitions are sometimes employees of associations, for example, football or hockey players. In such cases, liability for bribery may come into question under the current legislation for an employee who accepts a bribe and for the briber. However, sometimes there is no employment nor any actual contractual relationship and the procedure is then not punishable as bribery.

The sanctions available within the sports movement to take measures against bribery, for example, suspension, cannot be considered as being sufficiently far-reaching to protect the gaming market or sports movement against organised crime which engages in betting on the outcome of fixed matches.

The Inquiry is therefore proposing a special provision targeted on benefits provided to influence the outcome of competitions, on which commercial betting takes place.

Negligent financing of bribery – Chapter 10, Section 5 d

Under Chapter 23, Section 4, a person who furthers an act by advice or deed can be punished for being an accessory to the crime. Accordingly, a person who has provided money or other assets to be used as a bribe can be sentenced for being an accessory to bribery, if he or she is not sentenced as the perpetrator. However, a prerequisite is that the accessory intentionally furthered the act.

The Inquiry considers that gross negligence in being an accessory to bribery should also be a criminal offence and is therefore proposing a special penal provision on negligent financing of bribery. It shall be possible to sentence a representative of a company for this crime if he or she, on behalf of the company, offers, promises or provides money or other assets to a person who, due to their position or by contract, represents the company in a particular matter and thereby furthers active bribery or gross active bribery in the matter through gross negligence.

A prerequisite for criminal liability is that the assets are given to a person who, due to his or her position or by contract, represents the company in a particular matter. This might, for example, be an employee of a company within the same group or an associated company or a person who, due to a contract for services, represents the company in the matter. The concepts “group” and “associated company” are used by the Inquiry in the same meaning as in Chapter 1, sections 4 and section 5, respectively of the Annual Accounts Act (1995:1554).

This provision is intended to apply together with, *inter alia*, the proposed code on gifts and other benefits in the business sector. The code proposes measures that companies should undertake to prevent bribery and improper influence. A company which has complied with the code in these respects cannot be considered as having acted in a grossly negligent way, even if it should be shown that the company has commissioned an agent, who, despite all precautionary measures taken by the company, has resorted to bribes when selling the company’s products.

Bribery may have been committed abroad as well as in Sweden. If the financier has transferred money from Sweden or if a Swedish company is the financier, there is as a rule a Swedish connection of such a kind that means that there is no requirement for dual criminality under Chapter 2, section 3, of the Penal Code. However, the financing must concern active bribery under section 5a or gross active bribery under section 5c. It is sufficient for criminal liability for the prosecutor to show that such a crime has been committed even if it may be unclear by whom. If the bribery has taken place abroad, local customs may be taken into account when considering whether the proceeding has been intended as improper influence.

The punishment for negligent financing of bribery is the same as for other bribery offences, a fine or imprisonment for at most two years.

Certain other penal law matters

The punishment for active bribery and passive bribery, breach of trust and misuse of office is currently a fine or imprisonment for at most two years. In gross cases, a sentence of imprisonment for at least six months and at most six years is imposed. The Inquiry has not been tasked with making any general overview of the scales of penalties for different forms of bribery offences. Nothing has emerged in the course of the Inquiry to indicate that a change in the scales of penalties is needed. It is therefore proposed that the existing scales of penalties be unchanged.

A special penal provision is proposed in *Chapter 10, Section 5c, of the Penal Code for gross active and passive bribery*. The Inquiry proposes that some circumstances are specified in the text of the law which the court shall particularly take into consideration in the assessment of whether the offence is gross. This should be the case if the deed concerned a substantial value, was part of crime that was engaged in systematically or otherwise was of a particularly dangerous kind.

The prosecutor has, at present, certain *restrictions on the duty to prosecute*. A prosecution may only be initiated if the employer or client has reported the crime for prosecution or if prosecution is called for from the point of view of the public interest. The Inquiry proposes that the rule that prosecution may only be initiated if the crime has been reported for prosecution by the employer or client be abolished. Instead, a global provision should be introduced which restricts the duty to prosecute to cases where prosecution is called for from the point of view of the public interest. Prosecution is as a rule called for in the case of bribes that influence public authority or public procurement.

Penal provisions on bribery do not only apply to offences committed in Sweden but also for those committed abroad. However, there is currently a requirement in the Penal Code for *dual criminality* which means that Swedish courts cannot normally impose sentences for bribes given abroad if there are no corresponding provisions in the country where the crime was committed. If the Inquiry's proposal for a new penal provision on negligent financing is adopted, the effects of the requirement for dual criminality will be limited to some extent. In such cases, the crime has often been committed in Sweden or has in some other way a link to Sweden of such a kind that a Swedish court is competent to judge the case.

It happens that Swedish companies abroad pay money or give other benefits to foreign public employees to safeguard the companies' rights, for example, to obtain customs clearance of goods within a reasonable time. There are no reasons to have special rules for payments of this kind, "*facilitation payments*". To the extent that the prerequisites for criminal liability, including the requirement for double jeopardy are met, a Swedish court can therefore impose a sentence for bribery.

Trading in influence

Article 12 of The Council of Europe's Criminal Law Convention on Corruption obliges states to make trading with influence a criminal offence. It shall be a punishable offence, inter alia, to "promise, give or offer, directly or indirectly, any advantage to exert an improper influence" over the decision-making of certain persons, such as an employed decision-maker in the public sector, members of parliament or ministers. There is a similar recommendation in the United Nations Convention against Corruption.

Trading in influence is targeted on the interaction between three players. It is centred on a person who exercises power and who is a decision-maker (A) – who is to make a decision on a particular matter. Circling around the decision-maker is an individual or an organisation (B) with a great interest in the outcome of an issue, which wishes to influence this outcome and commissions C to this end. What A does and realises is unimportant for the matter of whether B and C should be punished for trading in influence. It is also irrelevant whether the intermediary C is actually able to influence the decision-maker A.

The Inquiry considers that there is no reason to introduce criminal provisions on trading in influence targeted on contributions to political parties, nor is there any reason to introduce legislation to restrict the ability of an individual, a company or an interest organisation to employ a consultant or another agent to influence members of political bodies.

However, there are some distinctive situations where, in the view of the Inquiry, it would be directly objectionable if it was not possible to demand criminal liability. This might be the case if one party in an administrative proceeding secretly made a payment to the spouse of a decision-maker in order to get the spouse to convince his wife/the decision-maker to reach a decision in favour of the party.

The Inquiry therefore proposes that the provisions on bribery be worded in such a way that a person has criminal liability if this person offers, promises or grants a benefit to another person in order to influence the exercise of public authority or public procurement in an improper way. The same applies to the person who requests, accepts a promise or receives such a payment.

This provision would make it easier to punish cases where benefits are given to another person who is close to the decision-maker with a view to influencing the decision-maker's exercise of public authority although it cannot be proven that the public employee was aware that a benefit had been given for such a purpose.

A code on benefits in the business sector

The Inquiry Chair and a working group with representatives from the business sector in Sweden have produced a proposal for a *Swedish Code on Gifts, Rewards and Benefits in the Business Sector*.

This code is to be part of the business sector's self-regulation. *The Anti-Corruption Institute* has declared that it is willing, after this report has been circulated for comment, to adopt and administer the code.

The code is intended to provide guidance to companies on matters relating to how benefits in the business sector may be used to promote the company's business activities. It is intended to complement the penal law provisions. According to these penal law provisions on bribery, criminal liability may be incurred if benefits are intended to improperly influence the work or commission of an employee or contractor.

If a representative of a company has complied with the code, the action cannot be considered to be intended to improperly influence the work or commission of the recipient. This is not to say that a representative who has breached the code is automatically guilty of a crime. The code is intended to make higher demands than those ensuing from the provisions of the Penal Code on bribery. It is therefore not necessarily the case that a person who has given a benefit in breach of the code is therefore also guilty of improper influence in the sense of the penal provisions.

A general code for the business sector cannot possibly include detailed rules on improper influence. More detailed and specific industry or market systems can be produced through special agreements between trade organisations and companies in the same industry.

Consideration has been taken in the work with the code to the regulatory frameworks previously produced by various organisations, for example, OECD, ICC, Transparency International and the Anti-Corruption Institute.

The code will apply to all companies with a statutory duty to keep accounts under the Accounting Act or the Foreign Branches Act. If a company is covered by the code, this may be important in a court assessment of whether the company's representatives are guilty of bribery or not. The code will also serve as a tool for the companies' owners, business partners, and other stakeholders.

The code contains guidelines on when it is permissible or impermissible for a company to offer, promise or provide a benefit *to* employees or contractors in another company or public body. The code also contains guidelines to companies on when their employees and contractors should accept benefits *from* another party. The code also provides guidelines to companies on preventive measures and partners.

The full text of the code can be found directly following the proposed legislation.

CORRUPTION IN HUNGARY FROM THE VIEWPOINT OF FINNISH INVESTORS: AN EMPIRICAL STUDY

Éva Inzelt¹

Assistant researcher

PhD. candidate at Eötvös Loránd University

Department of Criminology, Faculty of Law

Budapest, Hungary

Introduction

The concept of corruption has been widely used both in the scientific works and in the media. Corruption is defined in many ways. It depends on the generally accepted functional, moral and legal norms of a society what kind of actions are considered to be corrupt ones and whether or not they should initiate a reaction on the part of society. In several societies corruption is an organic part of the socio-cultural traditions, and in many cases it is retained even though the social-economic system changes. In such a situation, giving a gift to the clerk for a service is not regarded as a bribe but as an expression of respect, and paying an official for an administrative act is regarded as a very natural thing. The rejection of the gift on the part of the clerk may even be regarded as an insult, and doing a favour to a relative is also plausible.

In many cases corruption is payment for services or material which, under law, are not due the recipient. This is called bribery, or, e.g. in the Middle East, baksheesh. On the other hand, in several cases the recipient is entitled to the service in question, and the money or other gifts merely ‘accelerate’ the office work. However, generally it is advantageous to the person who pays and of course, to the person who accept the bribe, and disadvantageous to all other persons who wait for their business to be arranged.

It follows that it is difficult to give a general definition of corruption. The approach may be legal, sociological or economic.

The original meaning of corruption comes from the Latin verb “corrumpo” which means to deprave or to deface. The word ‘corrosion’ originated from this expression describing the process in which a metal item is covered with rust or is entirely transformed by it, but in general it means that something loses its good flavour / feature. Corruption is the corrosion of a society.

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Corruption is a well-known concept in Hungary, although there is no uniform definition of the term. It is generally understood as including a variety of behaviour ranging from the acceptance of gratuities and tips to bribery and influence.

Nevertheless, there are some official definitions of corruption in international conventions. The United Nations Convention against Corruption specifies the following offences as corruption offences: active and passive bribery of national public officials, active and passive bribery of foreign public officials and officials of public international organizations, embezzlement, misappropriation or other diversion of property by a public official, trading in influence, abuse of functions, illicit enrichment, active and passive bribery in the private sector, embezzlement of property in the private sector, laundering of proceeds of crime, concealment, and obstruction of justice. The Criminal Law Convention of the Council of Europe on Corruption stipulates active and passive bribery of domestic public officials, bribery of members of domestic public assemblies, bribery of foreign public officials, bribery of members of foreign public assemblies, active and passive bribery in the private sector, bribery of officials of international organisations, bribery of members of international parliamentary assemblies, bribery of judges and officials of international courts, trading in influence, the laundering of the proceeds from corruption offences, and accounting offences.

Also researchers have tried to define the term corruption. Professor Petrus C. van Duyne (see Duyne, 1999) defines corruption as follow:

“Corruption is an improbity or decay in the decision-making process in which a decision-maker (in a private corporation or in a public service) consents to deviate or demands deviation from the criterion which should rule his or her decision-making, in exchange for a reward or for the promise or expectation of a reward, while these motives influencing his or her decision-making cannot be part of the justification of the decision.”

According to Mariann Kránitz (see Kránitz, 1988) “Corruption is – level of the society as a whole – secondary income *redistributive system which depends on the firstly redistributive system.*” I absolutely agree with this statement of Kránitz. Finnish society completely confirmed this statement. In Finland the first redistributive system is proper, which is one of the reasons why Finland has a low corruption rate. (This is supported by the Finnish example, where the primary income is properly distributed, so there is practically no small-scale corruption in Finland.)

The definition of corruption used by Transparency International is “*abuse of entrusted power for private gain*”.

According to the Finnish Ministry for Foreign Affairs

“corruption is defined in general terms as the exploitation of a position of influence for private benefit. This definition encompasses both direct and indirect corruption, and both petty and grand corruption. It also includes the exploitation of people’s positions within private enterprise and the

abuse of public offices by the private sector, for example in the form of bribery.”

The legal approach to corruption according to the criminal law in force in Hungary involves the offence of bribery and trading in influence².

How can the extent of corruption be recognized in a country?

One of the main problems is that the latency of corruption is very high. The volume of corruption in Hungary could be explored if we combine three different sources, namely the Unified Criminal Statistics of the Police and Prosecution Services, research based on the citizens’ perception of corruption (e.g. Transparency International Corruption Perception Index) and empirical research dealing with experiences with corruption.

According to the Unified Criminal Statistics of the Police and Prosecution Services in Hungary, over the last eight years the number of reported corruption cases was between 500 and 1000 (see Table 1 below). The real extent of bribery is not revealed by the statistical data. This data could show the minimum number of corruption cases in Hungary.

Table 1: Data of corruption offences in Criminal Statistics in Hungary

Year	2003	2004	2005	2006	2007	2008	2009	2010
Number of all reported crimes	413’343	418’883	436’522	425’941	426’914	408’407	394’034	447’186
Bribery	707	545	821	363	313	396	915	376
Trading in influence	75	50	137	117	37	144	47	106

Studies that focus on the hidden part of corruption mostly deal with public perception³.

It is evident that the results of the research dealing with the subjective perception of corruption and with objective experiences, respectively, differ from each other substantially. For example, according to the Gallup-UNICRI study (see Gallup, 2003) in 2003 only 9 % of the respondents said yes to the following question: “*has anyone (private person or public official) asked you or expected you to pay bribe in the last 12 months?*” The same study contained

² According to Act IV of 1978 on the Hungarian Criminal Code (hereinafter HCC) from Section 250. to Section 258/F.

³ The summary of the results of research on corruption in Hungary emphasises that most of the studies measured the subjective belief and not the real experience of corruption. See Nagy et al., 2008.

the following question: “*How big do you think the problem of corruption in Hungary?*” 87% of the respondents said that corruption was a serious problem in Hungary. Thus, only 9% of the respondents in Hungary had (recent) experience with corruption, but 87% thought that corruption was a serious problem.

In order to resolve this kind of contradiction, more empirical studies are needed to find out the experiences of corruption, which also help to reveal the real volume of corruption. That was one of my reasons to carry out this empirical research.

The aim of the research

Finnish society is recognized in surveys as one of the most corruption-free societies in the world. According to the Transparency International Corruption Perception Index 2010 (see Transparency International, 2010) Finland was ranked in the fourth place on the list, i.e., among the least corruption-infected countries. Every year Finland was to be found within the first five places. In 2010 Hungary was ranked in the fiftieth place. The question arose in my mind regarding how Finnish investors behave in a foreign trade relation. Do they play according to the local rules, or do they have to play according to the local rules?⁴ We could say that in Finland as well as in the Nordic countries in general the level of corruption is quite low⁵. However, in international commercial relations, especially in the field of arms trade, we could find some cases which are related to corruption, such as the Wärtsilä and Partia cases in Finland and the case of Gripen in Sweden (see Transparency International, OECD Progress Report, 2011).

Since we can perceive that there is corruption in Hungary, it is important to explore the experiences of foreign investors with it. On the one hand, we have certain forms of corruption to which people have almost become accustomed, and little attention is paid to it. On the other hand, a citizen from a country where corrupt behaviour in business and in the public sector is unusual is able to explore the ways in which we could mitigate the problem. Thirdly, we cannot neglect how our society is viewed from abroad. If a country is seen to be corrupt, it is not only a problem of moral worth but it could cause serious consequences to the economy in connection with foreign investments. Because of this I decided to carry out research focusing on the situation of Finnish investors in Hungary.

⁴ We could find examples of that behaviour, for example Finnish companies situated on the Finnish-Russian border. See Aromaa et al. 2009.

⁵ For a more detailed analysis of the statistics on corruption in Finland see Joutsen and Keränen, 2009 and also Juslén and Mutttilainen, 2009, page 95. Since 2000, about ten bribery cases have been reported per year.

During my research I interviewed representatives of the Finnish companies which have investments in Hungary and the representatives of the Hungarian subsidiary companies.

The research covers the following topics: the investment climate, business security, experiences of violent crimes, crimes against property, economic crimes and corruption in Hungary. In this article I will discuss only the investment climate and the experiences of corruption as part of the research.⁶

The aim of the research is to obtain information about problems caused by crime to Finnish companies in Hungary, in order to assist businesses in preventing crime and corruption.

Data and methodology

The list of the companies was collected from the databases of the Embassy of the Republic of Hungary in Finland, Finnagora, Finpro and ITD Hungary homepage information. I received a list of 117 companies from the Embassy of the Republic of Hungary in Finland which was made by the Finnagora in 2008. First, I had to select the companies still active in 2010. I disregarded the reseller and retailer companies which are not solely the representatives of given Finnish products, but which also deal with a lot of products of other foreign companies. Obviously, they are not real investors in Hungary. Some of the companies have become 100% (for example) Swedish, Italian or Dutch owned, and I eliminated these companies, as well. Following this selection, the final list contained 46 companies. During the research two companies terminated their activities in Hungary. The sample of active and available companies remained 44.

The companies were approached as follows. First, I sent by e-mail a one-page introduction letter which contained my personal data and a short description as well as the aim of the research. If there was no response to this letter within a week, I phoned the potential interviewees.

In Finland six companies rejected my request to participate in the study. (One rejection was quite nice: “To my best knowledge we have never had any problems with crime in Hungary. Your beautiful country in the business where we are present.”) Seven companies delegated the task to the local managing director (usually on the grounds that in Finland they did not have enough knowledge of the topic). Twenty-one companies did not answer my e-mails and phone calls. Eventually, ten companies were willing to participate in the study. I conducted the ten interviews in Finland between 1 January and 15 March 2011. The ten interviews were completed with eleven persons (four chief executive officers and seven senior or middle managers) representing ten companies.

⁶ The full research report will be published at the end of 2011.

In Hungary one company rejected my request. The managing director of two companies was the same person whom I had interviewed in Finland. Twenty-three companies did not answer my e-mails and phone calls. A total of eighteen companies were willing to participate in the study. I conducted the 18 interviews in Hungary between 1 May and 31 August 2011.

The 18 interviews were completed with 19 persons (three chief executive officers, 15 managing directors and one middle manager) representing 18 companies.

Thus, in the two countries I have conducted a total of 28 interviews involving 21 different companies / Finnish investors.

The business sectors of the companies were the following: durable goods sales/product sales, construction, trade/commercial, telecommunications, freight forwarding and transportation, packing, labour hire and recruiting services, consulting and training services, printing services, and electronics manufacturing.

14 out of the 21 companies were small-sized businesses (with less than 100 employees in the Hungarian subsidiary), five were medium-sized businesses (between 100 and 1000 employees in the Hungarian subsidiary), and two were large-scale companies (more than 1000 employees in the Hungarian subsidiary).

The interviews were qualitative, semi-structured, thematic, in-depth and face-to-face. The semi-structured thematic interview outline was developed by the author. The interview outline was divided into four main parts. The first part is the personal data of the interviewee (what kind of profession he or she has, his or her working experiences, how long has he or she been working in this company, what is his or her position in the company at the moment, etc.). The second part is devoted to the company unit with questions related to facts and figures of the company (e.g. the business sector and the forms of the company's activity in Finland and in Hungary, when has the company's activity started in Finland and in Hungary, what is the ownership of the Hungarian daughter company, how much was the annual turnover of the company's outlets in Hungary in 2010, how many employees they have in Hungary, etc.) This part contains the questions on the opinion of the investment climate in Hungary. The third part is 'Crime experiences in Hungary' which contains the experiences with violent crimes, crimes against property and economic crimes. The last part of the interview is the definition, the perception and experiences of corruption. All of the interviews started with the interviewer's introduction and a short description and the aim of the research.

The length of the interviews in Finland varied between 1 and 1.5 hours. The interviews in Hungary lasted on the average between 1.5 and 2 hours. The longest in Hungary took 4 hours and 19 minutes. Six interviews in Hungary lasted more than 2 hours. I received the impression that all of the representatives of the companies on the investor side knew the major cases, events and crimes related to the company. They could inform me concerning

the most important events in the subsidiary's activities concerning everyday administrative problems, crimes and corrupt behaviours.

At most of the companies, the Finnish representatives were quite familiar with the Hungarian political and economic situation. They knew the result of the election in the spring of 2010, the two-third majority of the new government and so on.

Out of the 28 interviews 25 interviews were recorded and transcribed. Three of the interviewees refused to allow recording of the interview because of the company's security policy.

Business climate in Hungary

Many of the companies had business relationships with Hungary before the political-economic transition⁷ in Hungary. Some of the companies set up their subsidiary immediately after the change of regime.⁸ Typically, the first few years after the establishment the managing director was a Finnish national. Nowadays, most of the local managing directors are Hungarians.

Half of the companies have relied on the assistance of the Finnish Embassy in Hungary when they established the company.

From the responses it appeared that the reasons behind setting up a company in Hungary were the good geographical location which is favourable for transportation and helps opening the market towards Central and Eastern Europe, as well as more capacity in respect of Russia. Furthermore, the high labour skills, good mathematics and IT education in Hungary, and low labour costs were also taken into account. It was also likely that Hungary would be a member of the European Union, and with the EU membership the legal and business environment would be more understandable and transparent, i.e., similar to the usual conditions.

In general, the companies found what they had expected, although they also had difficulties. The typical problems which all of the companies faced were the frequent changes in legislation (especially the regulations related to taxes), the bureaucratic legal system, the slow procedure in court, the complicated reclaiming of VAT, the different interpretation of the law – sometimes the EU directions – and the inflexible, ineffective and inappropriate regulations concerning company bankruptcy. This point regarding bankruptcies is interesting, since section 5 of the Finnish Limited Liability Companies

⁷ The political changes in Hungary started in 1989. After the first free elections in 1990 the one-party, Soviet-type system was replaced by a multiparty democratic system. At the same time it was declared that the former planned economic system should be transformed into a market-oriented, capitalist one.

⁸ More detailed description of the relationship between the transition and the economic and white-collar crime see Inzelt, 2011, p. 352-379.

provides that *'The purpose of a company is to generate profits for the shareholders, unless otherwise provided in the Articles of Association.'* In Hungarian civil law there is no corresponding provision. Because of this fact, in Finland a company is responsible if it has not done everything to ensure a profit or if it has acted in bad faith. In Hungary only a special type of bankruptcy is punishable according to Hungarian Criminal Code Section 290.

An example of when a company is concerned about taxation:

“The past six months were unpredictable. Exposed a lot. So many tax issues. Uncertain. Exposed tax after the benefit for a foreign company. The taxation system has to be more predictable and certain.”

Another example of the opinion about the general business climate in Hungary:

“Some competitors use the law as a weapon. Competitors abuse the law.”

A piece of advice from a respondent:

“Is the political system totally separated from the legal system? You always have a little bit of doubt in your mind. In Finland you don't have it at all. The political system should be separated from the legal system.”

Defining corruption

Corruption was mainly understood by the interviewees both in Finland and in Hungary as any money or gift which is given to another person in order to influence their decision. Most of them emphasised the illegal personal benefit caused by corruption. Some of them mentioned the problem of the grey economy and its impact on corrupt behaviour.

Only a few respondents mentioned the difference between large-scale and small-scale corruption.

Many Finnish respondents referred to the company's code of conduct when defined corruption.

Many of the representatives of the companies both in Hungary and in Finland had faced difficulties in distinguishing between a bribe and a gift. The practice in respect of gifts and business travel was not uniform in the companies. Most of them referred to the provisions of their company's code of conduct regarding the value of gifts, both when accepting them and giving them. This value varied between 25 and 100 euros. Usually hospitality, for example a business lunch or dinner, is allowed by these codes of conduct.

Some of the Finnish respondents told me that the most typical form of corruption in Finland is to go skiing in Lapland and invite your clients. Some of them think that this is already corruption, because the value of the trip is high.

Three different views and practices could be found according to the answers. Five companies still have the practice of inviting the customers and paying all

the travel and other costs to the partners. The approach of some companies in the case of a skiing trip to Lapland is that the customers pay the cost of the flight and the rest (the accommodation) is paid by the inviting company. The rest of the companies invite the customers to a factory visit, but the customer has to pay the travel cost and the accommodation. This is a most common and acceptable way to do it for both sides. Some of the interviewees said that the Finnish attitudes to corruption are too strict, because in their view a business dinner is not corruption, but the attitudes of the Finnish public think that it is.

One respondent commented on who could issue an invitation to a trip without there being a sense of corruption:

“We have been invited only by those clients who had already been our clients for a number of years. This is a clear distinction. If you already do a lot of business together than you can accept a little bit more, e.g. a dinner or a trip.”

Some interviewees told me that the personal relationship is important and it could not be built by cash:

“In most of the other countries in which we operate the understanding of what is corruption is a lot higher up than in Finland.”

Business gifts at Christmas are allowed in every company. A new approach to this is where a company donates the money to charitable purposes and just sends a postcard to the partners, in which they note that the money that they could spend for Christmas business gifts has been transferred to support a certain organization.

The following example is evidence of the effectiveness of the social control theories (see for example Reiss, 1951 and Reckless, 1962) in Finland. Social control seems to be effective in Finland. Unfortunately, this is not working in Hungary as widely as in Finland:

“Since we are a company based in Finland we can not afford a case like this. If I bribe somebody in Hungary and that becomes news in [the newspaper] Helsingin Sanomat, I might lose all my business in Finland and on top of that nobody would want to work with me in Finland. Because this is the Finnish atmosphere, I have a business reason not to do that.”

In Hungary I heard also two remarkable statements which are worth citing: “*Corruption is a mechanism of social consensus*” and “*Insider information is a form of corruption.*”

Experiences with corruption

In accordance with the Hungarian Criminal Code and on the basis of the present research two categories can be distinguished regarding the relationships in corruption activity, i.e., between the business and the state or official sectors

and between the business or economic partners. First, the characteristic features based on the statements of the representative of Finnish industrial and commercial companies according to the above-mentioned categories will be surveyed.

In the interviews, primarily small-scale corruption was mentioned. When local authorities, mayors etc. or senior politicians would be / were involved the interviewee – with a few exceptions – either interrupted or refused to speak.

Some of the interviewees think that they had not received as many offers to pay bribes as happens between Hungarian partners, because they are Finnish or representatives of a Finnish-owned multinational company.

Many of the representatives declared that bribery cases which involve money were a special feature of Hungarian-owned small or medium-sized companies because the multinational company – as they are – rarely use cash money in business transactions.

Some of the respondents told me that they have been learning during the establishment of companies in other countries – they especially think about Russia and the Baltic countries – that if the local way of doing business includes bribes and if one would like to do business in that climate, you have to just accept it and trust your local people to know the situation better than you do. They said: *“For us it is strange to go to the customs officer and give a nice and big present. In Finland they would not take it.”*

The respondents mentioned that when somebody was asking money for his or her services it was not direct approach, usually just a hint.

Corruption between the business and the state or official sectors

The interviewees had the following experiences with cases which can be considered to be typical ones.

Maladministration by a customs officer

A customs officer offered a decrease in the amount of customs duty in return for a favour. This was declined by the Finnish company, and they reported it to the police. The case is ongoing in court.

Licences

In many cases, obtaining a licence (for example for construction) can be facilitated by a payment. The Finnish companies prefer to wait until the official deadline. The Hungarian representative of a Finnish company said that it

happened once, when the licence was very urgent, that they accepted the offer, paid a small sum of money to the clerk, and the licence was obtained at once.

Many of the respondents gave a small amount of money (around 10,000 forints = ca. 35 euros) in order to obtain a licence within one week, instead of the usual six weeks. They mentioned that this is typical behaviour in Hungary and everybody does it.

Tenders

This is a very serious point. According to one of the respondents, even though bribery of experts is specifically prohibited by the code of conduct, in Hungary it is often impossible to win a tender without bribery. Therefore, Finnish companies prefer not to participate in state tenders.

Tax and Customs Authorities

A curious practice can be found in Hungary. The tax controller has a yearly plan in advance decided by his or her boss concerning the amount of money to be collected as fines. The inspector's bonus depends on meeting this requirement. (A similar plan exists e.g., at the Police and at the Council of Public Procurement. At the latter, 20% of its budget comes from this source.) It is worth citing one of the respondents word by word: *“The Tax Authority has an office at our company because they visit us so often. Last time the controller told us – before inspecting any documents – that they want 35 million forints⁹ penalty to be paid. After bargaining we paid 5 million forints¹⁰ eventually.”*

This is certainly not an isolated experience, since several respondents told me that the controllers arrive at the company with a concrete amount of fine decided in advance. It also happened that an employee of the company was asked to show any item which is thought to be ‘uncertain’, because this would help the inspector to impose some kind of ‘symbolic’ fine. In another case after imposing a fine – that was appealed by the company – the inspector said the following words: *“some million forints won’t floor you”*. Several CEOs said that the controllers visit those companies more frequently, which are easily available. Another general complaint was the constant changes in the tax regulations, which are practically impossible to follow. Furthermore, due to the different interpretations of the regulations, in Hungary anybody can be fined at any time. In one case the company filled in the old questionnaire and not the new one. Even though the declared and paid tax was the same, the company was fined. A positive sign is that, because of the contradictory legal environment, the companies frequently ask the Tax Authority (formerly APEH,

⁹ This is approximately 130,000 euros.

¹⁰ This is c.a. 18,510 euros.

presently the Tax and Customs Authority, NAV) concerning their standpoint on different issues, and they usually receive adequate answers.

In another case, the Hungarian bookkeeper suggested to the CEO of a Finnish company to give some money to the inspector to get back the money from the Tax Authority that the company was entitled according to the law. Of course, the CEO followed the suggestion because he/she did not know the local habits.

“In Hungary the thinking of the inspectors is that you are guilty if you cannot yourself prove that you are not. In Finland if something is not clear in taxation tax, you are not punishable.”

Public procurement ¹¹

One aspect of public procurement has already been mentioned above. 80 % of the responding Finnish companies do not participate in public procurement procedures on purpose because they consider these to be unfair and burdened with corruption. It was said that they want to live under market relations.

A special situation emerged with one interviewed company in a public procurement process. The Finnish company's product and service were the best and the state-owned company would have liked to buy this product and service, but nevertheless the Finnish company did not win the process as a prime contractor. It continued according to the usual scenario, which is as follows. The state-owned company creates a private or public company – the owner and the CEO of such companies are usually friends of the director of the state-owned company – in order to participate in the procurement process. This company wins the procurement process and becomes the prime contractor. The purpose of the establishment of this company to take away some money from the procurement project. Meanwhile the state-owned company still needs the Finnish company product, and so the Finnish company becomes a subcontractor in the process. The prime contractor is just a company through which money flows.

Another feature was experienced in procurement, namely that the announcement specifies the product or the service in such detail that only one company can meet the requirements.

The case of the company cars

Another typical case in Hungary is when a company buys a new car which has to be registered as a company car. The process usually should take a minimum

¹¹ Transparency International Hungary estimates that corruption is systemic in government procurement, the cost could amount to an increase of 20-25%, and the result is often poor quality or useless goods and services to purchase.

of 60 days. However, for only 5000 forints or so (ca. 18 euros) one can get the document within one day.

Maintain a good relationship with civil servants

Some of the interviewees told me that they like to maintain good relationships with custom officials, municipal clerks or other civil servants. To achieve this they usually give some gifts not just during Christmas time, but also for example on the occasion of the public official's birthday. The value of the gift is usually not more than 25 euros. The gift could be a box of chocolate or a bottle of alcohol.

The interesting point here is that in Finland it is quite unusual to behave like this. The Finnish representatives think that this is a cultural distinction between the two countries. And of course it is not regarded as corruption in Hungary, while it is corruption in Finland in their point of view.

“The attitude is getting stricter towards corruption in Scandinavian countries. The civil sphere is isolated from the rest of the society.”

Cases related to the building industry

In the building industry the respondents divided the corrupt behaviours in three different categories. The first one is the cases related to building permits (mentioned above in subsection 2.). The second category usually occurs in big projects where there is a so-called “middleman” that sometimes the companies have to hire, because if they did not do so, they would not get the business. In 99.9 % of the cases the companies do not use this “middleman” construction. The third category involves structural engineering companies which stipulate what kind of products are good for a building. According to the interviewees most bribe requests typically come from these engineering companies whose employees state that their salaries are poor. They select the products of a given company as suitable ones, provided that the company gives a certain percent of the value of the products.

Corruption between business partners

It is worth summarizing the experiences of Finnish companies also in this respect.

Promoting the sale of the products

The directors of the customers responsible for purchases indicate that they would accept the price offered, however, they ask that a lower price be noted in the documents, and they want ca. 5 % of the original price to be transferred to

them or to the company. Such a deal is never accepted by the Finnish companies. The problem is, however, that there are companies on the market which accept this deal, and consequently the Finnish companies will suffer a disadvantage in the competition, and they lose business.

Prearranged tenders

Several interviewees told me that if there was a tender – which seemed to be clear – the company or the employee of the company has already arranged matters so that a certain one of the participants would win the tender. It is usually known that there is a hidden agreement between the parties.

Abuse by using inside information

Official persons involved in a tender convey the quotation of a given company to the competitors. Then the rival can easily offer a somewhat lower price, and win. This was mentioned by 70 % of the interviewees.

Customer asking for some support

One company mentioned a case in which a customer was asking for some support in renovating a meeting room of the company. The reaction of the company was that they were not able to pay extra money which is not linked to the direct business.

Nepotism

Some of the interviewees told of cases of nepotism. The owner of the winning company in a tender is a relative or friend of the customer. Everything seems to be legal because they win the tender with the lowest price. After the signing of the contract, there will be new accounts mentioned as unexpected costs. Evidently the final cost of the project will be substantially higher than that offered by any other participants in the original tender. Eventually the customer signs these accounts, and usually personally gets some of this extra money in cash.

Corrupt behaviour on the part of an employee

Some cases have arisen in the interviews in which the Hungarian employee of a company acted illegally – receiving personal benefit from the situation– without the knowledge and the will of the company, thus causing damage to the company.

One case was in connection with the amount of the rent of a company's warehouse, which was over the market level. After the company noticed the case – there were suspicions that a certain employee was obtaining personal

benefit in this way – they managed to have the amount of the rent decreased. The suspected person was fired.

Other cases were linked to the fact that employees had inside information of the company and they misused this.

Bonus after trade

Bonuses after the signing of a contract are legally allowed both in Finland and Hungary. However, the actual attitude is different in the two countries, which is due to the different social and economic environment. While in Hungary this bonus is generally accepted, in Finland it is seldom used.

The anti-corruption policy of Finnish companies

A code of conduct, which is used by 70 % of the Finnish companies, is a very important part of an anti-corruption policy. It should be emphasized that the code of conduct is made known to all employees, and their knowledge of it is tested each year. Every employee is responsible for the code of conduct personally.

The atmosphere at the working place also supports the prevention of corruption. The spirit of the code of conduct is considered even more important than its content. The code of conduct provides for zero tolerance for corruption in all companies, and an employee should be dismissed immediately if he or she commits such a criminal act.

Two representatives of a Finnish parent company said that they conveyed the solution to the local corruption-related problems to the local management, even they did not want to know about it. An example of this is the following:

“If you need to bribe somebody, I don’t need to know it. Yes, I know it is going on but I don’t want to know the amount, to whom, etc. You take care of your culture and you understand what needs to be done. We want the business to be run, we need profits from the business itself and if the price for obtaining that profit is that some of the profits go to somebody else, it is worth it.”

In some cases in which the partner’s company employee behaved in a corrupt way (see above for example the sections ‘Promoting the sale of the products’ or ‘Prearranged tenders’), and it seems to be that it is just his or her attitude to doing business, the local managing directors talked with the owner of the company and explained the situation. Usually in the near future it was proven that it was not an isolated case and finally the company fires that person.

Preventing corruption

All of the companies answered – happily – ‘no’ to the following question: “Has the corruption situation in Hungary influenced your investment decisions in the country in any way?”

However, most of the representatives of the companies stated that because of the corruption situation in Hungary they were losing business, since they were not giving bribes. They emphasised that the corruption situation reduces competition and prejudices fair competition.

The Finnish respondents recommended the following steps in order to curb corruption in Hungary: clear rules, transparency, effective law enforcement, investigations, a stable business environment, a good and predictable market, the fixing of the economy, a stable political structure and development, proper and honest ways of receiving gifts, improvement of the open market and free competition, paying attention to the company culture, investing time in the code of conduct, earning enough money in a legal way so they can avoid corrupt behaviours, the establishment by the government of good control mechanisms, more transparency in everyday life and business life, and the international business life and ethics would be a good sample. Preventing corruption must start from the top and go down to everyday life. Rethink the tax system: if the taxes decreased, the state could get more tax money and the black market becomes smaller. Tax authorities should make more inspections in order to prevent crimes. The pyramid structure has to be eliminated and responsibility has to be delegated to a lower level.

The money has to flow through accounts which are more visible to the authorities. Reduce the use of cash. The free press is a key element. Investigating journalism is a good way to prevent or fight against corruption.

Preventing corruption requires the raising of public awareness, which must start in school. It is a question of attitudes and education.

The Hungarian interviewees recommending making adequate regulations, starting ethic education in schools, the state should review its own activity in connection with the prevention of corruption, the structure of macro-economy should be reconsidered, the grey economy should be decreased, and civil pressure should be increased.

Some of the respondent mentioned that preventing corruption will be a slow process, because corruption is inherited, and is a part of the Hungarian culture. First of all Hungary needs an economic recovery, after which salaries can be raised and stricter regulation and control can be introduced.

In the following part I will discuss the attempts of the Hungarian governments over the last ten years to prevent corruption.

The various government-initiated anti-corruption programmes in Hungary are partially the result of international pressure. The most influential source of pressure has been the European Union (EU). While seeking EU membership,

successive Hungarian governments have participated in several anti-corruption actions initiated by the EU.

The Government decision on regulation No. 1023 of 2001 introduced the Governmental Strategy against Corruption. This contained a wide range of proposals concerned with conflicts of interest, property declarations, preparing more effective control of the sources of the assets of political parties and campaign donations, lobbying, increased publicity of data and reduction of the scope of business, bank or securities secrets, the length of immunity, restraint of profession in the case of committing bribery or trafficking in influence, the introduction of criminal sanctions applicable against legal persons, money-laundering, terrorism, and public procurement.

The strategy, however, took the 'traditional approach' to fighting administrative corruption by focusing primarily on punitive measures instead of prevention. Several other attempts have been made over the last two decades.

According to the strategy adopted in 2004 (No.1011/2004 Government decision) the Advisory Board for Corruption-free Public Life (hereinafter the Board) was established. The Board consisted of representatives from the Ministry of Justice, the Ministry of Interior, the Ministry of Defence, the Ministry of Finance, the Prime Minister's Office, the Governmental Supervisory Office, the National Security Office, the National Headquarters of the Police, the General Directorate of the Customs and Finance Guard, the Chief of the Coordination Office of OLAF, the State Audit Office and the Prosecutor General's Office. Additionally, representatives from civil society (i.e. university researchers, members of the Academy of Sciences) were invited to participate in the Board meetings. The main tasks of the Board were to carry out research relating to corruption, continuous evaluation of the results of anti-corruption activities, the providing of advice on anti-corruption measures and liaison with the United Nations Office on Drugs and Crime (UNODC), the Organisation for Economic Co-operation and Development (OECD), and the Council of Europe Group of States against corruption (GRECO).

Anti-corruption activities continued in 2007 with No. 1037 of 2007 government decision "The tasks related to the fight against corruption". This decision repealed No. 1011 of 2004 Government decision and No. 1023 of 2001 Government decision.

According to government decision No. 1037 of 2007 the government requested the Minister of Justice to draw up a long-term 'strategic document' and a short-term 'programme of action' to fight against corruption. These documents were to be formulated in detail by the Anti-corruption Co-ordination Body (hereinafter ACB) established in August of 2007. The members of the ACB were the representatives of the Ministry of Justice, the Ministry of Health, the Ministry of Economy and Transport, the Ministry of Local Government and Regional Development, Ministry of Finance, and the Ministry of the Prime Minister's Office. Permanent observers were the representatives of the State Audit Office, the Hungarian Competition Authority, the Council of Public

Procurement, the National Council of Justice, the Parliamentary Commissioner for Data Protection and Freedom of Information and the Prosecutor General's Office. On a temporary or permanent basis, the Ministry of Justice designated non-governmental public organisations and representatives of civil society, in proportion to the number of government bodies (six persons). In January 2008 the ACB had prepared an anti-corruption strategy and action plan. In view of the involvement of non-governmental public organisations and representatives of civil society in the work of the body (including Transparency International Hungary), the new anti-corruption programme was expected to be an important step towards a widely accepted national strategy against corruption. The Anti-corruption Co-ordination Body was scheduled to produce an Anti-corruption Strategy by the end of 2007, and the government planned to make a decision based on its strategy by February 2008. On the basis of our experience so far, we reserve judgement on the effectiveness of the work of this organization. We must also mention the crucial role of non-government organisations in the fight against corruption.

In February 2009 the Ministry of Justice and Law Enforcement published an Anti-corruption Action Plan which contained 5 main areas: a) the protection of whistle-blowers (draft Act), b) establishment of the so-called "Authority for Protection of Public Interest" (draft Act), c) Ethical guidelines for civil servants (draft Parliament Decision), d) Stricter regulations in the field of lobbying (draft amendment of the Lobby Act), e) transparency in party financing (draft amendment of the Operation and Financial Management of Political Parties Act). I think this was a great step ahead in combating corruption. Unfortunately, the introduction of these new measures have been blocked, at least partially. The act on the protection of whistleblowers was adopted by Parliament on 14 December 2009, but the act on the Establishment of the Authority for Protection of Public Interest, which would have provided guarantees of the process and institutional features of the whistle-blowing system, was not signed by the President. The amendment of the Lobby Act was not initiated in Parliament. The initiative to make party incomes and expenses more transparent was not accepted by Parliament in November 2009.

The new government – which was formed in May 2010 – introduced the following steps to fight against corruption.

- In September 2010 Hungary joined the International Anti-Corruption Academy (IACA). The aim of IACA is to overcome current shortcomings in knowledge and practice in the field of anti-corruption.
- From 2011 the government increased the support of the Office of the Central Prosecution Service in order to establish the Public Prosecutor's Department of Anti-Corruption. The Department deals with corruption cases where the value of the crime and/or the public outrage is high.
- To reduce police corruption the new government created a regulation to control the activities of persons belong to the staff of the police and other organizations of the Ministry of Internal Affairs, not just in their working hours but also in their private life. According to this regulation

a reliability testing system was introduced where the controller could use all sort of intelligence means to test police officers, prison guards, customs officers and firemen. There were several constitutional and human rights concerns.

- The whistle-blowing protection is on the agenda again, but up to now no legislation has been introduced on this topic.
- The government appointed a Government Commissioner whose task is to review the action of the former ruling party. This step can be considered a settling of old scores, and not as an effective measure against corruption.
- The corporate tax was decreased by the government from 19% to 10% in order to increase the payment of taxes.¹²

The main problem is that there is no long-term strategy in respect of the corruption situation in Hungary. The legislature still lacks a systematic approach to solving this problem.

Conclusions

The aim of the research was to obtain information about the experiences of corruption of Finnish companies in Hungary and to gain a deeper understanding of typical corruption situations. Corruption is an inevitable part of society, not solely in Hungary. It can not be entirely eliminated, although its volume and structure can be reduced to an optimal level. The results of this research clearly indicate that there are different levels of and situations in corruption (see above the section 'Experiences with corruption') and that there are different reasons and factors (e.g. social, political, economic, etc.) behind the diverse types of this criminal behaviour. To fight corruption effectively we have to examine the reasons and the factors. After that measures that specifically address these reasons and factors have to be introduced. It is quite well known that investigations in corruption cases are difficult because of the common interests of the partners. It follows from this that the introduction of measures focused on prevention would be more welcome.

Hungary is still a young democracy, only 22 years old with a period of 'wild capitalism' in the beginning, involving so-called spontaneous privatization. It takes time to face and improve the situation. Finland has been showing the way and an attitude against corruption for more than 90 years.

We may state that the multinational companies active in Hungary are exposed to an attempt to corrupt them. Their attitude is of outmost importance in respect

¹² This involves a special feature in Hungary. Hungarian small and middle-sized companies usually do not pay corporate tax because the corporate tax is calculated on the basis of the profit. Owing to inventive accounting, company accounts generally do not show any profit, and so they do not have to pay corporate tax.

of supporting the introduction of a different and better Northern-Western culture, and their anti-corrupt behaviour serves as a good example that is worth following, adapting and eventually putting into wider practice. Beside the moral impact, this will also strengthen the competitiveness of the Hungarian economy. The economy can develop if the business decisions are rational and do not contain corrupted elements.

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THE OFFENCE OF CORRUPTION IN CHINA: LEGISLATION AND PRACTICE

Zhenjie ZHOU
Associate Professor
College for Criminal Law Science
Beijing Normal University, China

Abstract: This article points out that the core essential element of the offence of corruption in Chinese criminal law is the abuse of office/power. After reviewing efforts made by the Chinese government in recent years to investigate and prosecute the offence of corruption, including a review of statistics, the article concludes that the political meaning of the death penalty is an important, if not the most important, reason that the Chinese government insists on punishing the offence of corruption with the death penalty. Meanwhile, it notes that the prevention of the offence of corruption is a matter beyond criminal law in China, and profound political reforms might be more effective.

Key words: Corruption offence; capital punishment; prevention policy; Chinese criminal law

On 19 July, 2011, XU Maiyong, the former deputy mayor of Hangzhou and Jiang Renjie, the former deputy mayor of Suzhou, were executed on the same day for taking bribes.¹ The executions might be seen as a signal showing “the firm stance of the Communist Party of China (CPC) and the Chinese government to combat corruption and build a clean government” proclaimed by the State Council in the *White Paper on China's Efforts to Combat Corruption and Build a Clean Government* (hereafter, the *White Paper*) issued in December 2010. Traditionally, criminal law is taken as a tool to respond to crimes and maintain social order, and punishment is a weapon to protect the state and people in China, just as is provided by article 1 of the 1997 Criminal Law: “The aim of the Criminal Law of the People's Republic of China is to use criminal punishments to fight against all criminal acts.” Therefore, it is not surprising to see that the Chinese legislature has placed certain corruption offences such as the taking of bribes on the list of capital offences.

What, then, exactly is the offence of corruption in China? Why does the Chinese government insist on punishing corrupt officials with capital punishment, while at the same time facilitating reforms to reduce the use of capital punishment? How many corruption cases are investigated and prosecuted in China every year? What is the Chinese government doing in

¹ See ZHOU Bin and LU Jie, “XU Maiyong and JIANG Renjie Executed”, *Legal Daily*, 20 July 2011.

order to combat corruption, and is it doing it right? This article aims to answer these questions. At the outset, this article tries to define the offence of corruption according to the criminal law amended in 1997 (hereafter, the 1997 Criminal Law). Then, it introduces the efforts that the Chinese government has made in recent years in order to deal with the problem of corruption. Thirdly, it discusses why the Chinese government continues to punish the offence of corruption with the death penalty while taking active measures to restrict its use. Finally, this article suggests that more profound and constructive system reforms beyond criminal law are necessary in order to enhance progress in coping with the problem of corruption in China.

The offence of corruption in criminal law

Although frequently used in academic papers and even official documents, “corruption” is actually a vague expression. A Japanese researcher has suggested that corruption in China usually means “an official’s pursuit of personal financial gain by abusing their public power or position. This definition specifically includes four kinds of crimes: embezzlement of public property, bribe-taking, illegally using public money, and other financial crimes committed by officials (for example, smuggling)”.² This definition itself is obviously too vague to help us to understand what corruption is in China. Moreover, it improperly limits the offence of corruption within the narrow scope of “financial crimes”, because corruption crime is usually called “贪腐犯罪” (Tanfu crime) in Chinese, where “贪” (Tan) means to take advantage of one’s office to pursue individual financial interests, and “腐” (Fu) means to abuse one’s office. The purpose of obtaining monetary advantage is irrelevant in the latter case.

Briefly, the essential elements of the offence of corruption in China could be summarized as following:

- 1) the actor must be a “State functionary”. According to article 93, 1997 Criminal Law, “State functionaries” refers to persons who perform public service in State-owned companies or enterprises, institutions or people's organizations, persons who are assigned by State organs, State-owned companies, enterprises or institutions to companies, enterprises or institutions that are not owned by the State or people's organizations to perform public service and other persons who perform public service according to law shall all be regarded as State functionaries;

² Wang Yunhai, “Corruption and Anti-Corruption Policy in Today’s China”, *Hitotsubashi Journal of Law and Politics* 33 (2005), p. 1.

- 2) the core essential element is the abuse of office. Therefore, a criminal act committed by an official shouldn't be punished as a "corruption offence" as long as the actor didn't take advantage of this office;
- 3) the purpose of obtaining financial advantage can often be seen, but not always. For example, according to the crime of abuse of power in article 397 of 1997 Criminal Law, a typical corruption crime, any functionary of a State organ who abuses his power shall be sentenced to fixed-term imprisonment, if only heavy losses to public money or property or the interests of the State and the people was caused. The article does not mention any purpose at all.

It should be noted that the scope of the actor in the taking of bribes has been extended, by *Suggestions on How to Apply Law in Dealing With Bribery Criminal Case* jointly issued by the SPC and the Supreme People's Procuratorate (SPP) in July 2007, from State functionaries to include also those who are in a special relationship with State functionaries and are able to make use of their post and influence (such as a mistress).

In the 1997 Criminal Law, typical corruption offences are those in Chapter XIII, including embezzlement (article 382), misappropriation of public funds (article 384), taking or extorting money or property from another person (article 385), introducing a bribe to a State functionary (article 392), holding a large amount of property that cannot be proved legal (article 395) and dividing up State-owned assets illegally (article 396) and Chapter IX, the crime of dereliction of duty (such as abusing one's power or neglecting one's duty; article 397) and intentionally or negligently divulging State secrets (article 398).

In addition to the crimes mentioned above, a few corruption crimes are provided in other chapters of the 1997 Criminal Law for the purpose of making the application and enforcement of the law more convenient, because these crimes are usually closely related to the criminal acts in question. For instance, Article 294, 1997 Criminal Law specially deals with organized crime. Clause 1 of the article provides the crime of leading or taking an active part in organizations in the nature of a criminal syndicate, clause 2 provides the crime of recruiting members within the territory of PRC by members of Mafia abroad, and clause 3 provides that any functionary of a State organ who harbours an organization in the nature of a criminal syndicate or connives at such organization to conduct illegal or criminal acts shall be sentenced to fixed-term imprisonment.

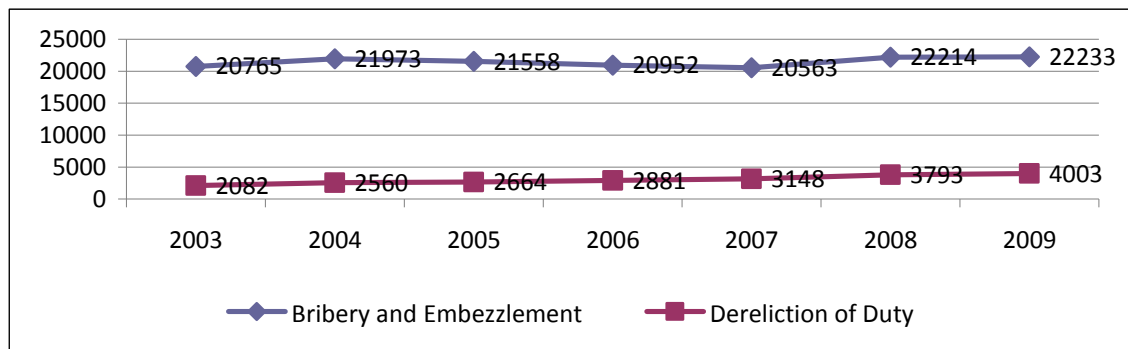
Corruption crime in judicial practice

"The CPC and the the Chinese government have been resolutely combating corruption and building a clean government since the founding of the People's

Republic of China on October 1, 1949.”³ And as early as in 1982, Deng Xiaoping advocated in a speech against economic crime that “the ‘struggle will have to be waged daily for 18 years’ to be won before the end of the millennium”.⁴ It would be fair to say that the Chinese government has been tough on corruption crime, as expressed again and again in documents and statements, and is devoting more and more resources to investigate and prosecute corruption cases and carry out transnational cooperation.

As can be seen in Figure 1, criminal cases of bribery, embezzlement and dereliction of duty tried by people’s court at all levels have been on the increase since 2003. Meanwhile, according to the SPP, which is responsible for dealing with embezzlement, bribery, dereliction of duty and infringements cases, “from 2003 to 2009, the people’s procuratorates at all levels filed for investigation more than 240,000 cases of embezzlement, bribery, dereliction of duty and infringements on rights. Battling the crime of taking bribes, China has improved a database on criminal records of bribery, and intensified efforts in punishing and preventing crime of bribery. In 2009, some 3,194 people were punished for their criminal liability in offering bribes”.⁵

Figure 1: Total Number of Criminal Cases of Bribery, Embezzlement and Dereliction of Duty (2003-2009). Source: China Annual Statistics (2004-2010)



Moreover, in 2005 China launched a campaign to combat bribery in business in six major areas, namely, engineering, construction, the granting of land-use rights and mineral resources exploration and mining rights, trade of property rights, purchasing and marketing of drugs, government procurement, and development of and deals in resources, as well as those related to bank credit, securities and futures, commercial insurance, publishing and distribution, sports, telecommunications, electric power, quality control and environmental protection. According to the *White Paper*, more than 69,200 cases of

³ Information Office of the State Council of the People's Republic of China, *White Paper on China's Efforts to Combat Corruption and Build a Clean Government* (December 2010, Beijing), p. 1.

⁴ Borge Bakken, “China, a Punitive Society”, *Asian Criminology* 6 (2011), p. 46.

⁵ *Supra* note 3, p. 18.

commercial bribery had been investigated and dealt with, involving 16.59 billion yuan in total from 2005 to 2009.⁶ It is especially worth noting that a large number of high-ranking officials have been prosecuted. Some of them were punished with severe punishments and even sentenced to death. For example, it was reported that in 2010 eleven officials at the provincial and ministerial level were held criminally liable, and among them, seven were sentenced to death with 2-year suspension and four were sentenced to life imprisonment.⁷

Finally, as “corruption is no longer a local matter but a transnational phenomenon that affects all societies and economies, making international cooperation to prevent and control it is essential,”⁸ China attaches great importance to international cooperation and exchanges in combating corruption. In 2003, China acceded to the UN Convention against Transnational Organized Crime, the first such global convention. In 2005, China joined the Anti-Corruption and Transparency Experts Task Force of the Asia-Pacific Economic Cooperation Forum, and the ADB/OECD Anti-Corruption Initiative for Asia-Pacific, and acceded to the United Nations Convention against Corruption. In 2006, the SPP initiated the International Association of Anti-Corruption Authorities (IAACA).

So far, China has signed 106 judicial assistance treaties with 68 countries and regions. It has established the China-US Joint Liaison Group on Law Enforcement Cooperation and an anti-corruption panel with the United States. It has also set up a bilateral Law Enforcement and Judicial Cooperation Consultations with Canada. The CPC Central Commission for Discipline Inspection and the Ministry of Supervision of China has engaged in friendly exchanges with anti-corruption institutions in more than 80 countries and regions.⁹

Corruption crime, public opinion and the death penalty

Public support for the death penalty for corruption crime

“China's enthusiasm for capital punishment has long been a target for international criticism of its human rights record.”¹⁰ In order to realize its promise in the Constitution to protect and respect human rights and improve its

⁶ Supra note 3, p. 19.

⁷ Legal Daily, 21 December 2010.

⁸ Para.4, Preamble, United Nations Convention against Corruption.

⁹ Supra note 3, pp. 21-22.

¹⁰ Susan Jakes, “China's Message on Executions”, at <http://www.time.com/time/world/article/0,8599,1554379,00.html> (retrieved on 16 July 2011).

international image, the Chinese government has carried out several constructive reforms on the death penalty system since 2005. The SPC made reform of use of the death penalty a key part of its third Five-year Plan as outlined in March 2009 and this has seen important work taking place on sentencing guidelines and review procedures. Moreover, this approach was endorsed by the first National Human Rights Action Plan issued by the State Council in April 2009. And as early as March 2007, Mr. LA Yifan, China's representative in the UN Human Rights Council, made a firm commitment that "the death penalty's scope of application was to be reviewed shortly, and it was expected that this scope would be reduced, with the final aim to abolish it."¹¹ The latest reform is the abolition of the death penalty for 13 crimes¹² in Amendment VIII to the Criminal Law of PRC adopted in February 2011, which is therefore thought of as the start point of China's long march toward total abolition of the death penalty.¹³

Whether the death penalty for crimes of corruption should be abolished or not was also debated when the Amendment was drafted. A few researchers suggested the death penalty for crimes of corruption be abolished in that crimes of corruption are non-violent and incapable of resulting in fatal consequences, and application of the death penalty for such crimes goes against the requirement in the *International Covenant on Civil and Political Rights* that in countries which have not abolished the death penalty, the sentence of death may be imposed only for "the most serious crimes", which refers to intentional crimes with lethal or extremely grave consequences according to the provisions of the ECOSOC Safeguards guaranteeing protection of the rights of those facing the death penalty, and it has been proven that the death penalty has no deterrent effect in preventing crimes of corruption.¹⁴ However, a high-rank official at the Standing Committee of the National People's Congress directly stated that the Standing Committee had never considered the question whether to abolish the death penalty for crimes such as embezzlement and the taking of bribes.¹⁵

¹¹ See Roger Hood, "Developments on the Road to Abolition: a Worldwide Perspective", in ZHAO Bingzhi (eds.), *Overseas Experience of Death Penalty Reform (2011)*, Beijing: China Legal Publishing House, p. 2.

¹² The 13 crimes are: smuggling of cultural relics; smuggling of precious metals; smuggling of precious animals or their products; smuggling of ordinary freight and goods; fraud connected with negotiable instruments; fraud connected with financial instruments; fraud connected with letters of credit; false invoicing for tax purposes; forging and selling value-added tax invoices; larceny; instructing in criminal methods; excavating and robbing ancient cultural sites or ancient tombs, and excavating and robbing fossil hominids and fossil vertebrate animals.

¹³ GAO Mingxuan and CHEN Lu, *Reading and Rethinking Amendment VIII to Criminal Law (2011)*, Beijing: Press of Remin University of China, p. 3

¹⁴ Youth Weekend, 2 September 2010.

¹⁵ Nanfang Weekend, 29 September 2010.

It is universally recognized that the death penalty for crimes of corruption should not be abolished now in China. On one hand, although crimes of corruption are also non-violent and economic crimes, just as the 13 crimes for which the death penalty was abolished in the Amendment VIII, the legal interest it impairs is a complicated one, including public property and the State's system of building a clean government, which is the basis of national security and social stability. Therefore, crimes of corruption are much more dangerous to society than other economic crimes. On the other hand, abolition of the death penalty for crimes of corruption hasn't obtained sufficient public support. And even academic researchers have brought forward the idea that China shouldn't abolish the death penalty for crimes of corruption for least 30 years.¹⁶ In a word, "abolition of the death penalty would be no more than a dream if the problem of public opinion couldn't be overcome."¹⁷

Nature of public support for the death penalty

It cannot be denied that public support for the death penalty is exceedingly strong in China. For example, the Law Institute of the Chinese Academy of Social Science (CASS) and the National Bureau of Statistics of China conducted a population survey in 1995 in three Chinese provinces in 1995. They found that over 95% of the respondents supported the death penalty.¹⁸ In another survey of 2000 persons in 2005, the respondents were asked if they supported the death penalty or if they wanted it to be abolished: 82.1% supported it, while 13.7% said they wanted it abolished. Even when the question was changed, and rephrased on the assumption that the death penalty had already been abolished by the state, 60.6% still wanted to retain the death penalty, although the number of abolitionists increased to 33%.¹⁹

The latest survey was the one conducted in Beijing, Hubei and Guangdong provinces by the Research Center for Contemporary China (RCCC) at Peking University in 2007-2008. The survey was administered as face-to-face interviews. Among the sample of 4472 persons that were eligible and responded, when confronted with the standard general question, without any qualifications as to the type and circumstances of the crime or the characteristics of the offender, 57.8% support the death penalty, 14% oppose it and 28% are undecided.

¹⁶ People's Procuratorate Daily, 9 September 2010.

¹⁷ MO Hongxian, "Analysis on the Interaction between Public Opinions and Judicature on Death Penalty: Paths of Judicial Control over Death Penalty", in ZHAO Bingzhi (eds.), *Chinese Practice of Death Penalty Reform (2011)*, Beijing: China Legal Publishing House, p. 71.

¹⁸ HU Yunteng, *Retention and Abolition: studies on basic theories of death penalty (2000)*, Beijing: Chinese Procuratorate Press, pp. 341-346.

¹⁹ See supra note 4, p. 42.

However, it would be different when it comes to the death penalty for the problem of corruption. In the first place, although public anger at corruption is fiery hot, few high-rank officials have in fact been executed over the most recent 10 years, even those who took greater amounts of bribes and caused more serious social loss than did the two executed deputy mayors. From the perspective of the traditional theory that the deterrence of criminal punishment depends not only on its severity, but also on its promptness and stability, then retaining the death penalty for the purpose of deterring crimes of corruption crime seems a suspect argument. Secondly, the public has no access to data on the number of executions. Consequently, all average Chinese, and nearly all high-rank officials, don't know the number of criminals who have been sentenced to death and executed, their professions, ages, names and the crimes that they had committed. Then, how can they be sure that the death penalty could deter corrupt officials? In other words, public support for the death penalty in China is blind in nature.

Briefly, public opinion may be an element preventing China from abolishing the death penalty, but it can never be the dominant one.

The political meaning of the use of capital punishment for crimes of corruption

The more important reason might be at the political level. The death penalty, as a legal system, was created by political organ, and its fate is also up to political decision. Therefore, it can be used to achieve political ends, such as to gain public support or restore public confidence. For example, in the federal election in Canada held in November 2000, in order to win out, the right-wing party adopted the phrase "putting the justice back into the justice system," and "all opposition parties, even the left-wing New Democratic Party promised to make sentencing tougher and to champion changes that respect victims' rights. And this trend, it should be recalled, occurred in the country that has experienced the most protracted period of declining crime rates".²⁰ This might be true also in China.

It has long been pointed out that corruption in China is a kind of "system corruption",²¹ which means that because the overall political environment are corrupt, persons within it naturally become corrupt. Moreover, "along with gradual development of market economy, its conflict with present political system is becoming more and more obvious."²² Therefore, more constructive

²⁰ Julian V. Robert, Loretta J. Stalans, David Indermaur and Mike Hough, *Penal populism and public opinion: Lessons from five countries*, New York: Oxford: Oxford University Press (2003), p. 13.

²¹ YU Jindong, "System corruption is the most fearful corruption", China Youth Daily, 7 September 2004

²² FENG Qiusu, "Political System Reform is fundamental to Present China", available at http://www.zaobao.com/forum/pages2/forum_lx100924d.shtml.

political reform is believed to be a better way to overcome the problem of corruption. However, as the following statement in People's Daily shows, it might be impossible to see positive and effective political reform, at least in the near future, in China: "the historic changes in China after the foundation of new China, especially after 30 years since the opening up policy, sufficiently proves that the political system we are implementing is in accordance with Chinese reality and full of vitality."²³ Then, how to respond to public anger at the problem of corruption?

The Chinese government chose to avert public anger from the overall political system by guiding it towards individual corrupt officials and has been trying to calm citizens down by applying severe punishment in cases where the amount involved was extremely large or the consequences caused were exceptionally serious. The executions of XU Maiyong and Jiang Renjie have offered us examples.²⁴ This is a choice based on penal populism, a political response that favours popularity over other policy considerations, and as has been shown in Western countries, it can be politically useful, but has nothing to do with penal effectiveness, because populist penal policies in some cases "can be a consequence of an intentional attempt to exploit public anxiety about crime and public resentment toward offenders. In other contexts they have emerged out of a desire by policy makers to respond to public opinion without having undertaken an adequate examination of the true value of public views. Public expressions of punitiveness are taken at face value."²⁵

To prevent corruption crime: Beyond criminal law

As noted above, the Chinese government has been tough on crimes of corruption and has been devoting itself to investigating and prosecuting corrupt officials. Unfortunately, the problem of corruption continues to become more and more serious and looms over the future of China. "Although we are working with insecure data, there is no doubt that economic crime has become far more serious since Deng started his 'daily struggle' in 1982, with its repeated campaigns of harsh sentencing." And "the international global corruption reports have all indicated that corruption has become more serious in China over the last decade. Professor Angang Hu at Qinghua University has put the present cost of corruption as high as 13–16% of GDP. He further estimated that 15–20% of public project funds "leak" into private hands".²⁶ Where is the problem? Criminal law shouldn't be blamed because the present

²³ ZHENG Qingyuan, "Push Forward Political System Reform positively and steadily along the Right Direction", People's Daily, 27 October 2010.

²⁴ See ZHOU Bin and LU Jie, "XU Maiyong and JIANG Renjie Executed", Legal Daily, 20 July 2011.

²⁵ Supra note 20, p. 3.

²⁶ Supra note 4, p. 46.

scope of criminalization is wide and punishment is severe enough. As far as criminal field is concerned, the problem lies in the application and enforcement of the law.

For example, although the number of corruption cases investigated and prosecuted is gradually increasing, the sentences given by courts at all levels are excessively light. According to the SPP, more than 69.7% of defendants held criminally responsible between May 2009 and January 2010 in duty-related cases were either put on probation or exempted from real punishment.²⁷ This phenomena has resulted in considerable suspicion and opposition to courts and judges, more specifically, abuse of discretion, in all social circles and has become a touchstone whether the principle in article 4 of 1997 Criminal Law “the law shall be equally applied to anyone who commits a crime” and justice and fairness could be turned into reality.

Another problem that has been attracting great public attention and causing universal anger at government departments is protection for witnesses and reporters for public interest. The SPP stated in a reported in 2006 that more than 70% bribery cases were successfully investigated thanks to reports from citizens,²⁸ and again in 2007, it admitted that it is reports from citizens that helped judicial organs to disclose and investigate more than 50% of the economic criminal cases.²⁹ However, it is regrettable to see that the Chinese government isn't offering enough protection to witnesses and reporters. According to incomplete statistics, the number of criminal case in which reporters for public interest were wounded and even murdered had increased sharply from less than 50 annually in 1990s to 1200 in 2008.³⁰ Although provision concerning the protection of witnesses and reporters could be found in both the 1997 Criminal Law and the Criminal Procedure Law,³¹ witnesses and reporters have no way to get help and remedy from governments when judicial organs neglect their duty to offer appropriate protection.

Both regulating the exercise of the discretion of judges and making it a compulsory responsibility to offer proper protection to witnesses and reporters

²⁷ Jinghua Times, 19 November 2010.

²⁸ People's Daily, 28 March 2006.

²⁹ Legal Daily, 5 August 2007.

³⁰ 21st Century Economic Report, 28 June 2008.

³¹ For example, article 308, 1997 Criminal Law provides that whoever retaliates against a witness shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention; if the circumstances are serious, he shall be sentenced to fixed-term imprisonment of not less than three years but not more than seven years, and article 49, Criminal Procedure Law provides that the people's courts, the people's procuratorates and the public security organs shall insure the safety of witnesses and their near relatives. Anyone who intimidates, humiliates, beats or retaliates against a witness or his near relatives, if his act constitutes a crime, shall be investigated for criminal responsibility according to law; if the case is not serious enough for criminal punishment, he shall be punished for violation of public security in accordance with law.

are more a political than a legal issue in China, because they both involve the question of power distribution and supervision. However, we should consider that Chinese judicial organs seem to be losing the trust of citizens. For example, even a vice president of the SPC has admitted that “presently, some citizens’ distrust in justice system has gradually evolved into a kind of universal social psychology. This is an extremely terrifying phenomenon.”³² This might have made political leaders aware that it is time to make a decision.

In a word, since the real cause of crimes of corruption is to take advantage of or abuse office / power, the most effective way to prevent it might be to properly regulate and supervise the exercise of power. Criminal law is undoubtedly an important part of prevention policy, but never the decisive one, because it is the power that dominates criminal law, and criminal law is basically considered as a tool to ensure the smooth exercise of power in China. After all, although now on the way toward “rule of law”, China is still being under rule by law.

Conclusion

“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. This evil phenomenon is found in all countries—big and small, rich and poor—but it is in the developing world that its effects are most destructive.”³³ China, as a developing country under the threat of corruption, has been taking active criminal measures, such as extending the scope of punishment and allocating judicial organs more resources, expecting to achieve deterrence. It cannot be denied that a large number of corrupt officials have been held criminally responsible, and even put into prison or executed. However, it is also true that crimes of corruption are on the increase and the present prevention mechanism isn’t working as effectively as expected.

Corruption might be a socio-historical phenomenon, and its causes complicated. However, the fact that its nature is to take advantage or abuse power implies that the effective way to prevent corruption crime is to strictly regulate and control the exercise of power. Therefore, in addition to criminal punishment, China needs to strengthen its mechanism for protection of civil rights, and make the process of the exercise of power more transparent and democratic in order to realize the goal to “build a clean government” stated in the White Paper.

³² WU Ke, “SHEN Deyong: Some Citizens’ Distrust in Justice System now a Universal Psychology”, *People’s Daily*, 19 August 2009.

³³ *Kofi A. Annan*, Foreword to United Nations Convention against Corruption.

CRIMES OF GLOBALISATION: SOME MEASUREMENT ISSUES

Michael Levi, PhD, DSc(Econ), AcSS
Professor of Criminology
Cardiff School of Social Sciences
Cardiff University, Wales UK

Introduction

Globalisation did not begin in the late 20th century, nor did transnational crime begin then. However it seems sensible to cluster a set of transnational crimes – looking from crime production to delivery and laundering – within that ‘crimes of globalisation’ category.

Any set of statistics that relates to crime categories contains an element of social construction. Unless one is to define ‘crime’ as coterminous with (far from objective) ‘social harm’, the decision by any polity to treat a harm as a ‘crime’ rather than, for example, a matter for ‘regulation’ or administrative law or even social disapproval represents a moral as well as political decision (whether intended or not). The traditional legal distinction between *mala in se* (wrongs in themselves) and *mala prohibita* (wrongs that are forbidden) reflects not just process differences in terms of whether evil intent has to be proven but conscious or unselfconscious ideological valuations of relative harm. Sometimes this is combined with a judgement about how economic interests might be affected by taking these wrongs seriously. A good example would be the length of time it has taken the US to get the rest of the world to criminalize transnational bribery of public officials overseas (via the 1997 OECD Convention and the UNCAC 2005) since they first passed the Foreign Corrupt Practices Act 1977.

The question of whether criminal sanctions actually have to have been applied for the conduct to be included in an empirical review of crime applies to all areas of crime, but has been a particular issue for white-collar crimes because of their contested and relatively under-policed nature. Given the tiny number of transnational bribery prosecutions, even in the US (and none in the UK), this would have a huge impact on the analysis of costs, incidence and prevalence. Thus, if we are to include unprosecuted cases, this inevitably involves making assumptions about levels of intention and recklessness that would be highly contentious in criminal cases. Some critical criminologists would contend that one should go beyond this and include social harms that have been ‘politicked out’ of the criminal law and the criminal process: in this paper, I will draw the line at recasting the criminal law but if one were to take no account of unprosecuted cases, then the notion of the ‘dark figure of crime’ would make

no sense. It is important to take account of the growing significance of the private sector and 'its' actions in policing fraud and acting as gatekeepers of the criminal process.

There are a number of questions we might ask of such crimes.

1. What do we want data for, and how serious are we?
2. *What* do we count, *whom* do we count and *where* do we count them?
 - The expansion of transnational/human rights crimes;
 - Counting victimisations (e.g. fraud, extortion, kidnapping/people trafficking); and counting consensual illicit acts such as illegal drug-taking, (in some jurisdictions) gambling and prostitution.
3. What are the mechanisms of transnational crime delivery and how do these affect the counting challenge?
 - Separation of place of offending from offender residence *in different jurisdictions*;
 - Most serious offenders in the supply chain may never set foot in the jurisdiction where the victimisation or where the consensual purchase takes place.

There are a number of vices to which such data are prone (see Andreas and Greenhill, 2011 for a wider range of questionable counting practices):

1. Generate a number for prevalence, harm or effectiveness that suits the bureaucratic and/or moral imperative
2. This then becomes a 'fact by repetition'
3. But the larger the figure, the less likely it is that *any law enforcement or preventative* measures will impact significantly on it
4. So why do people/journalists almost never match crime costs – global, national or local - with control measures in place?
5. Can we resist the media and political demands?
6. If not, what are the consequences?

In the zemiological tradition, there is enthusiasm for counting harms rather than crimes, since crimes are an artefact of the capitalist law-making and enforcement processes, and the 'harms' approach transcends this enforcement process (or purports to do so) (Dorling et al, 2008). I will set aside the problems of how victims can know the intent of offenders (an issue largely ignored by national and international crime surveys) and note that we sometimes also count 'organised crime groups' – nationally plus references to foreign countries or 'hubs'. However, quite apart from the epistemological problem of knowing (and justifying) when crime networks begin and end, there remain some practical questions:

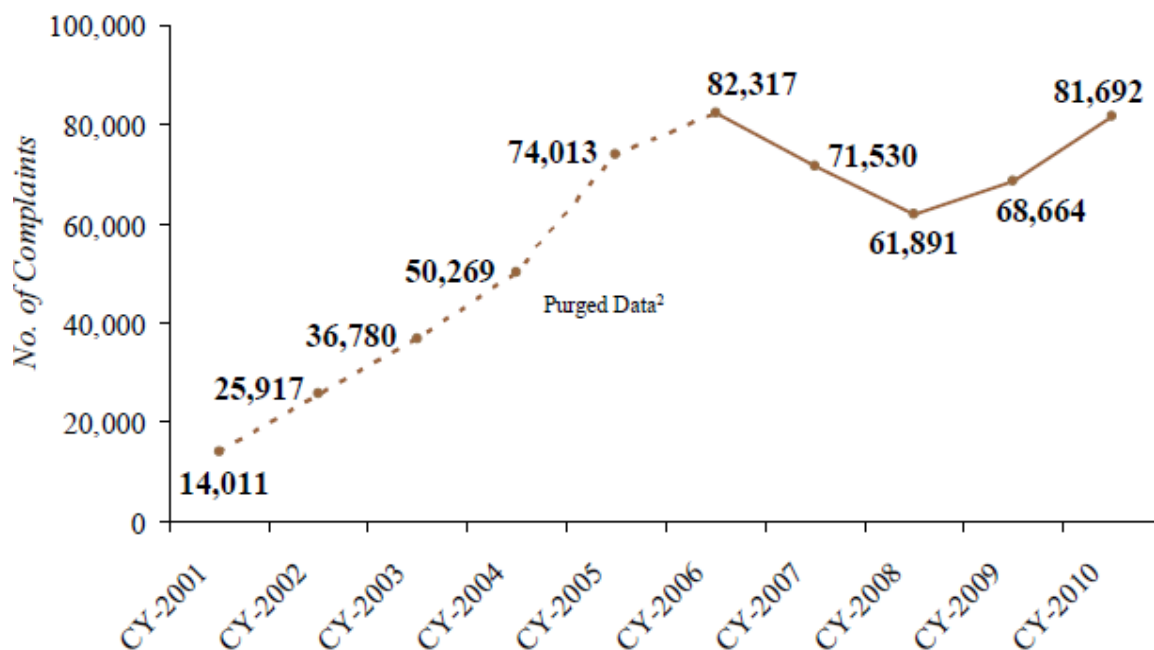
1. Do we multiply count trafficking crimes in every country the drugs or people pass through?
2. Do we multiply count proceeds of crime in every country the funds pass through?
3. How do we evaluate the harmfulness of crimes or harms arising in a third party country?

Although offences connected with trade might be the earliest forms of globalisation-connected offences – the transfer of people and products, whether *per se* licit or illicit – I will focus primarily on financial crimes. Let us take an example. From UK cases examined, boiler room frauds are commonly based abroad (e.g. in Spain, where police interest is low), have never sought authorisation by the Financial Services Authority (FSA) – which is a legal requirement to sell securities - and use high pressure sales and telemarketing (author interviews with UK officials and police). If the fraudsters have sufficient nerve, they can seek to become regulated in one EU country and obtain a ‘passport’ to operate in another under EU single market regulations, using that as a base for fraud and making it difficult for regulators to intervene to close them down. In all of these cases, what the boiler room is really selling is deceptive and worthless expectations.

The growth in cross-border frauds can be illustrated by data from the US (FTC, 2011). The US multi-agency Consumer Sentinel received over 100,000 cross-border fraud complaints during calendar year 2010. Cross-border fraud complaints comprised 14% of all fraud complaints received during calendar year 2010, and 13% during both CY-2008 and CY-2009. Prizes/Sweepstakes/Gifts was the leading product/service category in U.S. consumers’ cross-border complaints (12%), followed by Lotteries/Lottery Ticket Buying Clubs (11%), Internet Auction (9%), Foreign Money Offers (8%) and Advance-Fee Loans/Credit Arrangers (8%). Of all cross-border fraud complaints (104,402) in calendar year 2010, almost two thirds were from U.S. consumers complaining about other foreign companies and 14% were from U.S. consumers complaining about Canadian companies. U.S. consumers reported fraud losses of over \$31 million against companies located in Canada, and losses of over \$184 million against companies located in other foreign countries in calendar year 2010. A fraud complaint is “cross-border” if: (1) a U.S. consumer complained about a company located in Canada or another foreign country; (2) a Canadian consumer complained about a company located in the U.S. or another foreign country; or (3) a consumer from a foreign country (e.g. the UK or Australia) complained about a company located in the U.S. or Canada. Company location is based on addresses reported by the complaining consumers and, thus, likely understates the number of cross-border complaints. In some instances the company address provided by the consumer actually may be a mail drop in the consumer’s country rather than the physical location of the company in a foreign country, and in other cases, the consumer does not know whether the location is in the U.S. or abroad.

Complaints from U.S. Consumers Against Companies Located in Foreign Countries¹

Calendar Years 2001 through 2010



¹Number of cross-border fraud complaints from U.S. consumers against companies located in Canada or other foreign countries by calendar year.

²Complaint counts from CY-2001 to CY-2005 represent historic figures as per the Consumer Sentinel Network's five-year data retention policy.

From a crime-recording viewpoint, it might be sensible to develop an international protocol about where the crime should be recorded in such a case. This is even more important where cybercrimes are committed against individuals globally from a jurisdiction – if identified at all – that is hard to reach by mutual legal assistance. If the scams are recorded separately where the victims live, this might inhibit the collation of collective data identifying the origins of the scam and thus reduce prevention possibilities, including cross-border enforcement interventions.

Furthermore, we are used to working out metrics for measuring harm. Traditionally we have merely counted crimes. But the burgeoning interest in the impact of crime has led to work on the cost of crime (Cohen, 2005). To date, only applied to substance misuse, household crimes, street crimes & those illicitly sexually exploited women who have escaped – from which highly questionable extrapolations are made about harm to trafficked/smuggled

women generally. Hitherto, this has been calculated only in a national context, in terms of:

- Productivity losses
- Medical and mental health care
- Direct property losses
- Indirect costs of victimization

There are some paradoxes. Using court settlements or negotiated ones in the shadow of the court, injuries to wealthy may be valued higher if not 'normalised' against income or wealth. Can it be applied to fraud and to e-crimes?

- In UK, 2005, the estimated cost of fraud identified was a minimum of £12.9 billion, plus income tax fraud + share of EU fraud (Levi et al., 2007; Levi and Burrows, 2008)
- By 2011, the cost of frauds identified rose to £38 bn. (National Fraud Authority, 2011)

There has been a rise in the number of corporate victimisation surveys conducted by international accounting and consulting firms. However although (for sound marketing reasons), they break up their global totals on a country basis, presumably based on where the company is headquartered, this does not resolve the question of where the crimes occurred, since any of these companies can operate in a number of jurisdictions and occur losses there. Partly because individuals are not targets for expensive consultancy services, there are very few studies of fraud/e-crime against individuals, except for those based around the international victimisation surveys, that ask only about consumer fraud and local corruption (van Dijk, 2007a, 2007b, 2008; van Dijk et al., 2008).

One can express data about the risks and impact of fraud on business activities in a number of different ways:

1. Absolute numbers of incidents, e.g. stolen credit and debit cards (not always reliably differentiated from lost ones by victims or in issuer or police records – the fewer defined as stolen rather than lost, the lower the recorded crime rate);
2. Absolute fraud loss figures (with a grey area of bad debt that may in fact be fraud by debtors such as cardholders but is seldom given out when 'fraud statistics' are presented);
3. Fraud to turnover (in some respects a better measure because it takes into account rising expenditure patterns) or fraud per financial instrument, e.g. per credit, charge or debit card; per internet transaction by number and/or value;

4. Fraud to profit (this replenishability factor – if better data were available - would measure how much business has to be done to make up for the losses); and
5. Fear of fraud (e.g. as experienced by cardholders, potential cardholders, retailers and bankers), which can have a chilling effect on commercial activity such as e-commerce or, conversely, can lead to inappropriate decisions by those who have insufficient awareness of the true risks they are taking or creating.

Each of these methods has its advantages and disadvantages, and organisations may wish to deploy them tactically to suit their interests. In media terms (as with crime statistics generally), the preference may be for bald data that can be used for simple headlines. The ratio per transaction or per turnover may be as unattractive to the tabloid press or television as would be the number of offences per male or female juvenile in vandalism, or homicides per released violent offender in other criminological spheres. For *individual* victims, on the other hand, there is less variation, though one could still analyse the different impact in terms of whether the funds were compensated by some government or private scheme - normally restricted to financial services investments up to a moderate limit, though even these do not exist in many parts of Central or Eastern Europe, or Third World countries; how much work it would take to make up the losses (expressed, say, in days); or indeed, in the case of retired/involuntarily unemployed persons, whether they could recover the losses at all; the emotional and health impact on victims; or indeed the general effects on consumer/investor confidence.

There are broader questions about international statistics. How do we compare financial crime harms with harms from other crimes and from ‘natural disasters’ and from the global financial crisis, in connection with which almost no senior banker and certainly no regulator has been prosecuted anywhere in the world? This is despite the transnational impact of US mortgage origination fraud.

The Future: Harm, risk and counting crimes

There are three dimensions of harm and risk:

1. Economic costs (present/future) & impact upon victims and upon third parties who fear being defrauded
What difference does it make to us if victims are non-citizens?
2. What the media represent the risks to be – this is a key driver of political reactions to crime.
3. Continuing risks arising from the kind of people who are committing financial crimes. These consist of
 - ‘Organised criminals’ with no stake in social respectability to constrain them and growing access to corruptible / pressurisable staff, especially in recession

- what they spend their money on (terrorism, political corruption, business) - though mostly on party-going

So in order to develop better measures for transnational crimes, we need to combine victim surveys with offender location studies, and how do we do that for offences with a low rate of clear-ups? We need 'sentinel' trend data, not precise numbers, which anyway are bound to be imprecise: the more precise that numbers are, the more suspicious we should be of them.

Gradually, via the impact of routine activities theory, criminologists have begun to see 'the causes of crime' as including an analysis of how crime is organized socially and technically. This fuses the neglected traditions of gang/subculture theory with situational opportunity theory, especially in its improved recent formulations in showing how the forms of crime are shaped by the motivational and cultural environments in which they occur, which facilitate and/or inhibit the development of transnational financial crime, whether or not accompanied by offender versatility. To understand how this is possible, we need to examine crime as a business process, requiring funding, technical skills, distribution mechanisms, and money-handling facilities. The larger the criminal business, the more likely all these elements will be required. On the other hand, those persons who commit acts defined as 'not really criminal' by their reference groups and by policing agencies, and where technological means of detection are not very powerful, are enabled thereby to commit offences with relative impunity. One method of improving one's chances of remaining unprosecuted and with assets available is to use the 'offshore secrecy' paraphernalia of modern commerce, though anti-money laundering legislation and evaluation has made the world shrink in terms of opportunities for concealment *once a well-resourced investigation happens*. Even the attempt to combat 'harmful tax competition' and control the more abusive aspects of offshore finance centers/tax havens has had some successes, and in 2012, the Financial Action Task Force has included tax evasion as a predicate offence in its new set of guidance. This could be characterized as risk-managing financial globalization, but by the nature of many frauds, they will not be picked up by the system until they become substantial: the logical result may be that there may be the same number of frauds, but the larger ones will be smaller than they would otherwise be. It is the *systemic* protection that is the principal objective.

There are barriers of distrust, of language and culture, and of modesty of ambitions and skills, that inhibit the transnationalization of all forms of crime, including fraud and corruption, and one must question any assumption that transnational crime will somehow replace ordinary, local crime. But when one can set up an Internet site from the privacy of one's home, get registered to process credit card transactions for one's pornography site, and then send modest extra invoices for non-existent transactions to thousands of people who *have* purchased from one's site, the possibilities for transnational fraud are readily visible and fairly open to all except the financial *lumpenproletariat*.

(Even they can obtain coerced assistance from those fraudsters unlucky enough to be sent to jail.)

Transnational functions are an inherent part of many financial fraud schemes, to lend plausibility and evade authorization mechanisms, and to frustrate civil and criminal investigations and asset recovery. However, in the financing and laundering aspects – as well as the physical transportation of legal and illegal goods and services – the transnational component applies to many other crimes as well. In the final analysis, the globalization offered to the international corporate world creates possibilities for illegal financial entrepreneurs that are both technically and economically difficult to police, even absent corruption on the part of political elites and law enforcement agencies. We are only at the beginning of how to measure these issues transnationally, or even nationally.

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RUSSIAN POLICE REFORM AND NEW CHALLENGES IN THE FIGHT AGAINST CRIME

Vasily P. Ignatov

Lieutenant General of Police (retired)
Assistant of International Affairs of the Moscow University
of the Ministry of Interior of the Russian Federation

and

Dmitry D. Shalyagin, Ph.D

Colonel of Police
Head of the Human Rights & International Law Chair
Moscow University of the Ministry of Interior of the Russian Federation

The significant geopolitical, economic and social changes that have taken place in Russia at the end of the twentieth century have brought about change in respect of combating crime. Reforming the system of government, which directly touched the bodies of internal affairs, had a significant impact on the quality of their judicial functions.

The Federal Law "On Police" has been prepared in accordance with the Presidential Decree dated 18 February 2010 № 208, "On some measures to reform the Ministry of Internal Affairs of the Russian Federation." On the 1 March 2011, a new Federal Law "On Police" was introduced.

The Law has brought together the most important proposals for the reform of the Russian Ministry of Interior, which were received from professional lawyers, expert and scientific communities, political parties, public associations and citizens.

The provisions of the Law takes into account the principles, norms and standards of international legal acts on the police.

The law enforcement functions are assigned to the police. The existing major activities of the militia, which are similar to the police activities carried out in most other countries, are retained. However, some activities which are implemented by the militia have been changed in order to reflect current conditions. The Law defines the following professional key areas of policing:

- 1) Prevention of crimes and administrative offences;
- 2) Identification, suppression and detection of crime and the inquiry in criminal cases;
- 3) Search for persons and stolen property;

- 4) Elimination of administrative violations and the investigation of administrative cases;
- 5) Protection of the public order;
- 6) Traffic safety;
- 7) Control of trafficking in arms;
- 8) Control of private detective and private security activity;
- 9) Protection of property and facilities under contracts;
- 10) State protection of participants in criminal proceedings, judges, law enforcement officials and regulatory agencies;
- 11) Assistance to citizens and officials in the protection of their legitimate rights and interests.

The Law specifies that the main principles of policing are:

- respect of human rights and freedoms;
- the rule of law;
- impartiality, openness and publicity;
- insurance of public confidence and support of citizens;
- police cooperation and collaboration with government agencies, local governments, associations, organizations and individuals;
- use of science, modern technology and information systems.

The openness and transparency of the police will help to restore confidence among citizens. In accordance with the laws of the Russian Federation, citizens and organizations are eligible to receive from the police information that directly affects their rights.

The police should inform the media about their activities. At the request of editors, they are to provide the necessary information, conduct press conferences, disseminate information and statistical data, and interact in other ways.

Public opinion should play the determining role in assessing the effectiveness of the police activities. In this regard, the responsibility of the Russian Ministry of Interior is the constant examination of public opinion and the monitoring of interaction between the police and civil society.

The chapter in the Law on "**Principles of Policing**" contains the obligation for the police officer, when implementing measures towards the person that restrict his or her the rights and freedoms, to explain the reason and grounds for the application of such measures, as well as the accompanying rights and obligations of a citizen. This includes clarification for the detainee of his or her right to legal assistance, the right to an interpreter, the right to notify relatives about the detention, and the right to refuse to give explanations. A substantial

procedural novelty is the right of the detained person to one phone call in order to notify close relatives or friends about his or her detention and the location.

The chapter on "**The Use of Some Measures of State Enforcement by the Police**" contains rules governing the exercise by the police of such measures of state coercion as the detention of citizens; entry or penetration into residential and other premises on land; the cordoning off or blocking of terrain, residents, buildings and other objects; and the formation and maintenance of data banks on citizens.

In accordance with the provisions of the Declaration on the Police, adopted in 1979 by the Parliamentary Assembly of the Council of Europe, and the recommendations of the European Court of Human Rights the Law, the chapter incorporates the rule that detainees should be kept in designated areas and they should be protected in conditions that preclude any threat to their lives and health.

To enhance the security of human rights and freedoms and in accordance with the European Code of Police Ethics, the Law contains provisions on the maintenance of a register of persons who are subject to detention.

The provisions on the **use of physical force, special means and firearms by the police** contained in the Law are based on the Code of Conduct for Law Enforcement Officials adopted by the UN General Assembly.

The Law defines the limits, conditions and procedures for the use of physical force, special means and firearms, as well as features of their applications, especially the use of special weapons and tactics by a police unit and in crowded conditions, and the grounds and conditions for the use of limited damage weapons. In addition, the Law guarantees the personal security of the armed police officer.

Within the framework of the fight against corruption, the demands on the personal and professional skills of police officers have increased. Every Russian citizen entering the police service must undergo psycho-physiological examination, testing for alcohol, drug and other toxic addiction, as well as a test to check his or her moral and psychological qualities.

Corruption is an anti-social phenomenon, immoral by nature, where the promotion of the personal interests of some (those who take and those who give bribes) infringes against the material, economic, financial and social interests of the majority of the population. Corruption erodes public morality, devalues the content of labour, and fosters greed, avidity, ignorance of the law and violence.

The President of the Russian Federation, Dmitry Medvedev, has quite accurately stated that corruption as one of the most significant barriers to economic growth and development. This is, of course, an international problem, a problem that exists in every country. There are no states in the world where this phenomenon is absent.

Speaking on the issue of anti-corruption, The Prime Minister of the Russian Federation, Vladimir Putin said: "In the fight against acquisitive crimes, we should not get involved in quantitative indicators at the expense of minor criminal cases. It is important to focus efforts on a thorough and comprehensive investigation of crimes that represent a direct threat to Russian security. I want to emphasize that in solving such problems, the police should not allow themselves to be drawn into corporate conflicts, disputes in businesses, and certainly should not introduce itself as one of the party in these conflicts. In addition, the firm principle should be the policy of purification against bribe-takers, people who have turned the service into a variety of profitable business."

During the reform of the Ministry of Interior, we observed the active cleansing of the police ranks from the former militia officers who were prone to corrupt practices. As a result of the reform the total number of employees of the Ministry of Internal Affairs was reduced to 22%, in counterbalance to which wages in 2012 should double.

It seems that this is not the end of the reform. The assumption is the continuation of reforms with further improvements in police performance. The main objective is not only to increase the effectiveness of law enforcement, but also to restore the confidence of the society.

SESSION 3: INFORMATION GATHERING

DATA COLLECTION ON [NEW] FORMS AND MANIFESTATIONS OF CRIME

Steven Malby¹
United Nations Office on Drugs and Crime

The terms “emerging crimes”, “new forms and manifestations” of crime and “complex crimes” are increasingly found in criminological literature and discourse on organized crime. In a high-level debate during the 2010 session of the Conference of the Parties to the United Nations Convention on Transnational Organized Crime (UNTOC), speakers underlined the importance of developing adequate legislative and operational responses in order to prevent and combat emerging and re-emerging forms of crime. Illicit activities mentioned during the debate included cybercrime, trafficking in cultural property, piracy, trafficking in natural resources, trafficking in counterfeit medicines and trafficking in organs.² Whilst there may be broad agreement on some specific crime types that fall into this rather diffuse crime category, the identification of a clear definition of an emerging, new or complex crime remains a challenging undertaking. Such crimes may perhaps be defined (under the “complex” label) as crimes that are “composed of more than one single action”. However, even certain common crimes often have multiple elements, such as the crime of burglary that typically requires unauthorized entry (whether forced or unforced) into a structure with intent to commit another offence. A further distinction may rely on the fact that many new forms and manifestations of crime require a certain degree of logistics and organization and hence may often be committed by groups of persons meeting the definition of an organized criminal group contained in UNTOC. However, some crimes typically included in the “emerging crimes” category, in particular cybercrime, may be committed by individuals acting alone or by loose associations of persons that do not meet the “durability” requirements of the Convention. Still further definitions highlight the “transnational” element of such crimes and, whilst this can be a common attribute of such crimes, it is by no means definitive. As recognized by the Conference of the Parties, even the label

¹ Drug Control and Crime Prevention Officer, United Nations Office on Drugs and Crime (UNODC). The views expressed are those of the author and do not necessarily reflect the views or policies of the United Nations or UNODC.

² United Nations. Report of the Conference of the States Parties to the United Nations Convention against Transnational Organized Crime at its fifth session, held in Vienna from 18 to 22 October 2010. 2 December 2010. UN Doc. CTOC/COP/2010/17

“new” may not be so applicable in the case of *re*-emerging crimes, such as ocean piracy.

As a result, even before turning to the challenges of data collection on non-traditional crimes, one is faced with a significant definitional problem. For the purposes of this paper, it may be sufficient to speak of data collection on “non-volume crimes”, that is, data collection on the types of crime that are *not* commonly encountered by the public at large and reported to the police as such. This therefore excludes crimes such as assault, burglary, robbery, theft, and rape. Nonetheless, even an appeal to the negative can encounter difficulties, since the public at large may still be direct victims, and in large numbers, of “new” crimes such as cybercrime, for example in the case of online credit card fraud. This leaves a rather unsatisfactory definition of the scope of this paper, but hopefully the above discussion at least traces some broad outlines of the type of events to which the following methodological discussion applies. Distinctions between the terms “emerging”, “complex” and “new” crimes are not attributed with particular significance in this paper and may all be taken as broad terms for the approximate phenomenon at hand.

At the international and regional level, the new crime types identified by the UNTOC Conference of the Parties do benefit from some definitional work. Trafficking in persons and smuggling of migrants, for example, are defined by their relevant protocols to UNTOC, a number of specific acts that constitute corruption are defined by the United Nations Convention against Corruption (UNCAC), acts constituting cybercrime are defined in a number of cross-national instruments, including the Council of Europe Convention on Cybercrime, illicit traffic in narcotic drugs is defined by the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, and European Union legislation defines a number of complex, organized or cross-border crime types, including money laundering, illicit trafficking in cultural property, and a number of environmental crimes. As such, even if the group of crimes falling into the category under discussion is not precisely known, the basic factual and legal elements of at least *some* crimes in this group do show common core agreement.

The next challenge is the identification of exactly *what* we want to know about these crimes. Some ten years ago, the United Nations Office on Drugs and Crime (UNODC) released a pilot survey of forty selected organized criminal groups in sixteen countries.³ The survey asked key informants who had studied these particular groups about the structure, size, activities, transborder operations, identity, use of violence, corruption, political influence, penetration into the legitimate economy, and co-operation with other organized criminal groups. The idea behind the study was to take steps towards a comprehensive system of classification for transnational organized criminal groups and the level of harm that they cause. The report noted that a layered approach of

³ UNODC. Results of a pilot survey of forty selected organized criminal groups in sixteen countries. September 2002. Available at: http://www.unodc.org/pdf/crime/publications/Pilot_survey.pdf

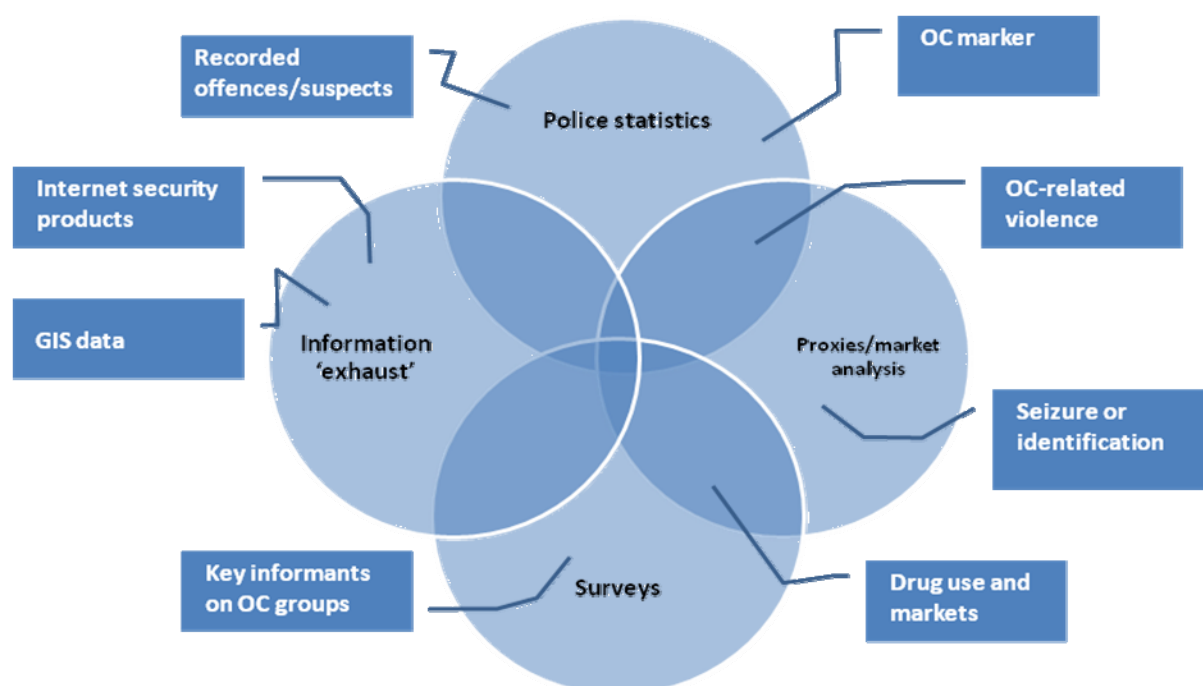
“groups”, “clusters”, and “markets” was important to provide a comprehensive framework in which to collect information and assess trends. The report recommended starting with the lowest “building blocks” of the system – criminal groups. Eight years later, in 2010, the UNODC Transnational Organized Crime Threat Assessment concluded that “Today, organized crime seems to be less a matter of a group of individuals who are involved in a range of illicit activities, and more a matter of a group of illicit activities in which some individuals and groups are presently involved.”⁴ The different focus of these two reports – “groups” and “markets” – well highlights the range of possible approaches to the measurement of organized crime. Whilst the identification and characterisation of the individuals and groups behind organized and emerging crime types is important, it does appear true that organized crime today can have a very fluid structure. Drug trafficking organizations in Mexico, for example, frequently show shifting alliances, splinters, and engagement in a range of different illicit activities as individuals are arrested and incarcerated, as power grows and wanes, and as illicit markets, incentives, and risks develop and subside. Overall, however, it may be fair to assume that we would like to know *who* (and *how many*) are involved in *what* (and *how much*). When crime generates proceeds in small amounts, as is usually the case in common crimes, the offender will typically spend a significant proportion of this income on living costs and minor luxuries. In contrast, offenders whose proceeds of crime accrue in large amounts need to “launder” a large proportion of their income in order to disguise its illicit origin. Such is the case with many new and emerging types of crime, including piracy that may generate payment of ransom sums of the order of millions of dollars, or large-scale organized cybercrime that benefits from thousands or hundreds of thousands of fraud or scam victims. Understanding the size, nature and direction of illicit financial flows can represent important information concerning the nature and extent of the underlying illicit acts. Finally, we may wish to measure and understand the *harm* caused by new forms and manifestations of crimes. Such harms may fall into three categories: direct victims of violence associated with crimes, direct loss to victims from crimes, and indirect loss to victims. Indicators capturing (non-conflict) violent death or injury to individuals are able to provide information on the first of these, although of course the challenge is to distinguish the sub-category of deaths or injuries that are attributable to the crime types of interest. *Indirect* harm is frequently even less straightforward to identify and quantify, including harms such as the socio-economic costs of crime prevention, governance loss, drug abuse and illegal migration. One of the main dangers of substantial financial flows related to transnational organized crime, for example, is the ability to foster the economic viability of the underlying criminal activity, thereby contributing to its spread and expansion. Illicit financial flows also have

⁴ UNODC. The Globalization of Crime. A Transnational Organized Crime Threat Assessment. 2010. Available at: http://www.unodc.org/documents/data-and-analysis/tocta/TOCTA_Report_2010_low_res.pdf

negative socio-economic implications in their own right. Criminal funds prioritise concealment over rates of return, resulting in negative impacts on economic growth by diverting resources to less productive activities. Distortions in prices, consumption patterns and imports have negative effects on economic and consumers and resultant corruption drives out legitimate business, introducing a parasitic, anti-competitive market approach.⁵

Having identified the broad landscape of crimes to be “measured”, and outlined what may need to be known about such crimes, it is next necessary to examine what *information sources* may be used in practice. Four broad areas are identified: i) police statistics, ii) proxies or market analysis, iii) survey-based information, and iv) information “exhaust”. These are depicted in figure 1.

Figure 1: What could be measured?



As many forms of new, emerging, or organized forms of crime do not frequently come to the attention of the police, this traditional source of crime statistics is often considered of limited use for the category of crimes under consideration. In addition to the challenge of underreporting or under-identification and a large “dark figure” of such crimes, it may often be difficult in police statistics to link acts that come to the attention of the police with the phenomenon of new and emerging crimes. Whilst some complex crime may be

⁵ UNODC. Estimating illicit financial flows resulting from drug trafficking and other transnational organized crimes. Research Report. October 2011. Available at: http://www.unodc.org/documents/data-and-analysis/Studies/Illicit_financial_flows_2011_web.pdf

explicitly identified as such in police statistics – such as instances of human trafficking or smuggling of migrants - these cases are often numerically small compared to “volume” crime acts, such as murder which nonetheless may be closely associated with the activity of, for example, organized criminal groups. In this respect, the possibility of a “marker” for organized crime involvement for use in police records is commonly considered. The European law enforcement agency (EUROPOL), for example, specifies that for any crime or criminal group to be classified as “organized crime” at least six of the following characteristics must be present, four of which must be those numbered (1), (3), (5) and (11): (1) collaboration of more than two people; (2) each with his or her own appointed tasks; (3) for a prolonged or indefinite period of time; (4) using some form of discipline and control; (5) suspected of the commission of serious criminal offences; (6) operating on an international level; (7) using violence or other means suitable for intimidation; (8) using commercial or businesslike structures; (9) engaged in money laundering; (10) exerting influence on politics, the media, public administration, judicial authorities or the economy; and (11) determined by the pursuit of profit and/or power.⁶ Nonetheless, indicators such as the rate of homicide offences considered linked to organized crime is generally not considered a strong indicator of underlying organized crime levels due to differences in the stability, instability, and degree of competition between organized criminal groups and markets, as well as their differing propensities to use violence.

Following a “market” based approach to the measurement of organized and complex crime, the use of information based on seizure or identification of illicit goods and movements allows inferences to be made about market size and direction. Whilst methodologies for extrapolating total market *size* from seizures (which represent a (non-statistical) “sample” from the market) may contain a greater or lesser degree of precision depending upon other known market information, *trends* in markets may perhaps be more reliably estimated from such information. Although seizure information (such as seizures of illicit drugs in transit) represents a combined effect of law enforcement activity and the underlying market, if law enforcement activity is reasonably constant, it is possible that market changes over time can be detected. As demonstrated later in this paper, seizure information clearly shows, for example, shifts in cocaine transit routes between the Caribbean and Central America in the last ten years. Using a sample-based methodology, statistical surveys may further allow inferences to be made about phenomena as a whole. Interviews with key informants or general population-based interviews can be used, for instance, to obtain estimates of the size of drug consumption markets, or, as discussed earlier, of the structure and *modus operandi* of a sample of organized criminal groups.

Finally, the concept of information “exhaust” represents a novel idea concerning the extraction of “patterns” in information that is routinely

⁶ Criteria specified by EUROPOL Doc. 6204/2/97 ENFOPOL 35 Rev 2.

generated but may change in response to changes in crime events. In the area of cybercrime, for example, a large proportion of potential victims of cybercrime have security devices, such as firewalls or antivirus software, installed on their computers. The aggregate automated response data generated by all such installed software can be considered analogous in the area of “volume” crime to, for example, the aggregate data from all house security systems, such as burglar alarms. Information generated by geographic information systems, such as satellite imagery, may only cover a proportion of the potential population of victims, but can represent a significant sample from which inferences may be made.

One key to measuring new forms and manifestations of crime is likely to be found in the effective *combination* of these various data sources – police statistics, proxies/market analysis, surveys, and information exhaust. A number of precedents exist in this respect. At the international level, the UNODC threat assessment approach includes use of a range of data sources to identify and define illicit market flows in terms of routes (source, destination, vector), dimensions (annual market volume and value), perpetrators (groups involved), and threat (trend and effects). Other UNODC work, including the “Global Afghan Opium Trade Threat Assessment” (2011), a research report on “Estimating Illicit Financial Flows Resulting from Drug Trafficking and other Transnational Organized Crimes” (2011), the “Global Study on Homicide” (2011), as well as the “Global Report on Trafficking in Persons” (2009) make use of a range of information include market-based approaches based on seizure and consumption statistics, modelling based on estimates of market size, profit and the proportion of profit laundered, in addition to law enforcement, criminal justice and public health data.⁷ At the regional level, research such as the European Union-financed “Improving Knowledge on Organized Crime” project combined a number of measures to develop an approach aimed at estimating the probability that an organized crime event may occur, based on *inter alia* indicators related to characteristics of known criminal groups and law enforcement risks to such groups.⁸ Such work demonstrates that whilst methodologies for combining data sources are still under development, a number of first steps have been taken towards the quantification of the nature and extent of new and complex crimes.

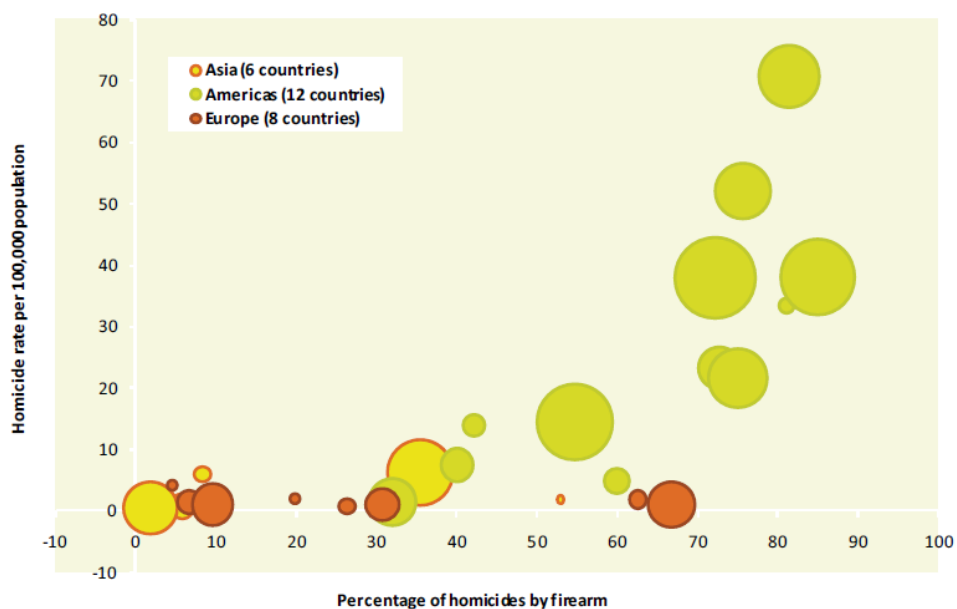
The remainder of this article presents a number of brief examples of work at the international level that well illustrate recent attempts to collect and interpret data from sources such as those depicted in Figure 1. All are drawn from completed or ongoing work by UNODC. The first example concerns the

⁷ Reports available at: <http://www.unodc.org/unodc/en/data-and-analysis/TOC-threat-assessments.html> and <http://www.unodc.org/unodc/en/data-and-analysis/statistics/publications.html>

⁸ See for example, Savona, E.U., 2006. Measuring organized crime: an international perspective, A methodology for measuring the probability that a given organized crime event will occur and a methodology for measuring the harm caused by organized crime. *Forum on Crime and Society*, 5(1), 21-88.

investigation of links between intentional homicide, the use of firearms in homicide, and the proportion of homicides linked to gangs or organized criminal groups. Data presented in the 2011 UNODC Global Study on Homicide⁹ suggest a greater involvement of gangs and organized crime in homicides in the Americas than in other regions of the world. As shown in Figure 2 below, the match between a high proportion of homicides by firearm in the Americas and a high proportion of gang/organized crime-related homicides suggests that in those countries where there is a higher homicide rate, the percentage of firearm homicides is also higher and is often associated with higher shares of homicides committed by organized crime or gangs, as reported by police data

Figure 2: Homicide rate, percentage of homicides by firearm and percentage of gang/organized crime-related homicides, selected countries (2010 or latest available year)



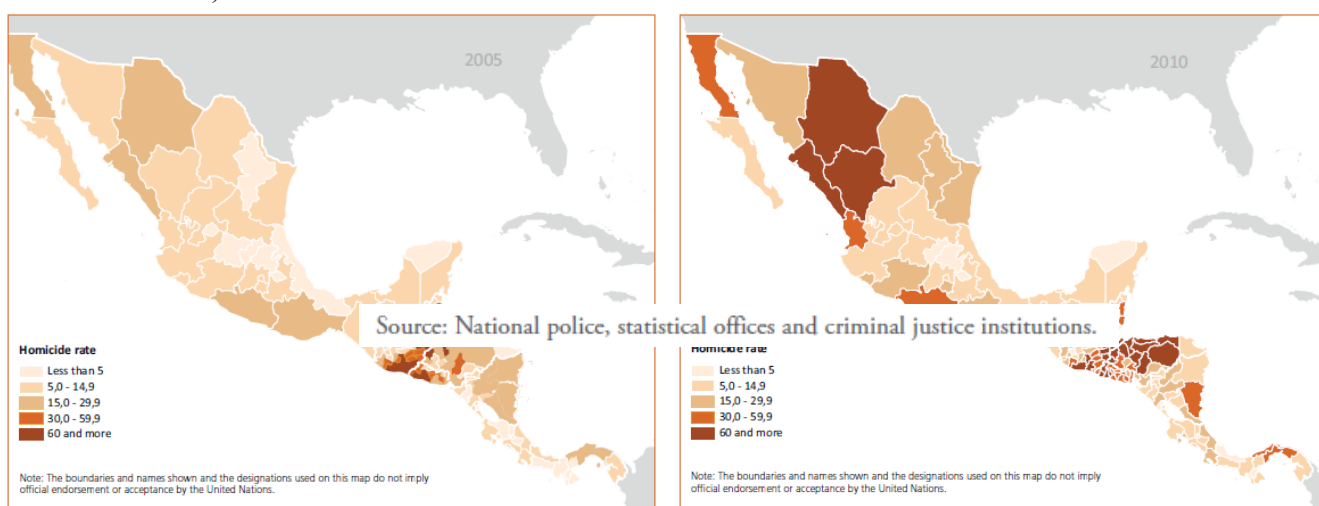
Source: UNODC Homicide Statistics (2011) and national police data. Bubble size is proportional to the percentage of gang/organized crime-related homicides.

As elsewhere, homicide trends in the Americas are influenced by numerous factors. A 2007 UNODC study pointed out that many countries in Central America and the Caribbean, for example, were vulnerable to crime and violence for a number of reasons, including their legacy of armed conflicts and violence, the easy availability of guns, chaotic urbanization, high income inequality, a high proportion of youth, local gang structures, as well as

⁹ Figures 2, 3 and 4 and the accompanying narrative are based on UNODC, 2011, Global Study on Homicide. Ch.3. Available at: http://www.unodc.org/documents/data-and-analysis/statistics/Homicide/Globa_study_on_homicide_2011_web.pdf

organized crime and drug trafficking. Nonetheless, in light of the role played by gangs and organized criminal groups in homicides in selected areas of the Americas, comparison of homicide patterns with other indicators, such as those related to changes in the levels of organized crime, drug trafficking or gang activity may prove instructive. Figure 3 shows that countries in Central America and the Caribbean have seen significant changes in homicide rates in recent years. In Central America, homicide rates have increased in five out of eight countries in the last five years, with Honduras in particular seeing homicide rates more than double between 2005 and 2010, while Mexico saw an increase of 65 per cent in the same period.

Figure 3: Homicide rates at the subnational level, Central America (2005 and 2010)

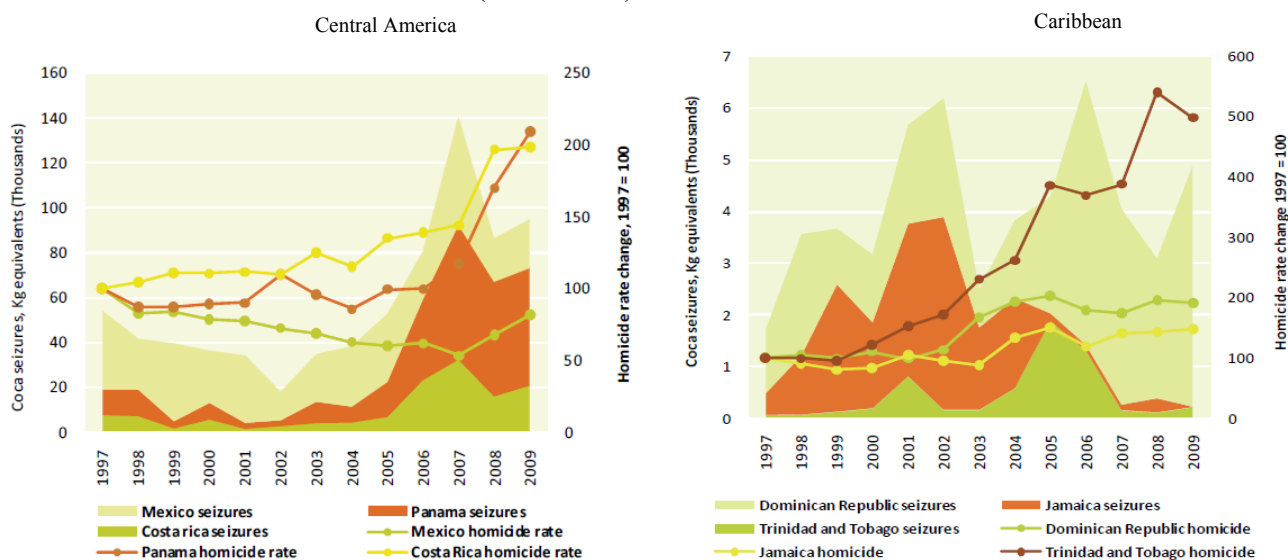


A major cause of violent crime in Central America is the region’s strategic location between the lucrative cocaine consumer market in Northern America (although the European market is increasingly important) and the main areas of coca cultivation in Colombia, Peru and the Plurinational State of Bolivia.¹⁰ While all Central American and Caribbean countries have been affected by drug trafficking at varying points at different points in time, the effects of this trade on violent crime have been far from uniform or linear. Organized criminal groups involved in drug trafficking do not necessarily make themselves visible through violent and lethal crime. Rather, violence often escalates when an existing status quo is broken, as a result, for example, of changes in the structure of the drug market, the emergence of new protagonists or the “threat” posed by police repression. Comparison of national homicide rates in this region with cocaine seizure trends suggests that at least part of the pattern of homicide trends is attributable to changes in cocaine trafficking flows and increased competition and conflict relating to drug markets. Figure 4

¹⁰ UNODC, 2011. World Drug Report.

shows, for example, that higher levels of violence and homicide are not only associated with *increases* in drug trafficking flows, but also with *decreases* in drug trafficking flows that lead to turbulence in established markets, more competition between criminal groups and more killings. As such, it is likely that *changes* in drug markets may drive lethal violence, not overall levels of trafficking flows *per se*. In Central America, for example, cocaine seizures by law enforcement authorities rose almost constantly until 2007 in Mexico before dropping abruptly, while they increased and remained at an elevated level in other countries of the region, such as Panama and Costa Rica, indicating the importance of Central America over the Caribbean as a preferred drug-trafficking route from South to North America. At the same time, homicide rates in these countries doubled from 1997 levels. In the Caribbean, whilst drug seizures decreased by 71 per cent between 1997 and 2009, diminishing drug trafficking flows may be traced to increases in lethal violence, caused in part as increased competition between drug trafficking organizations led to fighting for established shares of a diminished market.

Figure 4: Cocaine seizures and homicide rates, selected countries in Central America and the Caribbean (1997-2009)



Source: UNODC Homicide Statistics (2011) and ARQ. Area is proportional to cocaine seizures in kg equivalents. Lines represent percentage change in homicide rate based on a starting point of 100 for 1997.

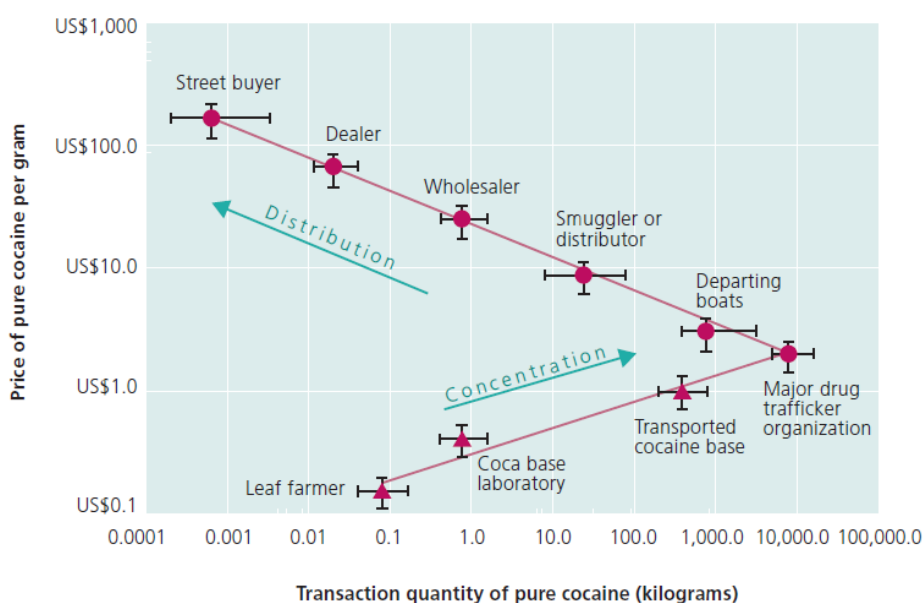
Source: UNODC Homicide Statistics (2011) and ARQ. Area is proportional to cocaine seizures in kg equivalents. Lines represent percentage change in homicide rate based on a starting point of 100 for 1997.

In addition to the use of homicide and drug seizures as relevant indicators for drug trafficking flows and changes in markets, modelling of the illicit *financial flows* associated with the drug trade can provide further insights into the nature and extent of this crime type.¹¹ Such an approach uses a market-based analysis

¹¹ Figures 5 and 6 and the accompanying narrative are based on UNODC, 2011. Estimating illicit financial flows resulting from drug trafficking and other transnational organized crimes. Research Report. October 2011. Available at: http://www.unodc.org/documents/data-and-analysis/Studies/Illicit_financial_flows_2011_web.pdf

which recognizes that the supply of illicit drugs proceeds in stages. Wholesalers import drugs in bulk and sell in smaller quantities to their network of retailers for resale, in even smaller quantities, to consumers. As shown in Figure 5, with respect to the cocaine market, this market structure results in a characteristic “V”-shaped graph, linking the transaction quantity of pure cocaine (in kg) with the price of pure cocaine (per g). Price and concentration increase to the level of a major drug trafficking organization, followed by further price increase but concentration decrease, as bulk cocaine is diluted and further distributed. As a result, in order to answer questions such as “how much crime is there?”, “how much profit is there in crime?”, “what proportion of the profit is laundered?” and “where does it go for laundering?”, it is necessary to generate a model that breaks the sequence of events into a number of basic steps, including estimating the number of traffickers involved at the retail and wholesale levels in key countries, analysing the market structure, and applying the resultant market structure to the estimated number of traffickers at the retail and wholesale levels with a “cut-off” rate for reasonable “living expenses”, above which traffickers are able to launder money. The modelling of the geographic attractiveness of destination countries for money launderers is then based on factors such as the geographic distance from the source country, whether the countries share a common border or are linked by a key transport route, whether the countries share a principal language, and the overall proportion of exports that pass from one country to the other.

Figure 5: Price quantity relationship of the cocaine market in the late 1990s



Source: R. Anthony and A. Fries (Institute for Defense Analyses), “Empirical modelling of narcotics trafficking from farm gate to street”, *United Nations, Bulletin on Narcotics*, Nos 1 and 2, 2004, Illicit drug markets, pp. 1-48, New York 2006.

With respect to the global cocaine market, analysis of this type suggests that the gross profits out of cocaine sales (totalling 85 billion USD) were around 84 billion USD for the year 2009 (about 1 billion USD were production costs, mainly going to farmers in the Andean region). Most of the profits (retail and wholesale) were generated in North America (35 billion USD) and in West and Central Europe (26 billion USD). Whilst the local cocaine market in South America (including Central America and the Caribbean) are still rather small in dollar terms (around 3.5 billion USD), the gross profits of organized crime groups operating in South America, selling the drugs to the local markets as well as to overseas markets rises to some 18 billion USD. The calculations, derived from the estimates of the size of the market, the number of traffickers and the market structure (derived from individual drug seizures) suggests that, at the wholesale level, some 92% of global cocaine gross profits were available for laundering in 2009. The proportion fell to 46% at the retail level. In terms of destination countries for laundering, the “gravity” model for destination countries, suggests that out of more than 84 billion USD in gross profits and some 53 billion USD available for laundering, around 26 billion USD left the jurisdictions where the profits were generated.

The approach of combining data from multiple sources – including police statistics, seizure reports, market surveys, and quantitative modelling – in the case of illicit drug trafficking shows that a reasonable picture of the nature and extent of the market and its consequences, both in terms of human suffering and capacity to distort licit business activities and investments can be constructed from a macro perspective. In conjunction with local, intelligence-led information, such data is key to the inclusion of a cross-national understanding of the nature and extent of the phenomenon, and in turn, to the development of effective policy responses. The same need for a systematic approach, based on clearly defined data sources is no less pressing in other new and emerging crime areas. With respect to cybercrime, for example, data collection faces a number of significant challenges, including defining the extent of the term “cybercrime” in the first instance, as well as in understanding the nature and limitations of potential information sources, including police statistics and data generated by private sector organizations. In this respect, the United Nations General Assembly has recently mandated a “comprehensive study” on the problem of and response to cybercrime.¹² In discussing the scope of the study, Member states decided that it would be important for the study to include research on: the phenomenon of cybercrime; statistical information on cybercrime; the challenges of cybercrime; common approaches to cybercrime legislation; criminalization; procedural powers; international cooperation; electronic evidence; the roles and responsibilities of service providers and the private sector; crime prevention and criminal justice capabilities and other responses to cybercrime; the role of international

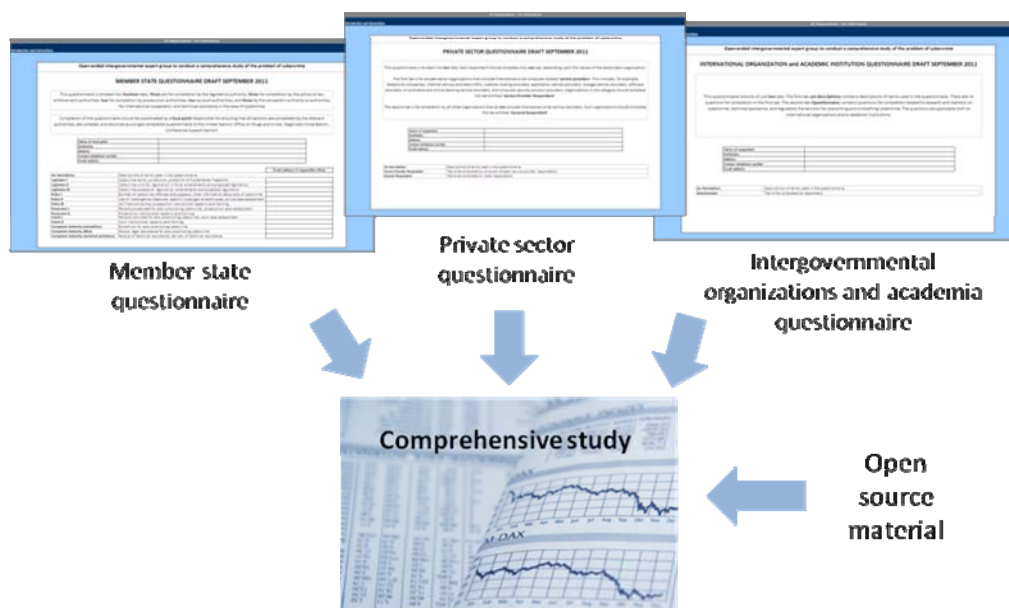
¹² See United Nations General Assembly Resolution 65/230. Para 9.

organizations; and technical assistance needs of Member states for the effective prevention and combating of cybercrime.¹³

Information gathering for the study recognizes that relevant data will be found in all of the governmental, intergovernmental, private sector and academic domains. Indeed, preventing and responding to cybercrime requires partnership between the private sector and national governments to a greater extent than probably almost any other crime type. Cybercrime acts involve the same mobile devices, computers, wireless or wired internet connections, cloud computing power, software and global connectivity as the vast majority of legal computer use, all of which are provided by private sector organizations. The private sector has also developed advanced technical solutions to prevent and respond to cybercrime, including computer firewalls, anti-virus software and identity-protection packages. At the same time, many national governments have created legislative approaches to cybercrime, criminalizing acts such as illegal access to a computer system or illegal interference with computer data. Both the effective prevention of cybercrime and the bringing of cybercrime perpetrators to justice require close cooperation between the private sector and government institutions. Computer service providers, for example, may receive requests from law enforcement for information on computer users or customers, such as IP address records. Such requests often raise issues including rights to privacy and also to freedom of expression and can involve law enforcement authorities from multiple countries. In light of this complexity, questionnaires for information gathering for the study have been developed that cover many of these areas, including a questionnaire for Member states that requests police, prosecution and court statistics on cybercrime acts and a questionnaire for private sector organizations that asks about cyber-trends and threats encountered. In order to address definitional challenges, the questionnaires *do not* “define” cybercrime as such, but rather include a list of “act descriptions” which provide common acts that may be considered cybercrime: a definitional approach not dissimilar to that of the United Nations Convention against Corruption. The act descriptions include *inter alia* acts such as illegal access to a computer system, illegal data interference or system interference, the production, distribution, or possession of computer misuse tools, breach of privacy or data protection measures, computer-related fraud or forgery, computer-related identity offences, computer, computer-related acts causing personal harm, computer-related production, distribution or possession of child pornography, and computer-related acts in support of terrorism offences. As depicted in Figure 6, it is the *combination* of results from questionnaires distributed to Member states, intergovernmental organizations, private sector organizations and academia that will be used in the preparation of the final study.

¹³ See United Nations. Expert Group on Cybercrime. Draft topics for consideration in a comprehensive study on the impact of and response to cybercrime. 20 December 2011. UN Doc. UNODC/CCPCJ/EG.4/2011/2.

Figure 6: Methodology for a comprehensive study on cybercrime



This paper commenced with discussion on those crimes that may fall within the broad group often referred to as “new forms and manifestations” of crime. It continued with consideration of possible data sources and methodologies for measurement, illustrated by examples including the illicit drug market in the Americas and the phenomenon of cybercrime. From a descriptive perspective, such new forms and manifestations of crime frequently involve the illicit movement of persons, goods, or other commodities, such as computer data, usually for monetary gain. The complexity and logistical challenges of these *modi operandi* mean that new forms and manifestations of crime may often be perpetrated by groups that meet the UNTOC definition of an “organized criminal group”.¹⁴ As such, information is commonly sought on *groups*, *markets*, and *financial* flows with a view to characterising who (and how many) are involved in what (and how much). Information of this type will usually need to be of a cross-national nature and it has been proposed that the *combination* of data sources offers a strong approach to measurement of the nature and extent of new and complex crimes. An understanding of all of groups, markets, and financial flows has implications for the response to new forms and manifestations of crime. An understanding, for example, of routes where migrant smugglers operate can result in targeted prevention measures, including those aimed at potential employers in identified destination countries. An understanding of organized criminal group structure, supply, demand, and financial flows associated with drug markets can direct demand and supply reduction efforts and law enforcement interventions. Similarly, an understanding of the extent of different acts constituting cybercrime can inform awareness-raising and prevention amongst potential victims. Overall, whilst

¹⁴ United Nations Convention Against Transnational Organized Crime, Art 2.

both definitions and measurement methodologies in this area are challenging, a systematic yet innovative approach that recognizes the comparative strengths of a range of data sources can begin to provide insights into the most hidden and yet, often, pervasive and destructive, forms of crime.

HOW TO IMPROVE THE INTERNATIONAL COMPARABILITY OF CRIME STATISTICS*

Jörg-Martin Jehle
University of Göttingen
Federal Republic of Germany

* This is the written version of my short oral statement given at the Helsinki International Seminar in honour of Kauko Aromaa. It is based on literature referred to in the footnote.

Problems of international comparisons

Since the beginnings of criminal statistics in the early 19th century, their use as instruments for measuring the amount of crime has been controversial. Nevertheless, they continue to be important up to the present day. These data are used to justify policies, to decide on measures of crime prevention and control and to make statements about the performance of the criminal justice system. Despite all the methodological doubts, these figures are still referred to in criminology, since there are no real alternatives to them. Even crime or victim surveys originally intended to replace recorded crime statistics can only complement them. Therefore it is important to face and attempt to solve all the methodological problems identified since the days of Quetelet and other pioneers in the field of criminal statistics.¹

If these observations are already true for the respective national situation to which criminal statistics are normally related, they are all the more valid when one tries to compare statistical figures of different countries. Criticisms that comparisons across jurisdictions are virtually impossible or at least misleading given the many differences in legal definitions, reporting and recording practices are as old as the earliest writings of Quetelet in comparative criminology. The difficulties in overcoming these problems may have led to the fact that international comparative data in criminal justice are relatively rare compared to other fields of public interest. But meanwhile signs are increasing that an upturn of international research in criminology is taking place. In view of an increasingly interlinked world and a Europe growing closer and closer together, not only economic and social comparisons are

¹ See Martin Killias, The European Criminal Justice Sourcebook Project, in: Jehle/Lewis: Improving Criminal Justice Statistics, Wiesbaden 1995, p. 203 ff.

needed, but it is also necessary to compare developments of crime figures as well as criminal policies and criminal justice systems.²

There are only a few international collections and evaluations of crime and justice statistics:³ those associated with international bodies, such as the worldwide UN Crime Trends Survey (by UNODC and HEUNI), EuroStat Data Collection (European Union), CEPEJ and SPACE of the Council of Europe on criminal justice and prison systems, and other collections based on the contribution of a small number of experts, especially the European Sourcebook.

How to overcome the pitfalls of international comparisons – The example of the ESB

The European Sourcebook of Crime and Criminal Justice Statistics⁴ (ESB) is a prominent example of such efforts to collect and evaluate national data on all levels of the criminal justice chain and to bring them together in a European comparison. In contrast to other data collections, it has established a common understanding of concepts, furthered comparability by using standard definitions for crime types and penal measures or at least improved the evaluation by demonstrating the deviations across jurisdictions.⁵ Evaluations have been made which focus on the question of how the given data can be used for criminological analyses especially of trends in crime and criminal justice, at the same time taking into account the methodological difficulties and the problems of lacking data.⁶

A crucial matter in internationally comparing crime and criminal justice data is the different legal concepts of offences defined by the national legislator. The European Sourcebook has tried to find a solution for improving the comparability of offence data by establishing standard definitions and breaking down the offence types in special items to be included or excluded. Thus for every offence type and for each country one can identify to which extent the

² Jörg-Martin Jehle, *Improving Criminal Justice Statistics – Needs and Prospects*, in: Jehle/Lewis 1995, p. 11 ff.

³ See Chris Lewis, *Crime and Justice Statistics Collected by International Agencies*, the European Journal on Criminal Policy and Research, Special Issue on European Statistics (2012, in print).

⁴ see Aebi et al, *European Sourcebook of Crime and Criminal Justice Statistics*, Den Haag 2010

⁵ see Jehle/Harrendorf, *Defining and Registering Criminal Offences and Measures*, Göttingen 2010

⁶ See the respective articles in the European Journal on Criminal Policy and Research, Special issue 2012 (in print)

national data could follow the standard definition. This can be demonstrated by the example of rape⁷ (see graph below):

RAPE: sexual intercourse with a person against her/his will (<i>per vaginam</i> or other)	
• Include the following:	Deviations:
• penetration other than vaginal (<i>e.g. buggery</i>)	ARM, CH, RUS, UA, SK, Scotland
• violent intra-marital sexual intercourse	MD, RUS, SK
• sexual intercourse without force with a helpless person	A, CH, GR, NL, SK, SLO, England & Wales, N. Ireland, Scotland
• sexual intercourse with force with a minor	CH, GR, SK, SLO
• attempts	P, SK
Exclude the following:	
• sexual intercourse with a minor without force	AL, B, F, LV, SW
• other forms of sexual assault	AL, I, LV, PL

The standard definition for rape was slightly modified after the first edition of the questionnaire, and then remained identical in the second and third editions of the European Sourcebook. For the fourth edition, the definition was updated after being evaluated and optimized by the AGIS project. It is specified as “sexual intercourse with a person against her/his will” and backed up with a list of items to include in or to exclude from the data.

Overall half of the countries reporting data to the ESB questionnaire could meet the ESB standard definition of rape at the police level. Nineteen countries followed the standard definition of rape proposed by the questionnaire.

⁷ See Jehle/Harrendorf 2010, p. 70

For the other countries, some items could not be included in or excluded from the data. Mainly, some countries could not include *sexual intercourse without force with a helpless person* in their rape data, and others had to exclude penetration other than vaginal. Only three countries excluded *violent intra-marital sexual intercourse*, but four countries could not exclude *sexual intercourse with force with a minor* from their data.

Generally, there are fewer deviations from standard definitions for conviction statistics than for police statistics.⁸

Of course, this definitional approach can only lead to a description of how far the national concepts of criminal offences can be compared. A further step in order to overcome the pitfalls of international comparisons should refer to the level of statistical recording. Firstly, on the police level not only is the violation of a legal provision recorded, but also additional criminological data e.g. concerning the object and the victim of the offence, are registered. If the additional data can be used, one can create identical or at least more similar statistical units despite differing national crime definitions.

To give an example: The ESB collects data on domestic burglary. The standard definition reads as follows: “Gaining access to private premises by use of force with the intent to steal goods”. This standard definition cannot be easily met by continental countries: Burglary is one special form within a broad concept of aggravated theft. Therefore the figures for aggravated theft can only be reduced to burglary if additional information on the target and the modus operandi is available. This is the case for police-recorded crime statistics in many European countries. But on the court level only the violation of a legal provision is recorded, and therefore no specific burglary data are found in continental countries.

Change of recording methods in an international uniform way

The ideal way of overcoming the pitfalls of international comparisons is the event-based approach suggested by Kauko Aromaa.⁹ This means that the legally defined crime is no longer taken as the statistical unit, but is replaced by a criminologically reasonable event particularly described by its elements and attributes. This approach has been adopted by the UNODC/UNECE Task Force, which has developed a comprehensive concept for the international

⁸ For details, see Jehle, Attrition and Conviction Rates of Sexual Offences in Europe, in: European Journal on Criminal Policy and Research, Special issue 2012 (in print)

⁹ For details, see Kauko Aromaa in this volume

classification of crimes and reported this to the Conference of European Statisticians.¹⁰

The starting point is an act/event-based classification. Each action/event is broken down into its constituents/elements/attributes:

Act: target (e.g. person/object), seriousness (e.g. damage), modus operandi (e.g. use of force), degree of completion (e.g. attempt)

Perpetrator: age, sex, intent (e.g. negligence), co-responsibility (e.g. accessory, accomplice)

Victim: age, sex

Such a breakdown by elements and attributes is promising, as is clearly shown by the examples of assault leading to death and burglary.

But of course the implementation of such an approach will mean hard work. The evaluation of the Task Force indicates that the development of an international crime classification system is challenging in light of significant differences between existing national crime classification systems. The eventual development of a full international crime classification should be carefully piloted using a limited number of crimes in the first instance. Substantial work would be required to either ‘parallel-code’ recorded crime events using an international classification, or to ‘cross-code’ from existing national classifications to an international classification. In order to ensure that lessons-learned are integrated into this process, any international crime classification should be developed in a consultative manner and implemented progressively both within and across countries.

Concluding remarks

- As long as we don’t have event-based crime statistics we have to try to find comparable elements between the existing national data on the police level or at least to document the differences.
- As long as a uniform European criminal code doesn’t exist we have to live with different crime definitions which determine the recording on court level.
- If we do not want to wait for an international uniform recording system we should continue internationally collecting and evaluating crime statistics data taking into account their pitfalls and weaknesses.
- This means: The figures can not easily be used by policy-makers and the public, but have to be thoroughly interpreted. At the same time this is a comfort for criminologists: Their expertise will not become superfluous, they still have work to do

¹⁰ Report of the UNODC/UNECE Task Force on Crime Classification, prepared by experts, among them Kauko Aromaa, Steven Malby and the author

PREPARED STATEMENT

Geoffrey Thomas
Eurostat

Eurostat's mandate to produce crime statistics goes back to the Hague Programme (2005) of the European Union. The 2006-10 Action Plan to implement the Hague Programme includes a number of activities in the area of so-called 'complex crimes', including trafficking in human beings, money-laundering, cybercrime and corruption. The Stockholm Programme (2010) reiterated many of the policy objectives outlined in the Hague Programme and this is reflected in the 2010-2014 Action Plan, which in turn reiterated many of the priorities of its predecessor.

In the specific area of money-laundering statistics, Eurostat has followed up the requirements of the third money-laundering Directive (2005/60/EC) which specified the information to be gathered by EU Member States and forwarded to the Commission. Eurostat's first point of departure was the network of contact points which had already been built up in the Member States for the purpose of collecting administrative data on crime such as police reports. Such data have been collected by Eurostat on an annual basis since 2007 and are published on the Eurostat website as well as in analytical factsheets in the series Statistics in Focus.

However, the collection of data on money-laundering proved more problematical due to communications difficulties within the Member States. These included in the first instance a lack of awareness at the national level of the work of the FIUs (Financial Intelligence Units) set up by the Directive. In some cases it required Eurostat's intervention to establish contact between the statistical contact points and the FIUs. In addition, the Directive was insufficiently clear on the information to be collected, requiring considerable work to define appropriate indicators and associated guidelines to enable the national authorities to provide the data.

The publication Money laundering in Europe covering the years 2003-2008 was finally issued by Eurostat in November 2010 and was generally well received as representing the first initiative of this kind. Eurostat is currently engaged in producing a second edition updating the situation to reference year 2010, which is scheduled to appear in late 2011.

The next area which Eurostat will cover concerns trafficking in human beings. A similar procedure is being followed and some of the experiences acquired in collecting money-laundering data will be put to use, including a process of informing the Member States of the initiative, providing detailed indicators and guidelines, and establishing a list of appropriate points of contact. In this case the important network consists of the network of 'national rapporteurs' set up

under the European Parliament and Council Directive 2011/36/EU of 5 April 2011 on preventing and combating trafficking in human beings. The role of the national rapporteurs as defined in Article 19 of this Directive includes collecting statistics, and in Article 20 a biennial report on trafficking is set up. Although the compulsory transposition of the Directive into national law is not due until 5 April 2013, the signs are hopeful that data will be forthcoming from a large number of Member States. A request to all countries was issued by Eurostat in September 2011 and publication of the results is planned in early 2012.

This brief overview of activities in the field of crime statistics indicates Eurostat's commitment to international progress in monitoring the types of crime which have been the focus of this seminar.

COLLECTION OF DATA ON HATE CRIME

Sami Nevala

European Union Agency for Fundamental Rights

The European Union Agency for Fundamental Rights (FRA), and its predecessor the European Monitoring Centre on Racism and Xenophobia (EUMC), has reported on an annual basis on racist crime and harassment – in dedicated reports¹, in its Annual Reports², and in annual antisemitism overview reports³. The FRA will expand the scope of its analysis with a report on the collection of data on hate crime in the 27 Member States of the European Union, covering a wide range of grounds, including immigrant or ethnic minority background, religion, sexual orientation, disability, and other grounds.

While the FRA continues to follow the situation on hate crime in the Member States based on administrative data (for example, data collected by the police when recording incidents), only limited conclusions can be drawn based on existing official data collection. In many European Union (EU) Member States, the existing data collection can provide only limited tools for designing and improving measures for the prevention of hate crimes. This is reflected in the large discrepancies between Member States in the number of recorded hate crimes, from tens of thousands of cases each year in some countries, to a handful of cases in others.

To complement the picture provided by police statistics, and in order to move towards a more comprehensive approach to data collection and analysis, the FRA has initiated a number of projects to explore the experiences of hate crime among persons at risk in the EU Member States.

The forerunner of these projects has been the European Union Minorities and Discrimination survey (EU-MIDIS). This survey, which interviewed a total of over 23,000 immigrants and ethnic minority persons in the EU-27, has provided a wealth of data that can inform us not only about how widespread the problems are, but also about the situations where hate-motivated crime takes place, who are the perpetrators, and to what extent these incidents are

¹ See e.g. *Racist Violence in 15 EU Member States* (2005): http://fra.europa.eu/fraWebsite/research/publications/publications_per_year/previous_publications/pub_cr_racistviolence01-04_en.htm

² See http://fra.europa.eu/fraWebsite/research/publications/annual_report_on_fundamental_rights/annual_report_on_fundamental_rights_en.htm

³ See e.g. *Antisemitism – summary overview of the situation in the EU 2001-2010* (2011): http://fra.europa.eu/fraWebsite/research/publications/publications_per_year/2011/pub-antisemitism-update-2011_en.htm

reported to the police. The survey also collected data on the experiences of immigrants and ethnic minorities with discrimination, their awareness of their rights, and their experiences of being stopped by the police.

Indeed, the results of the survey – as documented in a series of reports⁴ – show that most incidents are never reported to the police, and in many cases people are to a large extent unaware of the rights they have, and are therefore unlikely to pursue those rights. In 2012 the FRA will complete its set of Data in Focus reports based on the survey with the sixth report in the series, dealing with the experiences of criminal victimisation among immigrants and ethnic minorities.

The FRA has also launched an EU-wide survey on violence against women, which will interview a random sample of 40,000 women across the EU's 27 Member States and Croatia. The survey will collect data, through face-to-face interviews, about women's lifetime and more recent experiences of physical, sexual and psychological violence in different settings and by different perpetrators. Although not framed as a survey on 'hate crime', the findings on gender-based violence can also be looked at through the broad lens of 'bias-motivated crime'.

In addition, in 2011-2012 the FRA initiated further population-based survey research to measure the extent and nature of hate crime against lesbian, gay, bisexual and transgender people across the EU, as well as a separate survey on discrimination and hate crime against Jewish people in selected EU Member States.

The results of the FRA's new surveys – as outlined above – will be available from 2013 onwards. Each survey presents comparable results between Member States, which can allow for informed targeting of resources to areas that have been identified as problematic – be it through new legislation or development of programmes aimed at preventing these crimes.

In turn, the research carried out by the FRA should also encourage countries to consider developing new methods of data collection at the national level, as a part of a comprehensive system for evidence-based policy making in the field of hate crime.

⁴ The results of the EU-MIDIS are available at <http://fra.europa.eu/eu-midis>

POLICY RELEVANCE AND CRIME DATA

Kauko Aromaa
HEUNI

What are crime data?

The data sources most commonly used for situation assessments, for trend assessments, and for comparisons across regimes and jurisdictions refer to

- police-recorded crime, and
- survey-based crime victimisation.

There are many other potential and existing data sources on crime-related issues. However, these two types of data are those that are currently used most widely.

For this reason the following discussion is primarily about these two, even though it is worth considering the implications also in respect of other frequently scrutinised data types, such as prosecutor, court and prison data, as well as sanctions-related data more generally.

In regards to administrative crime data, a number of other options do exist. Such data are being produced under many umbrellas, and by many organisations, from state to municipal to non-governmental organisations.

Consequently, much of the following does – more or less – apply to all of these various data sources.

There are three main justifications for doing comparative crime data analysis. One is comparison of crime rates; a second one is comparison of crime trends; and a third one is a combination of these two. Currently, all of these objectives are severely hampered by a fundamental lack of comparability of these data.

The fundamental problem

Crime statistics are not highly valued or used in decision-making related to crime policy. When they are used, the conclusions are likely to be incorrect

This is due to one well-known fundamental problem, and three lower-level flaws.

The fundamental problem is that administrative crime-related data only reflect the work of crime control agencies, and not “crime”. Unrecorded crime notoriously hampers the usefulness of this data source, if the expectation is that it should inform us about “crime” as this occurs in everyday reality. Survey-based data, on the other hand, are not readily comparable with administrative data and therefore also problematic.

Since this problem has been recognised, many policy-makers and experts alike have lost faith and failed to try to make the best out of what we have.

This is a mistake: administrative data are the only ones that are readily available on a regular basis. Therefore, much effort should be invested into making them more useful, rather than complaining about their shortcomings. One way to do this is to look at the lower-level flaws of crime-related administrative data.

The three lower-level flaws

Compared to the fundamental problem of administrative crime data being about the work of the relevant authorities, not about crime, the three lower-level flaws are in a way of more interest because they can be remedied.

The first flaw: administrative and survey data are not sufficiently useful for policy purposes because they do not adequately address **policy relevant issues**.

This is to a large extent due to administrative crime data being **outdated** – they were designed in a different historical situation. They do indeed come from archaic societies that had quite different interests in knowledge than current democratic societies. Often, the way in which administrative crime data are compiled has not been significantly amended over time to correspond to a modern policy-making environment, in which statistics/crime data, in addition to their governance function, serve quite a different function, where they are used and needed for social and political debate. Also, the important requirement of continuity slows down changes that would be needed to improve the “timeliness” of the data.

Also survey-based data are **outdated**, albeit in terms of a shorter time perspective: they were initially designed with the idea of wanting to learn about unrecorded crime, and since then they have not been properly developed to their full (unrecognised) potential.

Re: "Policy relevant issues": What is crime policy?

In order to discuss policy, we are well advised to go back to Patrik Törnudd (1969, 1971) who coined a working definition of crime policy through its objectives. According to Törnudd,

”Decision-making related to crime and crime control – criminal policy or crime control policy – has two basic objectives:

1. To regulate/minimise the sum total of the social costs (including human suffering) caused by crime and by society’s response to crime (i.e. crime control), and
2. To distribute these costs fairly among the parties involved, i.e. offenders, crime victims, tax payers, and so on.”

The objectives of crime policy

To emphasise the core issues: the objectives of crime policy are fourfold:

- minimising the social **costs of crime**
- minimising the **costs of crime control**
- **distributing** the costs
- doing this in a “**fair**” manner.

A knowledge-based response to all of this requires improvements to crime-related data. It also requires much research of a kind that is not being done too often

The second flaw: Administrative crime data and survey-based data are not addressing sufficiently well the strategic logical elements of crime. Because of this, those wishing to use them for knowledge-based decisions will be at a loss.

The logical basic elements of crime

Crime takes place in a specific temporal, geographical, social and legal framework that determines what people and legal persons are able to do, and which actions are defined as crimes in that particular framework.

Reform work and debate concerning the criminal justice system has often been about changing the legal framework: diversion, decriminalisation, decarceration, alternative sanctions, restorative justice, etc.

Within this framework, crime is a simple thing, composed of **three logical elements** that are required for a crime to take place: the perpetrator, the target/victim, and insufficient control (Marcus Felson)

The first element is **the offender**

Graph 1: The first element: the offender.

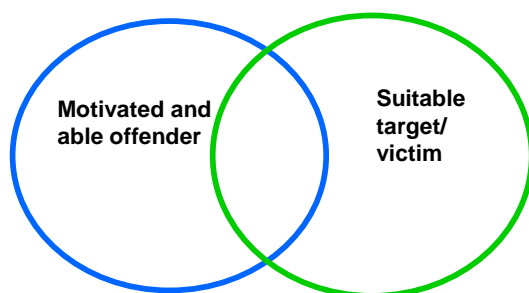


The requirement of a motivated and able offender has several consequences. First, no crime can take place if there is no criminal will and capacity, i.e. there is no motivated and able offender. Societal change influences how many such offenders are around and what they are like. Crime data, research and policy have been mostly looking at this factor. Our criminal law and criminal justice systems are focused on the offender.

Furthermore, a large part of existing theory concerns this element of crime: crime causation theories (biological, psychological, social) are the prime example of this. This is not wrong as such. It is indeed relevant to study offenders and offending behaviour. Criminal law is about wrongdoing, and the criminal justice system deals with the known wrongdoers, and tries to deter the potential ones.

The second element is the target/victim.

Graph 2: The second element: the target/victim



However motivated, skilful and able the potential offenders may be, a crime cannot be committed if a suitable victim or target is not available. Societal change influences how many and what kinds of targets/victims are available. It also influences the intersection of these two elements, i.e. how much and in what respects they overlap.

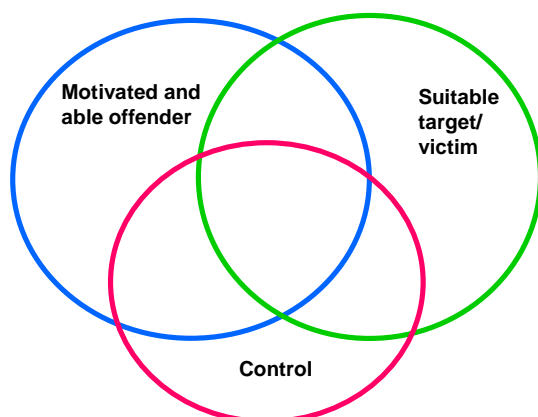
Awareness – and data – regarding targets and victims, and research to this end are essential for improved interventions.

Similarly, data and research that illuminate the intersection of offender and target are essential for a better understanding of the situation.

An improved understanding of the relevant mechanisms also provides tools for the legal and administrative systems designed for interventions.

The third element is control.

Graph 3: The third element: control



Even when offender and target coincide in time and space, nothing will happen if the situation/opportunity is adequately controlled. Also the size and profile of this element is influenced by societal change, and so are its intersections with the first two elements.

Control is both formal and informal. It is external control. Self-control and internalisation of norms are another matter that would rather belong to the problem area “motivated and able offender”.

External control has not been studied too much, nor is there much work on the interplay of the three basic logical elements.

The third flaw: Currently, administrative crime data and survey-based data are incompatible. They speak two different languages.

Administrative data speak the language of the criminal code (what was the name of the offence, etc.).

Survey-based data speak an everyday existential-phenomenological language (what happened, who was involved, how did you feel, etc.).

There is indeed even a fourth flaw that causes much trouble as well: the counting rules and units are often not identical. However, I choose to neglect this particular flaw for the time being. Basically, in order to be comparable, counting should be event-based, as is mostly the case in respect of data on police-recorded crime as well as of data from victimisation surveys (albeit that the latter are often used to estimate victim prevalences rather than event incidences).

Remedies

Regarding the first flaw (missing policy relevant issues): administrative crime data, even though they are working statistics, could nevertheless offer more information about the target/victim, the costs issue, and the control element. In

particular, simple victim characteristics such as age, sex, relationship to perpetrator, etc. should be collected on a routine basis.

Regarding the second flaw (neglecting the logical elements of crime): similar remedies would, to a degree, take care of this flaw as well.

Regarding the third flaw (administrative crime data and survey-based data speak two different languages): the comparability of these two types of data can be improved by relatively simple measures. These would also provide a partial answer to what could be done about the first two flaws. I'll explain.

More about the third flaw

Administrative crime data are currently not comparable with survey data, and not comparable across jurisdictions (and perhaps not strictly comparable over time either).

This is because they are working statistics, and thus prisoners of their respective criminal codes that define what is being described.

This flaw can be influenced in a simple manner: Introduce a reasonably small number of new descriptive variables to standard crime data at the police level. For example for crimes against persons, it would be useful to know who were involved, what was their relationship, what were the damages, what was the modus operandi, what were the circumstances ...

Some of this has actually already been done in many countries for some selected crime categories.

For instance, “aggravated theft” may be specified by using subcategories that indicate whether breaking and entering is involved, and that describe the target of the burglary/offence (home, business premises, warehouse, ...)

Similarly, some countries have recently joined a European project that attempts to introduce a joint standard for data collection on police-recorded homicides. This project recommends that identical case characteristics should be collected regarding each homicide, describing a multiplicity of perpetrator, victim, and event characteristics.

Because the currently used additional variables are unique for each country, these additional descriptive elements are not uniform and not similar, and thus their usefulness is limited.

Systematically add some new variables to police crime data

These variables should not be too many, and they would, to a degree, depend on the type of crime.

Not all crimes need to be dealt with simultaneously, at once; it might be tactically better to start with a few crimes that are not too numerous and that are politically interesting.

It would then be possible to proceed to other crime types when the time is ripe, i.e. when the usefulness of the innovation has become obvious.

The result

If this is done systematically, the information value of the crime data becomes much higher.

Comparability over time and across jurisdictions is considerably improved since the new variables are not criminal code related but practical, and therefore comparable.

What is an additional bonus is that this solution creates a “bridge” between police data and survey data, bringing them eventually to speak a few words of a common language.

The time is ripe

Consequently, the new variables should be of a kind that correspond to some international victimisation survey standard. Today, in Europe, for some crimes, such a standard is currently being developed: Eurostat is about to launch a European Union wide general victimisation survey, and the Fundamental Rights Agency is about to launch a European Union wide dedicated survey on violence against women. The core event characteristics of the relevant crimes could be simply taken over from these surveys and added to police-recorded crime data.

The time is ripe to take this cheap and small, yet radical step that will finally allow existing crime data to be understood and applied for better policy decisions.

CLOSING REMARKS

Fredrik Wersäll
President, Svea Court of Appeal, Sweden
Chairperson, HEUNI Advisory Board

I shall not attempt to summarise the discussions that we have had. However, the contributions show that the work of HEUNI moves within the core area of research and policy-making.

Just a few words about the future. The topics discussed today have currently been highly acute at the European level and also at the global level, since issues of this kind are obviously not just of European relevance. However, as major topics for HEUNI, they are not likely to survive forever – although it is probably true that they will never disappear or be elaborated sufficiently. Nonetheless, once a critical amount of basic work has been done on such topics, the work is likely to proceed to the level of new routines that are no longer something for small think-tanks to take forward, but instead become part of standard administrative routines. If this will take place, innovative path-breaking work on such topics will no longer be of the highest priority.

Even so, some work on these topics should be continued also in the future, not least because some unique expertise around these topics has been developed in HEUNI in recent times.

It is likely that new acute problem areas and corresponding new areas of excellence are going to be developed, and need to be developed, in the years to come. We should be prepared for this – a classic dilemma of an organisation that wants to survive in a turbulent environment (and today, it is indeed turbulent in several respects) is that it continues to do the “right” things for too long, and will eventually end up in a crisis. What was initially “right” may eventually not continue to be so, and an organisation interested in survival must try to be sensitive to this.

I am not trying to look into the future too closely. To forecast such things is not too simple.

But it is likely that if HEUNI maintains its knowledge about and familiarity with current and emerging international concerns in the area of crime and crime policy, the institute is also going to be able to maintain its position. New topics in this sense are not likely to emerge overnight, but are bred for years and years in preparatory organs before they will gain broader recognition. Thus, being there and being active and awake when this happens is the answer. See, for instance how forced labour issues have come to the surface – this took years and years of ILO input before becoming better recognised and accepted – and this work is by far not finished yet. The life span of a topic of this kind is not very short.

In any case, the longevity of topics may vary. Topics that have once been forgotten also tend to be revitalised, although when this happens it is likely that they become flavoured with new perspectives. A good example of this is the ever-topical issue of crime data. It reappears in new disguises over and over again, but old expertise on them will not suffice when this happens – it is essential to have the old knowledge to build on, but it is totally insufficient to apply the old knowledge “as is”.

To summarise: In my opinion, the way forward for HEUNI is to participate in international development work and debate, cooperating with the big players in the area, while at the same time taking advantage of the flexibility of a small organisation. With that in mind, I can foresee another 30 successful years for the institute.

Last but not least a few words to Kauko.

We came to know one another about 20 years ago and have had contact ever since. You are a recognised researcher, who combines the skill of going in depth with a problem and at the same time presenting the finding in a way that is understandable for amateurs as me.

You are colourful and outspoken and not a bit afraid of being controversial, something that is not very common in this part of the world.

We on the Advisory Board have had little to add to the skilful leadership that you have presented. We are constantly trying to come up with new ideas, but they have normally already been thought of.

I know that I speak for the entire Advisory Board when I say that it has been a pleasure to work with you as the Director for HEUNI. We wish you all the best in the future.

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