

EUROPEAN PARLIAMENT



Directorate-General for Research

WORKING PAPER

**The European Union
and the United Nations Convention
against Transnational Organised Crime**

Civil Liberties Series

LIBE 116 EN

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11-2001

Executive summary

This study presents the result of a comprehensive comparison of the UN Convention against Transnational Crime and relevant instruments adopted in the European legal framework, mainly in the context of EU police and judicial cooperation in criminal matters and the Council of Europe.

It focuses on the most significant multilateral initiatives, which are the most direct and natural basis for comparison with the UN Convention. This approach is by no means intended to neglect the importance of local initiatives, such as bilateral agreements, as the first and often crucial steps in the fight against organised crime. However, it is increasingly recognised that the ultimate response to highly mobile criminal groups, fully exploiting the resources of the global economy and infiltrating legitimate markets, lies in the possibility of as many States as possible cooperating through the setting of minimum legal standards and common practices.

The participation of over 120 States in the negotiation of the UN Convention reflects a serious concern that technological advances, combined with the ever-growing inter-dependence of economies, is offering criminal groups unprecedented lucrative opportunities. This has become possible through the exploitation of loopholes and divergences in national legal systems which, in turn, are still predominantly based on the notion of the sovereign territoriality of criminal law.

The analysis tries to highlight the existence of different standards between the UN and the EU legal framework, with a particularly critical eye on instances in which cooperative arrangements between European States do not adequately address growing concerns about organised crime.

The comparative method is particularly useful when UN provisions create binding obligations for State Parties: in this case, the lack of equivalent provisions at the European level will reveal a strong case for the adoption of new legislation in compliance with UN standards.

However, the benefits of the comparison hopefully emerge also when UN provisions simply recommend, or encourage States to introduce, changes in their domestic law. Even in the absence of a legal obligation to act, the UN Convention may well be a useful tool and a fresh starting point for new EU legislative proposals. In this perspective, the UN Convention will be scrutinised in its positive role as a source of innovative ideas and legislative frameworks to guide the EU in its ambitious aim to become an area of ‘freedom, security and justice’.

The study shows how far EU and Council of Europe initiatives in the fight against organised crime coincide with the provisions of the recent UN Convention, signed in Palermo on 12 December 2000, the first instrument of a universal character to deal comprehensively with this form of crime.

The comparison was intended to serve various purposes: first of all, to assess the ‘state of progress’ in the European Union, with particular reference to activities pursued under the justice and home affairs ‘pillar’: where does EU legislation on police and judicial cooperation stand vis-à-vis the UN Convention? Do EU Member States have to improve significantly their cooperative arrangements in order to abide by the high standards agreed upon in the UN legal framework?

Secondly, an analysis of the UN Convention proved useful as a starting point for and source of new ideas that could help to guide future activities of the European Union in its gradual establishment of an area of freedom, security and justice.

The comparison has produced a mixed result: on the one hand, the EU appears to have set up more sophisticated and advanced cooperative structures and procedures between its Member States. This is particularly true of procedures for extradition and requests for legal assistance.

As to extradition, on one of the most contentious issues, the extradition of nationals, the EU is placing itself well ahead of the more traditional approach followed by the UN Convention. The EU is also progressively easing extradition procedures: under a 1995 Convention, for instance, the consent of the person to be surrendered may suffice in many cases to 'bypass' the lengthy formalities usually required. The next logical step may well involve turning extradition procedures into mere administrative transfers. An agreement between Spain and Italy, signed on 28 November 2000, has put this idea into practice and could become a reference model for future EU action.

As to mutual legal assistance, the recent 2000 Convention includes an innovative chapter on the interception of telecommunications. More generally, whereas the UN Convention is still reluctant to entrust judicial authorities directly with the handling of requests, the EU has already taken a significant step by ensuring that the majority of requests are exchanged between local judges. Certain procedural documents may even be served directly by post on people located in the territory of another Member State.

As a general rule, the EU's tougher and more advanced arrangements are easy to explain if one considers the context in which the UN Convention was negotiated. Its provisions reflect the inevitable compromise involved in forging agreement between over 120 States. This led necessarily to a certain degree of ambiguity and a number of watered-down provisions. In this respect the UN Convention is evidence of the constant tension between the search for universality and the need for efficiency. Thus the increasing mutual confidence between EU Member States, and the fact that they already have relatively homogeneous legal systems and practices in place, have allowed them to go much further in making reciprocal concessions to the principle of national sovereignty. Crucially, the existence of the single market and the virtual abolition of borders between them have been a powerful incentive for easing obstacles to cross-border cooperation rooted in the traditional rules of international law.

On the other hand the comparison shows that the UN Convention has the potential to significantly influence the way in which EU Member States will proceed in the near future with the integration of their domestic systems of criminal law and criminal procedure. This holds true in more than one respect.

First, the UN Convention can be regarded as a stimulus and a source of legislative ideas upon which the EU may usefully draw to improve its legal framework for cooperation in criminal matters. What follows is a concise list of the main points, taken from the articles of the UN Convention, which may form a useful starting point for fresh debate in the EU:

- Article 8 (Criminalisation of corruption) calls on State Parties to establish as criminal offences acts of corruption involving foreign public officials and international civil servants. EU legislation only covers the more limited category of Community officials.

- Article 9 (Measures against corruption) requires that law-enforcement authorities develop special competencies to fight corruption. The EU has so far concentrated on repression, (by focusing on common definitions and approximation of penalties), whereas the UN Convention stresses the need to develop expertise also on the prevention and detection side.
- Article 10 (Liability of legal persons) indicates that some form of corporate liability (not necessarily criminal) should be established for all ‘serious crimes’: consequently, the EU should consider adopting an instrument calling on States to impose criminal, civil, or administrative sanctions on corporations involved in offences punishable with the deprivation of liberty for at least four years.
- Article 11 (Prosecution, adjudication and sanctions) ensures that States adopt effective measures on custody pending trial, early release after conviction, and limitation periods for serious crimes. So far, the EU has focused on the approximation of penalties, but has left each Member State free to regulate these other elements. A debate could be launched with a view to at least fixing common guidelines on all issues involving the deprivation of liberty before and during trial.
- Article 12 (Confiscation and seizure) attempts to facilitate confiscation of proceeds from crime by suggesting that the burden of the proof concerning the demonstration of the lawful origin of proceeds should switch from the prosecutor to the alleged offender. The UN Convention thus reiterates the call for a procedural measure that an EU Action Plan has already recommended taking.
- Article 14 (Disposal of confiscated proceeds of crime or property) suggests that international agreements be concluded to ensure that at least part of confiscated proceeds go either to a special UN account designed to deliver economic assistance to developing countries, or to other intergovernmental bodies specialising in the fight against organised crime. The EU should consider these proposals seriously. So far, the only instrument dealing with the disposal of confiscated property is a 1990 Council of Europe Convention that merely refers to the domestic legislation of each State Party.
- Article 18 (Mutual legal assistance) calls for the easing of restrictions still to be found in the European legal framework, in particular the abolition of banking secrecy as grounds for rejecting a request for legal assistance; also, the UN Convention makes the cross-border transfer of detained persons for evidentiary purposes possible on a wider number of grounds than the EU legislation, and takes the innovative step to encourage the oral transmission of requests for assistance in urgent cases.
- Article 22 (Establishment of criminal record) may orient future EU initiatives regulating the use of information originating from a criminal conviction made by the courts of one Member State on subsequent criminal proceedings taking place in another Member State.
- Article 23 (Criminalisation of obstruction of justice) requires the establishment of certain behaviours as criminal offences in the domestic law of each State Party. Despite its intensive work aimed at reaching common definitions of various other crimes, the EU has not dealt with obstruction of justice.
- Article 24 (Protection of witnesses) calls for the adoption of agreements on witness protection schemes, including their international relocation. The 1995 EU Council Resolution, the EU instrument entirely dedicated to this issue, envisages no measure aimed at the cross-border coordination of witness protection programmes.
- Article 26 (Measures to enhance cooperation with law-enforcement authorities), recognises the importance of statements made by members of organised criminal groups who actively cooperate with judicial authorities. In particular, it suggests that such statements made before the courts of one State should also pave the way to penalty reductions and other

benefits in another State. In the EU, the adoption of a legislative instrument for the ‘mutual recognition’ of statements made by collaborators of justice may help shed light on the whole spectrum of criminal groups’ cross-border activities.

- Article 30 (Other measures: implementation of the Convention through economic development and technical assistance) calls for the setting up of a UN fund to which State Parties will make voluntary contributions to finance technical assistance projects for developing countries in their fight against organised crime. The EU may find it useful to establish and run a similar fund limited to contributions from its Member States. If the system proves effective, it could be ‘replicated’ at a later stage within the broader UN framework.
- Article 31 (Prevention) recommends that action be taken in various areas relating to crime prevention where the EU has not yet produced concrete initiatives: the promotion of public awareness campaigns on the threats posed by organised crime, rules on the disqualification of people convicted of serious offences from managing legal entities (including the setting up of public records for disqualified people), and the prevention of the misuse of governmental subsidies and licences granted by public authorities for commercial activities.

Secondly, the very way in which the UN Convention is structured, regardless of the content of its specific provisions, may be taken as a ‘model framework’ for the streamlining of current EU legislation in criminal matters, possibly with a view to drawing up a single EU instrument. Such instrument should at least set out the guiding principles needed to deal comprehensively and homogeneously with transnational crime.

In fact, the ambition of the EU to create an integrated common judicial area, supported by smoothly-working law-enforcement authorities and a high degree of convergence in criminal law and procedure, will no longer be compatible with a situation where the bulk of its legislation is scattered in a variety of partially overlapping documents from heterogeneous legal sources. EU legislation co-exists with national domestic law as well as Council of Europe instruments, whose membership is not only varied, but still allows State Parties to make extensive reservations to its provisions. The high level of fragmentation of the European legal framework runs the risk of affecting the certainty of the law and eventually giving rise to contradictory outcomes, thus playing straight into the hands of the very organised criminal groups it originally set out to fight. But the UN Convention has the advantage of including all aspects of inter-State cooperation in one homogeneous and carefully crafted document.

The need to streamline EU legislation may become compelling after the next enlargement of the EU. If the decision-making process in the field of justice and home affairs (JHA) remains centred around the principle of unanimity, the number of reservations and opt-outs will increasingly affect the negotiations of new instruments between 30 or so States, each of which will be bringing to the negotiating table their own legal systems and peculiarities. To avoid further fragmentation, the usefulness of the UN Convention as a ‘model’ may become even more convincing.

Finally, the EU will benefit from persuading third countries to regard the UN Convention as the main legal basis for cooperation and to fully implement its provisions. This will require a twofold effort on the part of the EU: first of all, given the nature of large parts of the UN Convention as a ‘framework agreement’, detailed arrangements with non-EU countries will have to be drawn up, making a skilful use of its external relations instruments.

However, the setting up or strengthening of formal channels of cooperation may not be enough to stem the increasing flow of criminal activities originating in third countries and infiltrating into lawful and unlawful markets in Europe. By acknowledging that, unless they receive adequate assistance, the developing countries are likely to encounter insurmountable obstacles in the implementation of its provisions, the UN Convention has called on the industrialised world to act as a provider of technical and economic assistance. Such a call has a special significance in the case of the EC, not least because of its official status as a regional economic integration organisation. It should be pointed out, in fact, that the role of the EC/EU began, rather than ended, with the signing of the UN Convention in Palermo: the Conference of the State Parties, a body that will start meeting after the entry into force of the Convention, will be an invaluable forum for the EU to confirm its commitments, update its policies, and exchange knowledge on all matters relating to organised crime.

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Introduction

Method and purpose of this study

This study presents the result of a comprehensive comparison between the UN Convention against Transnational Crime and relevant instruments adopted in the European legal framework, mainly in the context of EU police and judicial cooperation in criminal matters and the Council of Europe.

The focus will be on the most significant multilateral initiatives, which represent the most direct and natural term of comparison with the UN Convention. This approach is by no means intended to neglect the importance of local initiatives, such as bilateral agreements, as the first and often crucial steps in the fight against organised crime. However, it is increasingly recognised that the ultimate response to highly mobile criminal groups, fully exploiting the resources of the global economy and infiltrating legitimate markets, lies in the possibility of as many States as possible cooperating by establishing minimum legal standards and common practices.

The participation of over 120 States in the negotiation of the UN Convention reflects a serious concern that technological advances, combined with the ever-growing inter-dependence of economies, is offering criminal groups unprecedented lucrative opportunities. This has become possible through the exploitation of loopholes and divergences in national legal systems which, in turn, are still predominantly based on the notion of the sovereign territoriality of criminal law.

The present comparison will be carried out article by article in the order followed by the UN Convention.

The analysis will try to highlight the existence of different standards between the UN and the EU legal framework, with a particularly critical eye on instances in which cooperative arrangements between European States do not adequately address growing concerns about organised crime.

The comparative method will be particularly useful when UN provisions create binding obligations for State Parties: in this case, the lack of equivalent provisions at the European level will reveal a strong case for the adoption of new legislation in compliance with UN standards.

However, the benefits of the comparison will hopefully emerge also when UN provisions simply recommend, or encourage States to introduce changes in their domestic law. Even in the absence of a legal obligation to act, the UN Convention may well represent a useful tool and a fresh starting point for new EU legislative proposals. In this perspective, the UN Convention will be scrutinised in its positive role as a source of innovative ideas and legislative frameworks to guide the EU in its ambitious goal to develop itself into an area of ‘freedom, security and justice’.

1. The UN Convention against Transnational Organised Crime: brief historical notes and perspectives

The UN Convention represents the first attempt to include in one single binding document all the concepts and measures necessary to fight organised crime on a global scale.

Although the work of the UN to strengthen international cooperation in this field dates back 25 years, a number of events and ministerial conferences in recent years have greatly contributed to preparing the ground for the culmination of such an ambitious undertaking in an international convention.

A landmark event was the World Ministerial Conference on Organised Crime (Naples, 21-23 November 1994), whose Political Declaration and Plan of Action served as a basis for successive governmental meetings in Buenos Aires (1995), Dakar (1997) and Manila (1998). All such conferences reiterated support for the elaboration of an international convention, and acted as a forum where national governments could progressively narrow their differences. It was particularly difficult to agree on a precise definition of organised crime, and to overcome the widespread fear of developed States that the Convention would be of little use as it would reflect the lowest common denominator.

Based on successive resolutions of the UN General Assembly, the text of the Convention was negotiated by an ad hoc committee at ten sessions held between 19 January 1999 and 28 July 2000. All meetings took place in Vienna. Sessions usually drew about 100-120 national delegations and various other observers from non-governmental and intergovernmental organisations.

On 15 November 2000 the General Assembly (Resolution 55/25) adopted the text of the Convention plus the two Protocols on trafficking in human beings and smuggling of migrants. The General Assembly also called on the ad hoc Committee to complete its work on a third Protocol on trafficking in firearms.

Finally, the high-level signing conference, held in Palermo between 12 and 15 December 2000, was attended by over 120 States, with 123 of them signing it and a large majority also becoming Parties to its two Protocols.

The European Community was the first international organisation to sign. Under Article 36 of the UN Convention, 'regional economic integration organisations' are entitled to become parties to it, within the limits of their field of competence.

The success of the UN Convention will depend on many complex factors, including the willingness of the signatories to rapidly ratify it (40 instruments of ratification are needed before it can enter into force), and their ability to effectively implement its provisions, not only by making the necessary changes to their domestic legal systems, but also by ensuring that law-enforcement officials are aware of, and properly trained to enforce, its most innovative provisions.

Crucially, its strength will depend on the UN continuing to act effectively in parallel areas. The outcome of on-going negotiations for a convention on international terrorism will definitely

have an impact. The General Assembly has set up an ad hoc committee to develop such a convention, taking into consideration the provisions of the Convention against Transnational Organised Crime. At the same time, the usefulness of the latter will be greatly enhanced by the adoption of a comprehensive legal framework covering terrorist activities in all their forms and manifestations.

2. The EU and its fight against organised crime

Title VI of the Treaty of the European Union provides the legal framework for all EU initiatives in the fight against crime.

Organised crime, in particular, is given special attention, as it represents, together with terrorism and drug-trafficking, one of the three fields in which Member States are called upon to progressively adopt measures establishing minimum rules relating to the constituent elements and penalties.

Organised crime also appears to be a target of police cooperation as to the common evaluation of particular investigative techniques and the promotion of liaison arrangements between prosecuting/investigating officials.

Besides, in October 1999 the European Council held a meeting in Tampere exclusively dedicated to justice and home affairs (JHA). In this context, not only were the broad commitments set out in the Amsterdam Treaty re-affirmed, but certain criminal areas were highlighted that are most commonly the domain of lucrative activities of organised criminal groups: financial crime (money laundering, corruption, Euro counterfeiting), drugs trafficking, trafficking in human beings, particularly exploitation of women, sexual exploitation of children, high tech crime and environmental crime. All these areas were identified as the main sectors where common definitions, charges and penalties should be agreed upon by EU Member States.

Consequently, tackling organised crime may be regarded as a top priority for the EU in its effort to create an 'area of freedom, security and justice'. This concept is an innovation of the Amsterdam Treaty and an attempt to respond to the growing perception that organised crime is spreading in the EU with unprecedented virulence. Although activities linked with highly organised criminal groups have increased in virtually every corner of the world, as a result of the globalisation of economies and the rapid advance of communication technologies, the phenomenon is creating a particularly acute problem in the European Union: the Single Market and the Schengen system have established a virtually border-free area, but have not created corresponding judicial and police structures with the ability to coordinate their actions smoothly and effectively across national borders.

In addition, criminal groups are finding themselves free to move within an area where they can easily exploit loopholes and divergences in national legal systems. Some scholars have even described the current opportunities for offenders to take advantage of discrepancies in domestic systems as 'regime shopping'.

Despite widespread recognition of the urgent need to respond to these new challenges, original expectations that the Amsterdam Treaty would provide for a renovated decision-making process to significantly strengthen cooperation in criminal matters were partially frustrated. In fact, Title VI maintains a predominantly 'intergovernmental' character: the Commission only shares a right of legislative initiative with national governments, the European Parliament only has the right to be consulted, and the European Court of Justice is only partially involved in delivering preliminary rulings (in fact, its jurisdiction has first to be accepted by Member States). The overall impression is that, despite growing concern about the proliferation of criminal activities in the EU and the need for rapid and concerted action, national governments are still wary of abandoning their extensive veto powers in favour of a more 'supranational' decision-making

process (which would imply, inter alia, the possibility to take most decisions by qualified majority voting). The outcome of the negotiations of the Nice Treaty confirms this trend.

On the other hand, the Amsterdam Treaty has brought about a number of potentially important changes in the instruments at the disposal of Member States for implementing the provisions of Title VI.

Tools available under the Maastricht Treaty (notably Joint Actions, Joint Positions and Conventions), have been replaced by new ones. The hope is that they will facilitate cooperation to a greater extent. In particular, Framework Decisions (directly binding on Member States as to the results to be achieved) are expected to gradually replace Conventions. The latter were in fact criticised on the grounds that they had to be ratified by all Member States before entering into force, thus creating a major obstacle to delivering a fast and effective response to criminal activities.

Success in the fight against organised crime will crucially depend on the willingness of EU Member States to make full use of the instruments available under the Amsterdam Treaty. This may still prove a difficult and time-consuming exercise, not least because of the wide margin each of them still has for blocking the adoption of common rules in criminal matters. On the other hand, over-attachment to traditional notions of national sovereignty may ultimately play into the hands of highly mobile and sophisticated criminal groups.

A partial solution to the 'national sovereignty' dilemma may well lie in the new provisions on enhanced cooperation in JHA. Member States wishing to proceed at a faster pace in the approximation of their criminal law and judicial and police systems could thus 'override' the opposition of the others by simply leaving them out. However, this option would have to be approached very carefully, as it risks creating an endless number of layers of cooperative arrangements in an already-fragmented legal framework, which would create even more attractive opportunities for criminal groups.

3. Analysis of the Convention

Article 1

Commentary

Article 1 of the UN Convention sums up its overall objective (to fight transnational organised crime), and identifies inter-State cooperation as the means by which this goal will be pursued.

Also, the drafters of the UN Convention thought it important to stress the role of preventive measures (to which Article 31 is entirely dedicated) as an indispensable complement to repressive action.

The same broad areas covered by the UN Convention constitute an essential objective of the EU in the creation of an area of freedom, security and justice. The EU Treaty sets out the basic means and goals of Police and Judicial Cooperation in Criminal Matters. Thus, the bulk of EU legislation and initiatives dealing with organised crime finds its primary source of legitimacy in Title VI. However, the scope of Title VI is broader than the UN Convention, as the former is not limited to the prevention and combating of organised crime, but covers all forms of crime.

Article 2

Commentary

Article 2 of the UN Convention explains the meaning of legal concepts essential to the understanding and interpretation of its provisions.

There is no single EU instrument devoted to the definition of legal concepts valid for all EU legislative acts. However, individual acts contain definitions whose meaning significantly coincides with that given by the UN Convention. This is true for such concepts as ‘property’, ‘confiscation’, ‘predicate offences’, ‘organised criminal group’ and ‘structured group’.

The most complex and debated definition is that of ‘organised criminal group’, which the UN Convention defines according to four main elements: the existence of a structure, the number of participants (at least three persons), its duration (very flexible, it is sufficient that the structure exists for a period of time), and its aim (to commit offences for the purpose of financial or other material benefits).

Joint Action of 21 December 1998 on participation in a criminal organisation bases its definition of ‘criminal organisation’ on the same elements and meaning.

The requirement that an ‘organised criminal group’ be ‘structured’ should be read in a flexible way. Under both the UN Convention and the EU Joint Position, such structure does not necessarily imply well-defined roles for its participants or continuity of membership, although it must not be ‘randomly formed’.

Article 3

Commentary

Article 3(1) lists the crimes to which the UN Convention will apply. The list is an open one. In addition to the four specific offences which State Parties are required to establish as crimes within their national legislation (participation in an organised criminal group, money laundering, corruption, obstruction of justice), any other offences which can be defined as ‘serious crimes’ will fall within its scope. Under Article 2(b), serious crimes are those punishable by a maximum deprivation of liberty of at least four years. However, the UN Convention’s provisions will cover serious crimes as long as two conditions are fulfilled: they must be transnational in nature and involve the activity of an organised criminal group.

Article 3(2) describes various cases where the offence must be regarded as transnational: it is not necessary that the crime in question be committed in more than one State, although this is the most obvious case of ‘transnationality’. All cases where the offence is committed entirely in one State are also covered, provided that it has been substantially prepared, planned, directed or controlled in another State. Even the whole spectrum of activities relating to a crime, including its commission, may have occurred in the same State, and yet the crime may be qualified as transnational on two conditions: the organised criminal group involved operates at the international level, or the crime has substantial effects in another State.

There is no pre-determined category of crimes to which EU instruments on cooperation in criminal matters apply. Each of them serves the purpose of combating various offences. Accordingly, Article 29 of the EU Treaty requires that common action be taken on all forms of crime, whether or not organised, although it recommends that special emphasis should be placed on combating terrorism, trafficking in persons and offences against children, illicit drug-trafficking and illicit arms trafficking, corruption and fraud.

As a result, some EU instruments require Member States to coordinate their action against crime in general, without reference to any specific offence: this is the case of the new Convention on Mutual Assistance in Criminal Matters. Other instruments have their field of application well defined.

Europol, whose competence has been gradually extended from the original mandate, represents a special case. A current Swedish proposal recommends the most significant change, for including all forms of ‘serious international crime’ in Europol’s mandate.

In addition, some instruments directly instruct Member States to introduce certain criminal offences into their national legislation. The following, in particular, provide detailed descriptions of offences also defined by UN Convention. Joint Action of 21 December 1998 on participation in a criminal organisation, the Convention of 8 October 1990 on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, the Money Laundering Directive of 10 June 1991, the Protocol to the Convention on the Protection of the EC’s financial interests of 27 September 1996, and the Convention on the fight against corruption of 26 May 1997.

The crime of ‘obstruction of justice’ has not received a definition at the European level.

Finally, EU instruments require Member States to establish offences that fall within the notion of ‘serious crime’ under the UN Convention, provided that they also have a transnational nature and involve an organised criminal group. The Convention on the protection of the EC’s financial interests introduces for the first time a common definition of fraud to be adopted in all Member States (Council Act of 26 July 1995); the Council of Europe is drafting a convention defining cyber-crime (Draft No 22 REV); also, particular attention is being devoted to the relatively-new notion of environmental crime, which is the subject of a 1998 Council of Europe convention and a current Danish proposal for an EU Council decision defining ‘serious environmental crime’.

Concluding remarks

The drafters of the UN Convention have chosen a mixed approach in the identification of the crimes to which its provisions will apply. On the one hand, the Convention defines directly the elements of four crimes: money laundering, corruption, participation in an organised criminal group, and obstruction of justice. State Parties will be under an obligation to modify their national criminal codes in order to comply with those definitions.

On the other hand, the concept of ‘serious crime’ makes it possible to use the UN provisions for other unspecified transnational offences. This gives the Convention the necessary flexibility to respond to the emergence of new, unpredictable forms of crime, often because they are connected with technological change, such as cyber-crime, but also to take account of the exploitation by organised criminal groups of the ever-changing opportunities offered by the global economy.

However, the notion of serious crime might also serve the political purpose of avoiding delicate balancing exercises for some of the most controversial crimes. A striking example is the lack of a definition of terrorism. Despite the strong and unquestionable links between terrorism and transnational organised crime, its repression under the terms of the UN Convention will be possible as it will fall within the catch-all notion of ‘serious crime’.

Similarly, there is no pre-determined category of crimes to which EU instruments on cooperation in criminal matters apply. Each serves the purpose of increasing the level of Member States’ coordination on combating various offences. However, given the EU’s growing focus on crimes with a transnational character (in particular, financial crime), most of them are also of direct relevance to the UN Convention.

Article 4

Commentary

Article 4 of the UN Convention has been introduced to respond to possible fears that the extensive obligations set out in its various articles may lead to the erosion of State sovereignty. Despite the ambiguity of expressions such as ‘non-interference’ or ‘sovereign equality’, Article 4 is supposed to act as a ‘counter-balance’ to the stated goal of the Convention to strengthen international cooperation in the fight against organised crime, by reassuring States that they will always remain the supreme authority within their own territories.

Therefore, the UN Convention makes it clear that it has no ambition to place itself outside the current rules of international law, which remains based on the principle of the territoriality of criminal law.

The protection of national sovereign prerogatives is also perceived as the main cause of the slow pace at which cooperation in JHA has proceeded so far in the EU. The current inclusion of police and judicial cooperation in criminal matters in a separate ‘third pillar’ reflects a concern that too deep an involvement of the European Parliament, the Commission and the European Court of Justice in this area (together with wide use of qualified majority voting), would come at the expense of national sovereignty. In this perspective, sovereignty is linked to the preservation of the power of veto by national governments.

As a result it can be said that, although there is no explicit reference to it, the protection of sovereignty is still the underlying notion of EU cooperation in JHA. However, this notion is gradually being eroded by successive amendments of the EU Treaty that have granted the European Parliament and the European Commission an increasingly active role in the decision-making process. This is especially true of the Commission, which, under the Treaty of Amsterdam, has acquired the (non-exclusive) right to present legislative proposals. On the other hand, the role of the Parliament is still limited to the right to be consulted on most issues.

Article 5

Commentary

Article 5 of the UN requires State Parties to establish (if they have not yet introduced them in their national criminal law) a number of offences relating to participation in an organised criminal group. These should represent minimum standards, without prejudice to the possibility of adopting stricter provisions

Article 5 provides for the establishment of one offence as compulsory for all State Parties. On the other hand, it leaves them free to establish other, additional offences. This approach implicitly acknowledges the existence of substantive differences in the way each national legal system deals with the aggregation of two or more people with the aim of committing crimes. In particular, paragraph (1)(b) requires that the act of ‘organising, directing, aiding, abetting, facilitating or counselling the commission of serious crimes involving an organised criminal group’ be criminalised in any case.

Paragraph (1)(a) outlines the content of two offences, either of which State Parties are required to adopt (nothing prevents, of course, the adoption of both). The first offence consists in an ‘agreement with one or more other persons to commit a serious crime’ (Article 5(1)(a)(i). No specific conduct is required, nor in principle any act undertaken by one of the participants or the existence of a structured criminal organisation. The second offence differs from the first one in that two additional elements are required: ‘conduct’, and involvement of an organised criminal group. However, such conduct will be criminalised regardless of its being directed towards the commission of a ‘serious crime’ (i.e. an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty): Article 5(1)(a)(ii) simply refers to the ‘taking an active part in: (a)criminal activities of the organised criminal group or: (b)other activities’ in the knowledge that participation will contribute to a criminal aim.

The UN Convention therefore requires the adoption of at least two criminal offences.

Turning to EU initiatives, the 1997 Action Plan to combat organised crime recommended the rapid adoption of a legal instrument making it an offence to participate in a criminal organisation. It suggested that useful elements for the definition of such offence be drawn from the 1996 Extradition Convention. Although the purpose of Article 3(4) of the Extradition Convention is not to provide the basis for the criminalisation of certain acts, but only to clarify that extradition cannot be refused if the offence for which extradition is requested meets certain requirements, important elements of this definition were subsequently taken up in a 1998 Joint Action.

This is the EU binding instrument dealing entirely with the issue of participation in a criminal organisation, instructing Member States to make certain types of conduct ‘punishable by effective, proportionate and dissuasive criminal sanctions’ (Article 2(1)). Unlike the UN Convention, the Joint Action requires that Member States establish only one offence out of two, although it will always be possible to adopt both offences, and to introduce crimes which are of a broader scope than those defined.

The first of such offences focuses on an ‘agreement with one or more persons’ (Article 2(1)(b)): this case perfectly coincides with the offence mentioned in the UN Convention in paragraph 1(a)(i). Both instruments only require the intention to pursue a serious crime, without the need for any additional behaviour. (The Joint Action even specifies that criminalisation of such an agreement be independent of the ‘actual execution of the activity’.)

The second offence defined by the Joint Action relates to ‘conduct by any person who ... actively takes part in the organisation’s criminal activities....or the organisation’s other activities’. As such, it is substantially close to the ‘compulsory’ offence of paragraph 1(b) of the UN Convention, in that it requires the existence of three elements: conduct, the involvement of an organised criminal group and the aim to commit a serious crime (the Joint Action does not formally adopt the notion of serious crime, although in practice it accepts the same notion by referring to ‘offences punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty’).

On the whole, therefore, the scope of the Joint Action is narrower than the provisions of the UN Convention. Under the Joint Action, for instance, Member States could legitimately adopt only one offence based on the ‘pure agreement’ between its participants. The other offence would be optional, although it would be the very one whose establishment is compulsory under the UN Convention.

Finally, the UN Convention contains a specification that may facilitate the burden of proof in courts: ‘knowledge, intent, aim, purpose or agreement referred to in paragraph 1 of this article may be inferred from objective factual circumstances’.

Concluding remarks

By implementing the provisions of the Amsterdam Treaty and the Conclusions of the Tampere Summit, whereby Member States should agree on common definition of offences, the 1998 Joint Action imposes the criminalisation of various forms of association to commit crimes, based on uniform crime descriptions.

This area is particularly tricky, in that the domestic laws of Member States lack uniform provisions aimed at punishing the mere aggregation of people for criminal purposes. However, the lack of homogeneity between Member States relates more to different legal traditions than differences in criminal policies, which allowed the Joint Action to agree on common definitions.

The crime descriptions widely coincide with those contained in Article 5 of the UN Convention, although the latter appears to impose more extensive obligations where the criminalisation of certain acts is concerned.

Article 6

Commentary

Article 6(1) of the UN Convention deals with criminalisation of the laundering of the proceeds of crime. It requires that State Parties adjust their national legal systems to make punishable four sub-categories of offences. The first two provisions aim to criminalise the behaviour of those acting to conceal or disguise the illicit origin of property. The third one relates to acts of ‘acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime’. The fourth offence makes it clear that any form or degree of participation in the commission of the above-mentioned crimes will also be punishable.

All four offences must be committed intentionally.

The EU has adopted two main instruments in the field of money laundering: the 1991 Laundering Directive, and the Second Protocol to the Convention on the protection of the EC’s financial interests.

Outside the EU legal framework, the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime contains key provisions and is relevant here since it has been signed by all EU Member States.

Taken together, the interaction of these European instruments gives rise to a rather complex regime. To begin with, the 1990 Convention creates an obligation for State Parties to criminalise money laundering on the basis of its own definition.

The 1991 Directive also contains a definition of money laundering, but it only requires that money laundering be prohibited (Article 2), without indicating the nature of the sanctions to be applied. Moreover, the prohibition only relates to money laundering which is the result of drug-related offences.

The Second Protocol, in turn, relies on the same definition as the 1991 Directive. It takes a step further than the 1991 Directive by requiring that Member States make money laundering a criminal offence (Article 2), but only when this crime originates from fraud and serious cases of corruption aimed at damaging the EC’s financial interests (Article 1(e)). Of these three instruments, therefore, the 1990 Convention is the one providing for the criminalisation of money laundering on the widest basis.

As far as the definition of the offences is concerned, both the 1990 Convention and the 1991 Directive perfectly coincide with the wording of the UN Convention.

Only in one respect does the 1990 Convention apparently go further than the last-named, by recommending that Member States consider punishing acts of negligence in addition to those committed intentionally, i.e. in the case where the offender ‘ought to have assumed that the property was proceeds’. However, such a possibility does not add anything substantial to the wording of the UN Convention. It is true that the UN Convention does not mention negligence as a possible element of crime, but it would certainly be possible for each State Party to enact legislation that took this element into account. In fact, Article 34(3) states that ‘each State Party may adopt more strict or severe measures’, and the 1990 Convention does not place Member

States under an obligation to introduce negligence as an integral part of the crime of money laundering, but simply envisages the possibility of doing so.

Article 6(2) of the UN Convention deals with predicate offences, i.e. offences as a result of which proceeds have been generated which may become the object of laundering. Recognising that in many States the crime of money laundering can only be punished when it is the result of committing specific criminal offences, Article 6(2) requires that such a legal basis be extended as much as possible.

Article 6(2) of the 1990 Convention contains widely similar provisions. In two respects, though, it appears to provide a wider basis for the punishment of laundering activities.

First, the UN Convention makes it compulsory to establish as predicate offences at least the crimes that it specifically provided for, (corruption, participation in an organised criminal group and obstruction of justice) and all other serious crimes, i.e. those punishable by a maximum deprivation of liberty of at least four years (Article 6(2)(b)). The 1990 Convention actually gives Member States the possibility of reserving their position to it by stating that they will apply its provisions to only a certain number of predicate offences. However, a 1998 Joint Action on money laundering instructed Member States not to seek reservations to the 1990 Convention in respect of predicate offences punishable by deprivation of liberty or a detention order of a maximum of more than one year (Article 1(1)(b)). The 1990 Convention is thus to be regarded as amended and providing for a wider basis of compulsory predicate offences than the UN Convention (certainly a wider basis than the 1997 Second Protocol for which, as we have seen, only certain cases of fraud and corruption are regarded as predicate offences). The 1990 Convention is in line with the conclusions of the Tampere European Council (paragraph 55), calling for 'the scope of criminal activities which constitute predicate offences for money laundering to be uniform and sufficiently broad in all Member States'.

Secondly, the UN Convention clarifies the point that laundering crimes will be punishable whether or not the predicate offence has been committed within the jurisdiction of the State in question. However, punishment in one State is subordinated to a requirement that the predicate offence committed in another State be qualified as a criminal offence by both (Article 6(2)(c)). The UN Convention therefore places an important limitation on a State's ability to prosecute laundering crimes when the predicate offences have been committed outside its jurisdiction. But the 1990 Convention does not contain such a limitation and simply provides that 'it shall not matter whether the predicate offence was subject to the criminal jurisdiction of the Party'.

Finally, the 1990 Convention (Article 6(2)(b)) is perfectly in line with the UN instrument (Article 6(2)(e)) when it provides for the possibility of a Member State declaring that the perpetrator of the predicate offence will not also be prosecuted for the laundering crime.

Concluding remarks

Definitions of money laundering are included in a number of legislative acts, in the framework of both the EU and the Council of Europe. Such definitions tend to coincide almost perfectly with the one contained in the UN Convention.

Both European instruments and the UN Convention describe money-laundering offences as those committed intentionally. Suggestions have been made, however, for including the concept of

‘negligence’ among elements of crime: the 1997 Action Plan’s recommendations with a view to Member States considering ‘the opportunity of extending money laundering to negligent behaviour’ has not yet been taken on in the EU, despite the same call being reiterated more recently in the New Action Plan on organised crime.

Despite the formal homogeneity of definitions of laundering offences, though, their effectiveness may be severely impaired if the law says that money laundering can be punished only if the proceeds originate from a limited number of acts (so called predicate offences). Typically, predicate offences are considered to be drug-related offences.

Two trends can actually be identified in the EU: the first is an attempt to switch to a much wider definition of money laundering, making this crime punishable regardless of the underlying acts. A recent proposal to amend the 1991 Directive goes in this direction, thus preparing the ground for correct implementation of the UN Convention, which requires the inclusion of ‘the widest range of predicate offences’. Consistent with this trend, the Convention on Corruption adopted by the Council of Europe explicitly requires State Parties to establish money laundering as a criminal act when proceeds originate from corruption offences. However, the Council of Europe Convention is not yet in force, and as of 5 May 2001 Denmark is the only EU Member State to have ratified it.

The second trend aims to persuade Member States to punish money laundering with more severe penalties: according to the French proposal, each Member State shall ensure that the offences defined in the 1990 Convention be punishable by deprivation of liberty for a maximum of at least 5five years (initiative of the French Republic, *Official Journal C 243* , 24 August 2000).

Article 7

Commentary

Article 7(1) requires States to adopt a variety of measures in the fight against money laundering. Such measures can be divided into two broad categories: domestic measures to make up a supervisory and regulatory regime for financial institutions, and measures designed to bolster international cooperation and exchanges of information between domestic agencies. The main EU instrument in this field is the 1991 money-laundering directive.

1. As to the first category (paragraph 1(a)), the UN Convention identifies the entities to which the regime should apply: banks, non-bank financial institutions and ‘where appropriate, other bodies particularly susceptible to money-laundering’. The 1991 directive clearly covers the first two kind of entities, by referring to credit institutions and financial institutions. As to the possibility envisaged by Article 7 of the UN Convention that Member States bring ‘other bodies’ within its scope, the 1991 Directive does not contain any list of such bodies: it simply leaves Member States free to extend its application to professions and categories of undertakings ‘which are particularly likely to be used for money-laundering purposes’ (Article 12). However, the current proposal for legislation amending the 1991 directive provides for a list of specific professions. At its first reading, the European Parliament has even extended the original list contained in the Commission proposal: the Parliament amendments could eventually result in the 1991 Directive covering art dealers, dealers in luxury items, auctioneers, tax inspectors, customs agents, notaries and legal consultants.

The UN Convention places such institutions in a crucial position in the fight against money laundering, and requires Member States to subject them to three main obligations: customer identification, record-keeping and reporting of suspicious transactions. The content of such obligations is not spelled out in any detail, whereas the 1991 directive appears to provide a much more articulated regime.

Concerning the obligation of credit and financial institutions to carry out identification of their customers, the 1991 directive requires it in two cases: when business operations of a certain nature are involved (such as the opening of accounts), and whenever a transaction amounts to a certain sum. If doubt arises as to whether customers are acting on their own behalf, identification becomes compulsory regardless of the amount involved. As Recommendation 11 of the Financial Action Task Force (FATF) suggests, doubts may legitimately arise in the case of domiciliary companies, i.e. companies which do not conduct any activity in the country where their registered office is located.

Exceptions to the identification requirement only concern the case where the customer is another financial institution or the business relation involves certain insurance policies.

The proposal to amend the 1991 directive contains innovative provisions in the field of identification applicable to ‘distance trading’, i.e. where an institution establishes business relations or enters into a transaction with a customer who has not been present for identification purposes. It is assumed that so called ‘non-face-to-face operations’, made possible by the development of new technologies, may favour anonymity, thus rendering traditional identification procedure obsolete.

To this end, specific safeguards are envisaged: a ban on cash transactions, and the requirement that the identity of a person opening a bank account be certified by an official document issued by an authorised state body, and that the first payment be made through a credit institution in the EU or third-country credit institutions which apply equivalent provisions to combat money-laundering.

As to record-keeping obligations, the 1991 directive is in line with the FATF's recommendations by requiring that both identification documents and proof of transactions be kept available to competent authorities for at least five years, running respectively from the date when the relationship with the customer ended and the date when the transaction was executed.

Suspicious transactions should then be reported, either on the initiative of individual financial institutions, based on any fact which 'might be an indication of money laundering' or at the request of the competent authorities.

In addition to the above obligations, the 1991 directive goes beyond the UN Convention by placing two more sets of duties on the shoulders of financial institutions. First, such institutions shall 'refrain from carrying out transactions which they know or suspect to be related to money-laundering' until they have informed the competent authorities. Those authorities may, in turn, block the execution of the suspicious transaction. If it is impossible to postpone execution of the transaction, the obligation to inform the authorities arises immediately. Secondly, directors and employees of the financial institution involved are forbidden to reveal to either their customers or third persons that information has been passed to the competent authorities which may be used in a money-laundering investigation (Article 8). Article 9 attempts to encourage a cooperative attitude on the part of directors and employees by requiring that measures be adopted to exempt them from any liability originating from the disclosure of confidential information.

2. As to the second category of measures mentioned in the UN Convention, Article 7(1)(b), requires that 'administrative, regulatory, law-enforcement and other authorities dedicated to combat money laundering (including, where appropriate under domestic law, judicial authorities) have the ability to cooperate and exchange information at the national and international level'. Also, the establishment of national financial intelligence units is envisaged for the 'collection, analysis, and dissemination of information regarding potential money-laundering'. Since this area is also covered by other articles of the UN Convention, Article 7(1)(b) makes it clear that its provisions are subject to such conditions and limitations as can be found in Article 18 (mutual legal assistance) and Article 27 (law-enforcement cooperation). The aim of Article 7(1)(b) is therefore to place additional emphasis on international cooperation (notably in the form of information exchange) in the area of money-laundering-related crimes.

In the EU legal framework, there are various instruments covering aspects of international cooperation in the field of money laundering, such as police cooperation (in the framework of the Europol Convention), investigative assistance, and confiscation (1990 Convention on Laundering, Search, and Seizure). Given their scope, which goes well beyond the mere exchange of information at the international level, they are more usefully compared with other equivalent provisions of the UN Convention.

Here are three EU initiatives dealing specifically with the exchange of information on money laundering-related crimes:

(a) among its main tasks Europol is called upon to obtain, analyse and facilitate the exchange of information between Member States on a number of criminal offences (Article 3, Europol Convention). Following the Council Act of 30 November 2000 amending the Europol Convention, those tasks have acquired relevance to the crime of money laundering in general, regardless of the type of predicate offence committed.

(b) The 1991 directive envisages the creation of a ‘contact committee’ made up of representatives from both the Commission and Member States, which should ‘facilitate consultation’ and provide a forum for ‘regular consultation on any practical problem arising from its [the 1991 directive’s] application’ (Article 13).

(c) The 1998 Joint Action on money laundering requires the preparation and constant updating of ‘user-friendly guides’ containing information on how each Member State can ‘provide assistance in identifying, tracing, freezing or seizing and confiscating instrumentalities and the proceeds from crime’ (Article 10). The General Secretariat of the Council of the European Union is given the task of translating and distributing the guides to all Member States, the European Judicial Network and Europol.

Article 7(2) suggests that Member States set up a system for detecting and monitoring the movement of cash and appropriate negotiable instruments across their borders. However, State Parties do not have an obligation to set up such a system but only to consider its feasibility. Reference is made to the need that any detecting system should not impede in any way the free movement of capital and the proper use of the information obtained. In this context, financial institutions are seen as key actors in the implementation of a detecting system. It is recommended that they should have the obligation to report all international transactions above a certain amount. The wording of Article 7(2) clearly draws upon Recommendations 22 and 23 of the FATF, although no EU binding instruments in the field of money laundering contain similar provisions.

Finally, Article 7(3) and Article 7(4) of the UN Convention stress the importance of bilateral and multilateral structures and initiatives as sources of guidelines and inspiration for State parties in the field of money laundering.

Concluding remarks

The EU is already making a considerable effort to step up its fight against money laundering, thus ensuring that its legislation also complies with the requirements set out in the UN Convention. Although the two reference instruments remain the 1990 Convention and the 1991 Directive, a number of Action Plans and the detailed work done by the FATF have paved the way for recent legislative proposals aimed at amending the above-mentioned instruments with a view to making them more effective tools.

Concerning the 1990 Convention, current policy aims to eliminate the possibility of States reserving their positions in respect of its various articles.

On the other hand, efforts to update the 1991 directive start from the assumption that an effective fight against money laundering cannot limit itself to involving the cooperation only of credit and financial institutions. A number of other non-financial professions vulnerable to money laundering are identified, as it is acknowledged that ‘the tightening of controls in the financial sector has prompted money launderers to seek alternative methods for concealing the origin of the proceeds from crime’.

Finally, the EU would be in a better position to fully comply with Article 7 of the UN Convention if a number of additional measures were introduced. The New Action Plan may be taken as a starting point for fresh legislative proposals aimed at the following goals:

1. preventing the excessive use of cash payments and cash exchanges from serving to cover up the conversion of the proceeds from crime into other property;
2. mitigating the onus of proof concerning the source of assets held by a person convicted of an offence related to organised crime;
3. devising a common European policy towards financial centres and fiscal paradises outside the EU’s jurisdiction. In this framework, it is suggested that the Council prepare a model agreement, under Article 38 of the EU Treaty, with off-shore and on-shore financial centres to ensure that they maintain accepted standards and cooperate effectively in the fight against money-laundering. This would require closer cooperation between Ecofin and the JHA Council.

Article 8

Commentary

Article 8 of the UN Convention criminalises corruption in its two forms: passive and active. These represent the two sides of the same crime, seen respectively from the public official and the corrupter's perspective. The offence is described in such a way as to be applicable to a large spectrum of behaviours. To this end, no distinction is made between direct and indirect means of corruption, the latter involving the action of an intermediary. Also, it is irrelevant whether or not the 'undue advantage' obtained as a result of an act of corruption is meant to benefit the public official directly: such advantage, which is deliberately a broad concept, not necessarily of a material nature, may also be sought to benefit a third person or entity, certainly including political parties.

The EU has adopted two instruments to fight corruption: the 1996 Second Protocol to the Convention on the protection of the EC's financial interests, and the 1997 Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union. The crucial difference between the two lies not in their definition of corruption, which is identical, but in the 'nature' of the people involved in the crime. The Second Protocol only targets national or Community officials with responsibilities in the management of Community funds; under it, Member States are required to establish corruption as a criminal offence to the extent that it 'damages or ... is likely to damage the EC's financial interests' (Article 2, Passive corruption, Article 3, Active corruption). However, practical reasons such as the difficulty of proving even the likelihood of financial damage to the EC budget, may have added to the decision to extend the criminalisation of corruption to all national and Community officials, irrespective of damage being done to the EC budget. This is the result of the 1997 Convention, which is broader in scope than the Second protocol as it is applicable to a wider category of persons. Under the current EU regime, therefore, Member States can criminalise corruption in general on the basis of a single broad definition, but they can also provide for different crimes and penalties depending on whether or not the financial interests of the EC are affected.

Even in comparison with the UN Convention, the 1997 Convention covers a wider spectrum of cases. Whereas the former instrument only requires the criminalisation of corruption involving 'public officials' as defined in the domestic law of each State party, simply leaving them free to include in the definition 'foreign public officials or international civil servants' (Article 8(2)), the 1997 Convention creates an obligation for Member States to include both national and Community officials. The latter instrument therefore includes a specific category of international civil servants within its provisions for compulsory criminalisation. It also defines who is to be regarded as a Community official (Article 1). Although Members of the European Parliament, the Commission, the Court of Justice and the Court of Auditors are not part of the list, national criminal law can, under the principle of assimilation, be made applicable to them as well. The extension of the definition of corruption to this category of people is mandatory if national legislation exists which already applies to individuals occupying equivalent positions within national institutions (Article 4).

What the 1997 Convention does not cover are civil servants from international organisations other than the EU, such as the UN. Short of providing for the criminalisation of corruption involving international officials in general, the 1997 Convention does not even encourage Member States to take action in this area. Despite the lack of provisions in the EU legal framework, in recent years two important instruments have been adopted taking into account the corruption of foreign public officials. One is the OECD Convention signed in November 1997. The other is a landmark agreement, signed in 1999, in the framework of the Council of Europe. Though not yet in force, the new Council of Europe Convention contains some very innovative provisions designed to criminalise corruption in as comprehensive a way as possible. In particular, it represents the first international instrument requiring States to criminalise bribery both in the private and the public sector. In addition, specific provisions concern bribery of members of foreign public assemblies and public officials, officials of international organisations and international parliamentary assemblies, and even judges and officials of international courts. Of particular interest is the obligation for States to criminalise ‘trading in influence’, which targets the corrupt behaviour of people who negotiate their asserted influence over a public official in exchange for an undue advantage.

Turning to the issue of participation, the 1997 EU Convention entirely covers the UN provision which makes punishable ‘participation as an accomplice’ in the crime of corruption (Article 8(3) UN Convention), by requiring the adoption of effective criminal penalties for those who participate in and instigate the conduct in question (Article 5(1), 1997 Convention). In this context, the 1997 Convention goes a step further by providing for an article on the ‘criminal responsibility of heads of business’ (Article 6): not only are Member States required to subject heads of business to penal liability as participants or instigators in corruption acts, but also to establish their criminal responsibility for acts of corruption committed by subordinates who were acting on their behalf. Article 6 thus creates an obligation to criminalise the actions (or the omissions) of people in a position to exercise supervision and control. Since no further details are given, it should be assumed that Member States may exercise a considerable degree of discretion as to both the nature and intensity of the penalties and the subjective element of the crime: in addition to cases where heads of business have failed to carry out duties of control and supervision (*culpa in vigilando*), nothing would prevent them from including the hypothesis of objective responsibility, without the need to prove negligence.

Concluding remarks

Having adopted two instruments on corruption (the 1996 Second Protocol to the Convention on the protection of the EC’s financial interests and the 1997 Convention), the EU is formally in a position to comply with all the requirements set out in the UN Convention.

However, the UN Convention also calls on States to consider adopting provisions for the criminalisation of corruption involving foreign public officials and international civil servants. In this respect, the EU has not adopted any binding instrument if we exclude Community officials, who are only a special case of international civil servants.

Thus, Article 8 UN Convention may be interpreted as implicitly urging EU Member States not only to promptly ratify the 1999 Council of Europe Convention, but also not to avail themselves of the extensive opportunity the Convention offers them for reserving their position on its provisions, with the effect of making its most innovative provisions inapplicable. The 1999 Convention is in fact the first international instrument to define bribery of a wide variety of

people, including members of international parliamentary assemblies and judges of international courts. Yet as of May 2001 the only EU Member State to have ratified it is Denmark (14 ratifications are needed before it can enter into force).

Article 9

Commentary

Article 9 of the UN Convention mentions the promotion of public officials' integrity, prevention, detection and punishment as the broad areas in which further administrative and legislative measures should be taken in the fight against corruption.

The 1997 Convention does not include any provision specifically targeted at integrity promotion and prevention, although the Action Plan to combat organised crime recommends that these very areas be taken into the utmost account in the drafting of subsequent legislation. In particular, it is recommended that measures be introduced to enhance the transparency of financial management and public procurements, as well as criteria for appointments to positions of public responsibility.

Instead of prevention, the 1997 Convention focuses on the repression aspect by referring to the need for effective, proportionate and dissuasive penalties to be applied to corruption crimes. It also requires that serious cases of corruption be punished at least by the deprivation of liberty (as opposed, presumably, to lighter penalties such as fines). An equivalent provision can be found in the Council of Europe Convention (Article 19). The two articles of the UN Convention on corruption (Articles 8 and 9), however, are silent on the nature of the penalties to be applied (the same goes for the crime of money laundering, participation in an organised criminal group and obstruction of justice: as we will see, the only guideline concerning penalties is provided by Article 11(1), under which sanctions must take into account the gravity of the offence).

In order for measures against corruption to be applied effectively, emphasis is placed by the UN Convention on the need for the competent authorities to have an adequate degree of independence 'to deter the exertion of inappropriate influence on their actions' (Article 9(2)). In this context, the 1997 Convention provides for a high degree of autonomy to be given to authorities charged with disciplinary powers, whose work must not be affected by the conduct of criminal proceedings. It is even suggested that in choosing the most suitable penalty, criminal courts should 'take into account any disciplinary penalty already imposed on the same person for the same conduct' (Article 5(2)).

Concluding remarks

Further steps are to be taken by the EU to respond to the UN call for the adoption of measures to promote integrity, the prevention and the detection of corruption. In fact, the 1997 Convention concentrates on penalties and disciplinary measures. Nothing is said, for instance, on the need for law-enforcement authorities to develop specialised competencies in the fight against corruption.

In this respect, the Council of Europe Convention, taking into account the work done by the First Conference for law-enforcement officers in the fight against corruption (Strasbourg, April 1996), appears better suited to respond to the challenges set out in the UN Convention. In addition to requiring the adoption of measures to ensure that persons or entities acquire specialised skills, it calls on States to provide them with ‘adequate training and financial resources for their tasks’ (Article 20).

In particular, the Recommendations of the First Conference stress the need for a multi-faceted approach, based on the assumption that corruption is increasingly to be seen as a ‘phenomenon, the prevention, investigation and prosecution of which need to be approached on numerous levels, using specific knowledge and skills from a variety of fields (law, finance, economics, accounting, civil engineers, etc)’. This new thinking should also guide future action by the EU.

Article 10

Commentary

Article 10 of the UN Convention introduces the general principle that legal persons are subject to liability in addition to that of the individuals materially committing certain offences. Such principle will apply to the four crimes specifically defined (corruption, money laundering, participation in an organised criminal group and obstruction of justice), alongside other ‘serious crimes involving an organised criminal group’. The list is therefore an open one, since, as will be recalled, serious crimes are identified exclusively by reference to the applicable penalties, in this case a maximum deprivation of liberty of at least four years.

Despite its calling on State Parties to establish a regime of liability for legal persons, the UN Convention does not go so far as to require a regime of criminal liability. This caution implicitly recognises the fact that many legal systems are based on the principle *societas delinquere non potest*. Under Article 10(2), therefore, the decision to impose criminal sanctions is left to individual State Parties, which may well decide to base the liability of legal persons on softer administrative or civil sanctions.

In the EU legal framework there are no provisions dealing with the liability of legal persons in relation to the generality of crimes. However, instruments have been adopted touching upon this issue in the context of the fight against specific crimes. These are:

- the Joint Action of 1998 on participation in organised criminal group;
- the Second Protocol to the Convention on the protection of the EC’s financial interests, which requires Member States to establish the liability of legal persons for fraud, active corruption and money laundering;
- the 2000 Council Framework Decision on the protection of the Euro by criminal penalties and other sanctions, in relation to counterfeiting offences.

Moreover, in the legal framework of the Council of Europe, both the Corruption Convention and the Convention on protecting the environment through criminal law have provisions equivalent to those adopted in the EU. The same goes for the Draft Convention on Cyber-Crime.

The European Union, therefore, deals with the issue of liability of legal persons only in relation to a limited number of offences. In this respect, the UN Convention covers a broader range of offences, since, as already mentioned, the principle of corporate liability will be applicable to all ‘serious crimes’ without distinction.

However, the UN Convention and the two EU instruments just mentioned do not differ significantly on the nature of the liability. Nowhere are States required to establish the principle of criminal liability, although this is one of the possibilities envisaged. The UN Convention states that ‘the liability of legal persons may be criminal, civil or administrative’(Article 10(1)). Under the 1998 Joint Action, ‘Each Member State shall ensure that legal persons may be held criminally or, failing that, otherwise liable...’(Article 3); the 1997 Second Protocol refers to ‘effective, proportionate and dissuasive sanctions, which shall include criminal or non-criminal fines and may include other sanctions’(Article 4(1)).

The latter instrument, in particular, is more detailed than the UN Convention in two respects: first, it contains a list of possible administrative sanctions, such as exclusion from entitlement to public benefits and disqualification from commercial activities (although only by way of example). Second, it identifies a number of cases where offences committed by natural persons will also involve the liability of legal persons. In order for corporate liability to apply, there need to be certain functional links between the perpetrator of the offence and the legal person involved. Such links centre around the notion of the 'leading position' occupied by the perpetrator of the offence in the corporation's structure. A leading position is further defined as that of someone acting either individually or as part of an organ of the legal person, if he/she has a power of representation of the legal person, or an authority to take decisions on behalf of the legal person, or an authority to exercise control within it. Moreover, the offence need not be committed entirely by the person in the leading position: their simple involvement as accessory or instigator, and failure to carry out the duties of supervision or control vis-à-vis the actions of subordinates, are enough for the liability to be extended to the legal person as a whole. The aim of such detailed provisions is clearly to ensure that corporate liability is also established in cases where the natural perpetrator of the offence does not hold an official position in the legal person's structure, or is not even materially involved in the offence, but nonetheless enjoys substantial powers of control over its activities.

Also, for corporate responsibility to apply, it is not necessary that the person holding a leading position acted 'positively' towards the commission of certain crimes: the concept of 'lack of supervision and control' ensures that the liability of legal persons may also originate from a simple failure to act.

Finally, all the instruments mentioned contain provisions virtually identical to Article 10(3)(4) of the UN Convention, as corporate liability will apply without prejudice to the criminal liability of natural persons.

Concluding remarks

Instruments adopted in the framework of the EU/Council of Europe are increasingly recognising the need to extend to legal persons the liability for criminal offences committed by natural persons, thus complying with Article 10 of the UN Convention.

In particular, a 'standard clause' is being developed centred on the notion of people holding a 'leading position', defined according to the position they hold in the structure of a corporation. Such a notion is accompanied by the corollary that failure to act (in the form of lack of supervision or control) on the part of people holding a leading position may also give rise to corporate liability.

However, neither the UN Convention nor other instruments adopted in the European context go so far as to require States to impose a criminal responsibility on corporations. Given the importance still attached by many national legal systems to the principle *societas delinquere non potest*, it is very likely that States will prefer to subject legal persons to lighter civil or administrative sanctions.

Finally, the UN calls on States to extend the principle of corporate liability at least to all serious crimes. This should set the trend for future action by the EU, in the sense that all instruments providing for common penalties and common definitions of crimes punishable by a maximum deprivation of liberty of at least four years, or a more serious penalty, should also contain a requirement that States impose some form of corporate liability. The current Danish proposal on combating serious environmental crime could be an immediate opportunity to put this idea into practice.

Article 11

Commentary

Article 11 sets broad guidelines on how State Parties should deal with the issues of deprivation of liberty before, during, and after a trial for the offences defined in the UN Convention. The guiding principle is to ensure that fundamental guarantees, provided by national criminal procedure codes and international conventions at different stages of a criminal proceeding, do not turn into an opportunity for alleged offenders to evade the administration of justice.

No clear-cut obligations are imposed upon State Parties. Article 11 does not go beyond strongly recommending the taking of certain measures. Moreover, the uninvasive nature of its provisions is emphasised in paragraph 6, which clarifies the principle that it is up to each State Party to set up the procedural mechanisms and apply their legal principles in the prosecution of all offences. The principle of national sovereignty (to which Article 4 of the UN Convention is dedicated) comes into play in a delicate area where securing effective measures against crime must be balanced against the need to guarantee the defendants' rights under the main conventions on the protection of human rights.

Article 11 has provisions covering each step of criminal proceedings, from the decision whether or not to prosecute a case to measures taken after conviction. With reference to systems that give public authorities discretion over the prosecution of cases, paragraph 2 calls upon State Parties to ensure that such discretionary powers are 'exercised to maximise the effectiveness of law-enforcement measures'. As the choice whether or not to prosecute is often a political one, the aim is here to ensure that, in the setting of priorities, precedence is given to the prosecution of crimes defined by the UN Convention.

The UN Convention also touches upon the issue of custody pending trial. Paragraph 3 recommends that national systems include the 'need to ensure the presence of the defendant at subsequent criminal proceedings' among the grounds that allow for the deprivation of liberty before conviction. The UN Convention is again very careful not to encroach on an area that raises delicate problems of compliance with the presumption of innocence principle. However, paragraph 3 is consistent with Article 5(1)(c) of the European Convention of Human Rights, which includes the need to prevent persons from fleeing after committing an offence as a legitimate ground for depriving them of their liberty.

As to the application of penalties, nowhere in the Convention is there any indication of the kind and gravity of sanctions to be applied. Apart from the obligation to apply sanctions that are criminal in nature, State Parties are left with a high degree of discretion. Without further guidelines, it may well be possible for them to apply monetary sanctions instead of tougher detention measures. Paragraph 1 partly tries to limit States' discretion over the choice of penalties: although it does not go so far as to require the setting of specific minimum detention periods, it recommends that the gravity of the offence should be taken as a leading criterion. The purpose is clearly to prevent a situation where the deterrent effect created by the inclusion of certain crimes in the national legislation is made meaningless by the provision of too light sanctions.

The UN Convention also deals with the issue of early release after conviction. Here again, an attempt is made to ensure that even conviction to long terms of imprisonment is not undermined by the practice of early release or parole. To this end, State Parties are called on to instruct national judges to carry out their assessment on the basis of the gravity of the offences committed (paragraph 4).

Finally, paragraph 5 aims to ensure that alleged offenders do not go unpunished simply because limitation periods in which to commence proceedings are too short. The duration of limitation periods is not indicated, except for the vague requirement that a 'long statute of limitations' be established, and a 'longer period where the alleged offender has evaded the administration of justice'.

Legal instruments adopted in the EU/Council of Europe framework do not cover as wide a range of topics as the UN Convention does. The provision of rules concerning the deprivation of liberty either pending trial or after conviction has so far been left entirely to the competence of individual Member States. Article 11 of the UN Convention therefore marks an innovative approach: it extends the range of issues covered by a multilateral treaty that were the traditional domain of national legislators.

Rather, there has been a tendency to provide for increasingly detailed requirements concerning the application of penalties by Member States. The progressive adoption of minimum rules relating to penalties in the fields of organised crime, terrorism and illicit drug trafficking is a specific objective of the Amsterdam Treaty (Article 31 of the EU Treaty).

Recent instruments defining offences that are also covered by the UN Convention contain a minimum requirement that penalties be 'effective, proportionate and dissuasive'. This is, for example, what Joint Action on participation in a criminal organisation provides for.

The wording of other instruments, notably the Convention on the protection of the EC's financial interests (together with its two additional protocols), and the 1997 EU Corruption Convention, go further by adding the requirement that in serious cases penalties shall involve the deprivation of liberty.

A 1996 Council Resolution on sentencing for illicit drug-trafficking further constrains Member States' free hand by requiring them to 'provide for the possibility of custodial sentences which are within the range of the most severe custodial sentences imposed by their respective criminal law for crimes of comparable gravity'. The same resolution lists a number of aggravating factors that judges might take into account when imposing penalties.

Probably, the most 'intrusive' EU instrument concerns offences connected with the introduction of the Euro: for the crimes of fraudulent making or altering of currency, the 2000 Council framework Resolution even indicates that maximum terms of imprisonment shall not be less than eight years.

Finally, in line with Article 11(5) of the UN Convention, the 1997 Action Plan to combat organised crime touches upon the issue of limitation periods by recommending 'fairly long time limits for prosecution of serious offences connected with organised crime' (Recommendation 18). However, this recommendation has not so far been taken into account for any legislative proposal.

These developments represent a big step forward when compared, for instance, with the provisions of the 1991 money laundering directive, which simply leaves States free to ‘determine the penalties to be applied’ (Article 14). The current trend involves an ever-growing category of offences, and is clearly meant to reduce Member States’ free hand in an area of criminal law that is traditionally regarded as their exclusive competence.

Concluding remarks

Article 11 of the UN Convention contains innovative provisions on issues that EU/Council of Europe instruments have so far left relatively unexplored.

So far, European instruments have focused on the application of penalties. The tendency is to constrain more and more Member States’ freedom over their choice of penalties, by ensuring that they apply severe sanctions to an ever-growing category of offences. These developments have been encouraged, *inter alia*, by successive rulings of the ECJ that have repeatedly called on Member States to apply ‘effective, proportionate and dissuasive’ penalties, and by the Amsterdam Treaty. The latter requires the progressive adoption of common minimum standards relating to penalties.

The UN Convention sets out loose obligations, and this is partly due to the fact that it touches upon delicate areas going to heart of each State’s sovereignty over its criminal law and procedure. However, its provisions are ground-breaking as they recognise that an effective fight against organised crime requires not only the application of severe penalties, but also the strengthening, and possibly approximation, of rules on early release after conviction, custody pending trial, and limitation periods for serious offences.

The EU should also develop initiatives to cover these ‘new’ areas. It would be a significant step in the direction of full implementation of the UN Convention. At the same time, though, a difficult balance would be needed to ensure that certain issues, especially those touching upon fundamental principles such as the presumption of innocence, do not clash with internationally agreed standards on the protection of human rights, in particular the ECHR and the jurisprudence of its Court.

Article 12

Commentary

Article 12 of the UN Convention calls on State Parties to adopt legislation to enable them to carry out confiscation of both proceeds from crime and all instrumentalities used during the commission of the offences, ‘to the greatest possible extent’(paragraph 1). Moreover, since a number of ‘ancillary’ acts are often a pre-requisite for confiscation orders, paragraph 2 requires the adoption of measures enabling competent authorities to first identify, trace, freeze or seize proceeds. On the whole, Article 12 focuses on domestic measures, whereas Article 13 deals with international cooperation arrangements.

In the European legal framework, the 1990 Council of Europe Convention is the main instrument in this field. Its scope of application is even broader than that of the UN Convention: whereas the latter instrument only applies to the offences covered by the Convention itself, the former is applicable to proceeds derived from whatever crime. The 1990 Convention thus fully covers ‘serious crimes’ as defined by the UN Convention, especially the drug-related crimes for which it was first designed.

The 1990 Convention is divided into two main chapters, the first of which deals with measures to be taken at national level. As such, it is directly comparable with Article 12 of the UN Convention. (The second chapter, is dedicated to international cooperation in the field of confiscation and seizure, and will be better assessed in the light of Article 13 of the UN Convention.)

Although the 1990 Convention still represents the main legal reference for action taken in the European context, it gives States wide room for reservations as to its provisions. For this reason a Joint Action of 3 December 1998 sought to limit the grounds on which States can ‘opt out’ of its provisions (the changes made in the 1998 Joint Actions are obviously binding only on EU Member States, without affecting the obligations of non-EU State Parties to the 1990 Convention).

The main elements of the 1998 Joint Actions are the following, in the case of reservations as to the 1990 Convention. In order to enhance action against organised crime, Member States shall take the necessary steps not to make or uphold reservations in respect of the 1990 Convention’s

- Article 2 (if the offence is punishable by deprivation of liberty or a detention order for a maximum of more than one year), and
- Article 6 (if ‘serious’ offences are concerned, i.e. those that are punishable by deprivation of liberty or a detention order for a maximum of more than one year or, as regards those States which have a minimum threshold for offences in their legal system, offences punishable by deprivation of liberty or a detention order for a minimum of more than six months).

In addition, it is worth mentioning that a recent French initiative aims to transpose the content of the 1998 Joint Action into a Council Framework Decision, a new legal instrument created by the Amsterdam Treaty. Contrary to the Joint Action, the new legal form will allow for judicial review by the Court of Justice. However, the initial proposal is being criticised on the grounds that it only provides for part of the 1998 Joint Action to transmute into the new instrument, with the risk that the overall regime will be split between pieces of legislation of different legal status. So far, the European Parliament has adopted a resolution (at first reading), drafted by

rapporteur Mr Luis Marinho, that calls for the entire 1998 Joint Action to be repealed. The committee responsible also adopted a number of amendments seeking to ensure that the fight against money laundering was not restricted exclusively to cases where the proceeds to be laundered were derived from serious offences, since this would leave an unjustifiably wide margin of criminal impunity.

As a whole, the provisions of the first chapter of the 1990 Convention and the 1998 Joint Action are in line with Article 12 of the UN Convention. They also extend the obligation to seize and confiscate proceeds to include property into which proceeds may have been transformed (although the 1998 Joint Action allows Member States to exclude confiscation of property the value of which corresponds to the proceeds from crime in ‘minor cases’).

In one respect, though, the UN Convention appears more detailed than the corresponding European instruments: it specifies that proceeds transformed into or intermingled with property deriving from legitimate sources will also be subjected to confiscation up to the assessed value of the transformed or intermingled proceeds (Article 3(4)). The same goes for ‘income or other benefits derived from proceeds’, to be treated in the same way (the interpretative notes included in the official records of the negotiations for the UN Convention point out that ‘other benefits’ are constituted by material benefits as well as legal rights and interests of an enforceable nature). These are useful clarifications that may be considered for inclusion in the above French initiative.

In other respects, the 1990 Convention and the UN Convention coincide perfectly: they both require that courts be empowered to order that bank, financial and commercial records be made available for the purpose of seizure or confiscation. To this end they stipulate that banking secrecy shall not be invoked as a reason not to disclose such records. (paragraph 6 UN Convention; Article 4 1990 Convention).

As to the protection of third parties’ rights, again both the UN Convention and the 1990 Convention have similar provisions: where the UN Convention states that third parties’ rights, acquired *bona fide* over assets subjected to a confiscation proceeding, will not be affected (paragraph 8), the 1990 Convention requires that ‘interested parties’ (namely the accused and third parties) be given effective legal remedies to preserve their rights (Article 5). However, the 1990 Convention makes no explicit mention of *bona fide*. In this context, the FATF recommends that contracts entered into by parties be made void, following a civil proceeding, in all cases where ‘parties knew or should have known that, as a result of the contract, the State would be prejudiced in its ability to recover financial claims, e.g. through confiscation or collection of fines and penalties’(Recommendation 7). In substance, protection would be afforded only to third parties that acted *bona fide*, in line with the notion already accepted in the UN Convention.

Finally, the UN Convention includes an innovative attempt to make it easier to impose confiscation measures in judicial proceedings. Recognising that the burden of the proof usually rests with the prosecutor to demonstrate the unlawful origin of the alleged proceeds of crime, State Parties are invited to consider amending their procedural law, so that it would be up to the offender to prove the lawful origin of the proceeds (paragraph 7). The New Action Plan recommends an equivalent procedural measure, where it refers to ‘mitigating the onus of the proof’. Together with the UN Convention, the New Action Plan should be taken as an additional stimulus for the introduction of binding legislation either at national or European level.

Concluding remarks

The EU still regards the 1990 Council of Europe Convention as the main international instrument dealing with the freezing and confiscation of the proceeds from crime.

However, efforts are under way, starting with the 1998 Joint Action and more recently with a French proposal, to limit the grounds on which States can make reservations to its provisions. In fact under Article 2 of the 1990 Convention each State Party can significantly reduce its impact, by declaring that it will adopt domestic measures necessary to confiscate proceeds only in relation to specific categories of offences.

As far as future action by the EU is concerned, Article 12 of the UN Convention may act as a stimulus in three respects: first, EU Member States may consider the idea of ‘mitigating’ the onus of the proof regarding the source of assets held by a person already convicted of certain offences. This would significantly facilitate the task of prosecutors of identifying the origin of proceeds from crime.

Secondly, it should be clearly specified that confiscation orders (or other provisional measures) shall also apply to ‘income from other benefits’ deriving not only from proceeds but also from proceeds that have been transformed into or intermingled with property deriving from legitimate sources.

Thirdly, common rules on the effect of confiscation orders on third parties’ rights should be clarified: this would require a decision on how to interpret the notion of third parties’ *bona fide*. If a ‘restrictive’ interpretation is accepted, third parties would be affected by a confiscation order not only when they knew about the illicit origin of their property, but also when they should have known about it.

Article 13

Commentary

Whereas Article 12 of the UN Convention deals with measures to be taken at the national level, Article 13 focuses on international cooperation for the purpose of confiscation. The aim is to ensure that requests for legal assistance from one State Party to another are managed promptly and effectively.

This area is also covered by Article 18 of the UN Convention, which encompasses all aspects of mutual legal assistance between States, not only for the purpose of confiscation. Article 13 thus complements Article 18, by setting more specific rules.

Article 13 of the UN Convention uses broadly the same language and outlines the same legal regime as Article 13 of the 1990 Convention. Both instruments describe the steps to be taken by a State Party at the request of another State Party to carry out confiscation of proceeds, properties or instrumentalities located in the former's territory. Depending on the nature of the request, the requested State shall either apply to its competent authorities for a confiscation order, or ask them to enforce a confiscation order already issued by the requesting State.

The 1990 Convention fully covers the UN instrument. But it also provides for the possibility of 'spontaneous information' being forwarded, when such information may usefully assist another State Party in carrying out investigations and proceedings, even in the absence of a prior request. Such information may then be used as the basis for a formal request.

The 1990 Convention also contains provisions dealing with two specific cases on which the UN Convention is silent: the event of 'confiscation consisting in a requirement to pay a sum of money corresponding to the value of proceeds'(Article 13(3)), and confiscation concerning a specific item of property. In the first case, if payment is not obtained the requested State shall 'realise the claim on any property available', provided that such property is located in its territory. In the second case, 'the requested State may enforce the confiscation in the form of a requirement to pay a sum of money corresponding to the value of property'(Article 13(4)).

In addition, in the EU legal framework the 1998 Joint Action has attempted to modify the 1990 Convention with a view to making cooperation for the purpose of confiscation more expeditious and effective. Under Article 4 and 5, best practice in international cooperation should be achieved through various measures. Member States shall give requests from other Member States the same priority as domestic proceedings (Article 3). Also, when the requested State find it impossible to fulfil a request from another Member State, it shall look at alternative ways of doing so, after consulting the requiring State (Article 4(2)). Thirdly, the need may arise during the fulfilment of a request for mutual assistance to pursue further enquiries in another area of concern to the requesting State: Article 5(2) provides for the requested State to 'take all possible steps to enable the necessary assistance to be rendered without the need for preparation of a further letter of request'. On the whole, these measures fit into the UN requirement that States cooperate 'to the greatest extent possible'(paragraph 1).

(It should be pointed out that, following the Amsterdam Treaty, a proposal has been put forward to incorporate the provisions of the 1998 Joint Action into a new Framework Decision, as the latter is regarded as a more effective legal instrument. However, the recent French proposal has not

incorporated provisions on best practice in international cooperation, giving rise to the objection that there could soon be two overlapping pieces of legislation of different legal status dealing with the same subject. The relevant parliamentary Committee has thus recommended that the entire 1998 Joint Action be repealed and all its provisions transposed into the new instrument.)

Paragraph 2 (Article 13 UN Convention) deals with measures ancillary to confiscation, such as freezing or seizing of assets, to be taken by the requested State following a request under paragraph 1. Such provisional measures are essential to prevent the destruction, transformation or disposal of property that could later be subject to confiscation.

This is an area in which the EU has taken important steps, by gradually removing legal obstacles to Member States' cooperation. The starting point remains the 1990 Convention, which not only obliges State parties to take such provisional measures at the request of another State party (Article 11(19)), but also eliminates the need for all transmitted documents to undergo legalisation formalities. The 1998 Joint Action builds on the 1990 Convention by emphasising the importance of freezing and seizing taking place in an expeditious way so as not to frustrate a later confiscation request (Article 5(1)).

Despite these significant improvements, a request for mutual assistance between EU Member States for the purpose of confiscation still has to go through traditional channels and formalities, which often enable the requested State to refuse assistance on a variety of grounds. This is why a recent legislative proposal, by introducing the principle of mutual recognition of pre-trial orders, aims to ensure that freezing orders issued by one Member State will be automatically executed in another Member State. If it becomes law this proposal will bypass the need for a request for legal assistance being transmitted between Member States. Under the Draft Framework Decision, freezing orders will be directly communicated through the judicial authorities, and the competent authorities in the executing State will recognise them without any further formalities. Execution will only be refused on formal grounds (such as when documents are missing or incomplete).

The introduction of the principle of mutual recognition of freezing orders could boost inter-State cooperation by bringing the EU closer to becoming a common judicial area. However, the drafters of the new proposal have acknowledged the difficulty for Member States, at the current stage of development of EU judicial cooperation, to accept such a revolutionary principle in relation to the generality of offences. The draft proposal thus has the less ambitious goal of applying to a restrictive list of offences. For the offences not covered, the traditional channel of a request for mutual assistance will still have to be followed.

Paragraph 3 (Article 13 of the UN Convention) sets out the elements making up a request for assistance for the purpose of confiscation. Such elements must be added to those indicated in Article 18(15), which spells out the elements common to all kinds of requests, irrespective of their content.

Paragraph 4 (Article 13 UN Convention) states the principle that the requested State will carry out its obligations under its domestic law and procedures, as well as all relevant bilateral and multilateral conventions that the requiring State is also a party to.

The 1990 Convention reaffirms this general rule, but also allows the requesting State to lay down a number of specific procedural steps. In this case the requested State must apply such procedure after verifying compatibility with its own domestic law.

Finally, paragraph 8 (Article 13 UN Convention) reiterates the principle, already discussed with reference to Article 12, that the rights of *bona fide* third parties must not be prejudiced in any way.

Concluding remarks

The strengthening of international cooperation for the purpose of confiscation is currently the subject of intense activity in the EU. Efforts are under way to make the execution of requests for legal assistance more rapid and effective.

Although the 1990 Convention still constitutes the main legal basis, its limits are becoming apparent. Increasing mutual trust between the judicial authorities of EU Member States is gradually making the Council of Europe instrument obsolete and paving the way for the exploration of new, more innovative channels of coordination. One such channel, embodied in a recent legislative proposal, aims to introduce the principle of the mutual recognition of pre-trial orders: freezing orders issued by one Member States would thus be automatically enforced by another Member State on whose territory the assets to be frozen were located, without the need for further formalities.

Introduction of the principle of mutual recognition could boost inter-State cooperation by bringing the EU closer to a common judicial area, but it would also affect conditions of dual criminality and dual punishability that still exist in many Member States. As a result, acknowledging the reluctance of Member States to completely relinquish their sovereign right to 'filter out' requests for mutual legal assistance, the new proposal has set itself the goal of applying only to freezing orders for a restrictive list of offences. This is probably the maximum level of cooperation that can reasonably be achieved at this point, given the current stage of development of EU judicial cooperation. The next step may be to extend the revolutionary principle of mutual recognition to the generality of offences, but this would require a willingness on the part of the Member States to forfeit more of their national prerogatives.

Article 14

Commentary

Once the proceeds from crime have been confiscated, whether or not at the request of another State, the problem of their disposal arises. The 1990 Convention follows the traditional rule requiring application of the domestic law of the State that carried out the measure, ‘unless otherwise agreed by the Parties concerned’(Article 15). Nothing else is said on the issue.

The UN Convention provides for a more articulated and innovative regime. While accepting the general rule in the 1990 Convention (Article 14(1)), it encourages Member States to return the confiscated proceeds to the requesting State. Alternatively, close consideration should be given to contributing the value of the proceeds to either a special UN fund established under Article 30(2)(c), or ‘intergovernmental bodies specialising in the fight against organised crime’(Article 14(3)(a)).

In the first case, however, State Parties will simply give ‘priority consideration’ to returning confiscated proceeds. In other words, their return will be not compulsory. Similarly, there is no obligation to adapt domestic laws with a view to contributing to the UN fund or other international organisations. As Article 30 explains, State Parties are simply expected to make ‘concrete efforts’ to support a UN account specifically designed to provide technical assistance to developing countries in their effort to implement the UN Convention.

In addition, the Ad Hoc Committee on the elaboration of the UN Convention suggests, in its interpretative notes to Article 14, that confiscated assets may also be used to cover expenses for measures aimed at the protection of witnesses. Such measures are set out in Article 24 of the UN Convention and include, *inter alia*, action for the physical protection of witnesses and their relocation.

EU Member States may usefully take into account some of these proposals. In particular, a system for the contribution of funds to witness protection programmes could help ensure that comprehensive witness protection schemes are not discarded simply because of the high costs often associated with them.

Article 15

Commentary

The UN Convention does not limit itself to requiring that State Parties adapt their national legislation to introduce a number of carefully defined crimes. Article 15 also lays down the criteria on which national courts will decide, on a case-by-case basis, whether or not to exercise jurisdiction on a specific case brought before them.

Such criteria fall into two main categories, depending on whether they make it compulsory for courts to start proceedings or simply enable them to do so.

The only ‘compulsory’ criterion set out in Article 15 is the traditional one based on the ‘territoriality’ of criminal law. The vast majority of national systems adopt it, as the fact that an offence has been committed on their own territory arguably provides States with the most solid and compelling reason to prosecute.

The second category of criteria, the optional ones, leaves States free to exercise jurisdiction if the offence was committed against a national of that State Party, (‘passive nationality principle’), or was committed by a national of that State Party (‘active nationality principle’). In both cases the interest of each State in dealing with offences that have not been committed on their own territory is less strong, although the nationality of either the victim or the author of the crime is usually deemed sufficiently important to at least enable them to exercise jurisdiction. In particular, the field of application of the active nationality principle has been extended by Article 15(2)(b) to include the possibility that the alleged offender is not officially a national, but has his or her habitual residence in the territory of the State concerned. An equivalent provision was not made for the passive nationality principle, which is strictly based on the victim of the offence having the nationality of the State concerned. However, the interpretative notes to Article 15 recommend that State Parties seriously consider thus extending the protection afforded to nationals to include habitual or permanent residents.

Article 15 adds to the nationality principle two more optional criteria. States may also exercise jurisdiction for the crime of ‘participation in an organised criminal group (as defined in Article 5 of the UN Convention) which has taken place outside its territory, although it is aimed to the ‘commission of a serious crime within its territory’(paragraph 2(c)(i)). Similarly, ‘participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling’ may be taken as grounds for jurisdiction, if these acts are taken with a view to committing crimes related to money laundering (as defined in Article 6 of the UN Convention). Also, paragraph 4 mentions the mere presence of the alleged offender on the territory of a certain State Party as a possible ground for the latter to prosecute the case.

In sum, the UN Convention creates an obligation for States to exercise jurisdiction only if the offence has been committed on their own territory. All other grounds are optional, without prejudice to the opportunity for each State to devise their own freely chosen criteria. In theory, therefore, it would be possible to make the prosecution of serious crimes covered by the UN Convention conditional on much wider grounds, for instance on a requirement that the crime in question threatens a State’s national security.

Moreover, in the extreme event that serious crimes falling within the scope of the UN Convention can also be defined as war crimes or crimes against humanity, national courts may well apply the so-called 'universal principle'. Under this principle of international law, prosecution is possible regardless of the place where the crime was committed or the nationality of the persons involved, on the assumption that certain crimes offend the interests and values of all mankind.

In the European legal framework, articles on 'jurisdiction' are included in the various instruments dealing with specific crimes. For example, the EU has provisions in force on jurisdiction for the crime of corruption, participation in an organised criminal group, and counterfeiting of the euro. The Council of Europe has also elaborated specific provisions in the framework of its two Conventions on corruption and on protection of the environment through criminal law. (On the other hand, instruments dealing with money-laundering offences do not establish any criteria. Despite the definition of these offences at the international level, therefore, it is left to each Member State to apply their own, often heterogeneous, principles.)

Recent instruments adopted within the EU and the Council of Europe on the crime of corruption exemplify well the current difficulties in getting States to accept new compulsory grounds for jurisdiction beyond the classical territorial principle.

Starting with the EU, both the First Protocol to the Convention on the protection of the EC's financial interests and the 1997 Corruption Convention have identical provisions focusing on the territorial principle as the only compulsory ground for establishing national jurisdiction. In this respect, therefore, they coincide with the UN Convention. They are also substantially in line with the UN Convention in respect of optional criteria based on the nationality principle (active and passive), although in this area EU instruments apply to a wider spectrum of subjects: the active nationality principle is extended to include alleged offenders who are either national officials or Community officials, provided that the latter work for an EC institution which has its headquarters in the Member State in question, whereas the passive nationality principle includes all national and Community officials alike.

Although both the First Protocol and the Corruption Convention leave States free to adopt the nationality principle, a procedure is laid down that should encourage Member States to introduce it into their legal systems. Whereas the UN Convention does not require the adoption of the nationality principle, under the two EU instruments Member States are bound by it unless they declare that they do not intend to be so bound. (Such declaration must be given at the time when they notify completion of their ratification procedure.) A presumption is therefore established in favour of additional criteria to complement the territorial principle, with a view to making it less likely that a national court will decline its competence for corruption crimes

The recent Council of Europe Convention on corruption apparently goes further than the corresponding EU instruments. Under Article 17, not only are State Parties obliged to exercise jurisdiction based on the territoriality principle; they must also do so when 'the offender is one of its nationals, one of its public officials, or a member of one of its domestic public assemblies' (paragraph 1(b)), or 'the offence involves one of its public officials or members or its domestic public assemblies or any person referred to in Articles 9 to 11 (officials of international organisations, members of international parliamentary assemblies, judges and officials of international courts) who is at the same time one of its nationals' (paragraph 1(c)).

However, as is the case with EU instruments, State Parties are in a position to declare that they will only apply the territorial principle, thus drastically reducing the far-reaching ambitions of the new Council of Europe Convention.

Finally, Article 15 of the UN Convention deals with the problem known as ‘conflict of jurisdiction’. Given the existence of heterogeneous jurisdictional criteria in national legal systems, it may well happen that two or more States claim their jurisdiction over the same offence. Article 15 addresses this issue by imposing a duty of consultation and coordination on interested State Parties (paragraph 5). The same duty can be found in the EU Joint Action on participation in an organised criminal group and the 2000 Council Framework Decision on euro counterfeiting.

Concluding remarks

The purpose of Article 15 is to reduce the opportunities for offenders to escape justice by exploiting national divergences in the grounds on which States exercise jurisdiction. Ideally, this objective would be fulfilled if offenders could not find shelter anywhere, as national courts from each State Party would all be able to commence proceedings against them, regardless of the nationality of the offenders (or victims) or the territory where the offence had been committed.

In practice, however, both the UN Convention and European legislative instruments raise a number of difficulties with extending the obligation to prosecute a case on the classical territorial principle (where prosecution by a certain State’s courts takes place because the crime was committed on the territory of that State) to include other grounds.

In fact, despite the listing of criteria that would allow courts also to prosecute serious crimes on the basis of nationality and other grounds, the possibility is there for governments to declare that they will not apply such provisions. If States decide to make full and frequent use of such reservations, they will invariably preserve the ability of alleged offenders to select the domestic system which best guarantees their unpunishability.

The highly innovative Council of Europe Convention on corruption, which has not yet entered into force, follows this pattern. As a first step to limit the inconveniences created by this system, the EU could for instance adopt an instrument ensuring that EU Member States do not seek reservations in relation to such a Convention at the time of ratification. This would only be a starting point, without far-reaching consequences, but it would be acceptable to the majority of Member States.

Article 16

Commentary

Article 16 of the UN Convention deals with extradition. However, its purpose is not to set out all the requirements and conditions, but rather to establish a broad legal framework. As a result, it relies heavily on the domestic laws of State Parties.

However, in a limited number of areas the UN Convention creates some specific obligations for States. Among these are the dual criminality principle, rules on provisional arrest, the extradition of nationals, fiscal offences, and the obligation to consult with the requesting State before refusing extradition. Overall, the aim is to make extradition easier by reducing the number of constraints and obstacles created by the requested State on receiving a request for extradition.

This approach implicitly recognises that domestic laws and international human rights instruments already provide for safeguards and procedural guarantees in the interest of the person requested for extradition. Accordingly, in addition to leaving State Parties free to set their own grounds for refusing extradition, Article 16 does not even mention issues such as the speciality principle and a regime for re-extradition to third States, which represent traditional guarantees for individuals sought for extradition.

Contrary to the UN Convention, instruments adopted at the European level cover extradition-related matters in a very detailed and specific way. Taken together, they form a complex web of multilateral, regional, and bilateral arrangements building upon the 1957 Council of Europe Convention. Although several changes have been made to its original provisions, the 1957 Convention still represents the most comprehensive instrument. Under Article 28(1), its provisions shall prevail over any other previous agreement between Contracting Parties, thus creating a completely new legal basis for European extradition law. Successive instruments have later contributed to extending and modifying the 1957 Convention on the basis of Article 28(2), which allows State Parties to conclude agreements in order to ‘supplement the provisions of this Convention or to facilitate the application of the principles contained therein’. Increasing trust and growing mutual confidence between European States have facilitated the task of rendering extradition procedures less cumbersome. In turn, these developments have been made possible by attaining similar levels of commitment to democratic principles and obligations in the human rights field.

However, despite significant progress towards the harmonisation of their laws, EU Member States are still far from having a uniform extradition regime. Even under the most recent instruments, there is plenty of room for States to make reservations and exclude the applicability of key provisions. As a result, not only does membership to extradition conventions vary depending on the institutional framework in which they are adopted (Council of Europe, EU or regional arrangements), but parties to the same legal instruments are often not bound by uniform provisions.

Here is a list of the main multilateral extradition agreements adopted in the European legal framework, with brief remarks on their content:

- **The 1957 Council of Europe Convention on Extradition:** as mentioned above, it is the most comprehensive instrument and the main reference for all successive legislation. It provides for various grounds upon which the requested State may legitimately refuse extradition, especially if the person to be extradited is a national of the requested State or the request concerns a political offence. The procedure for submitting an extradition request is cumbersome, and there are many opportunities for States to make reservations.
- **The 1975 First Additional Protocol to the Council of Europe Convention on Extradition:** it is the first attempt to reduce the cases in which State Parties can invoke the political nature of an offence in order to refuse extradition. Accordingly, a number of crimes as defined in the 1948 Genocide Convention and the 1949 Geneva Convention may no longer be treated as political offences. However, there is still wide room for reservations.
- **The 1977 Council of Europe Convention on the Suppression of Terrorism.** This further restricts the notion of political offence on the basis of a twofold regime: a compulsory one, whereby State Parties are required not to invoke the political nature of a series of terrorist acts, and an optional one whereby they can freely decide not to regard certain acts as political offences. As in the case of the 1975 First Protocol, the potential impact of its provisions is weakened by the possibility of making reservations.
- **The 1978 Second Additional Protocol to the Council of Europe Convention on Extradition:** it amends the 1957 Convention by assimilating fiscal offences to ordinary crimes for the purpose of extradition. Moreover, the extradition procedure is made more expeditious and an article is added on judgments in *absentia*.
- **The 1990 Convention implementing the 1985 Schengen Agreement:** originally applicable only between France, Germany and the Benelux countries, it is now integral part of the *acquis communautaire*. It contains provisions on amnesty as a ground for refusing extradition, interruption of prescription, and faster requests for extradition.
- **The 1995 Convention on simplified extradition procedure between the Member States of the European Union:** acknowledging that in a large number of extradition proceedings the persons claimed consent to their surrender, it reduces to a minimum, in such cases, the time necessary for their surrender. This is achieved by removing the need to submit a formal extradition request, as long as the requested State agrees.
- **The 1997 Convention relating to extradition between the Member States of the European Union:** it aims to supplement the 1957 Convention by making extradition easier in various respects. For instance, it provides exceptions to the dual criminality principle and the speciality rule. It also attempts to reverse traditional rules governing political offences and extradition of nationals, although it maintains the opportunity for Member States to enter a limited number of reservations.

For legal comparison a distinction can be drawn between matters that the UN Convention deals with directly, and others for which it relies on the domestic laws of State Parties.

1. Matters covered by the UN Convention.

(a) Dual criminality principle: it is clearly stated in paragraph 1 of the UN Convention. For the purpose of extradition, the offence must be punishable under the domestic law of both the requested and the requesting State.

The same rule is found in Article 2(1) of the 1956 Convention.

The 1996 Convention (Article 3) contains a significant innovation to the dual criminality principle concerning crimes of ‘conspiracy and association’. Regardless of whether or not such crimes exist in the domestic law of the requested Party, the latter is supposed to grant extradition if the acts of conspiracy or association are intended to commit terrorist crimes, drug-related crimes, and other offences involving an organised criminal group. The requested State may declare that it does not intend to apply this provision, but if so it has to make extraditable any offence with the features described in paragraph 3 of the same article: those involving a group of persons, acting for a common purpose, etc. On the whole, the pattern emerging from the 1996 Convention shows some progress towards weakening a classic obstacle to extradition, and the one most frequently deployed.

(b) Several separate offences: under Article 16(2) of the UN Convention, if the request for extradition is concerned with serious offences, some of which are not covered by Article 16 itself, the requested State may nevertheless grant extradition for all of them.

An equivalent provision is found in Article 2(2) of the 1956 Convention.

Article 1 of the First Protocol makes it clear that the rule contained in the 1956 Convention is also applicable to minor offences (those subject only to pecuniary sanctions), thus departing from the UN Convention requirement that the separate offences must be ‘serious’.

(c) Length of extradition procedure: paragraph 8 of the UN Convention calls on State Parties to speed up extradition procedures and to simplify evidentiary requirements. Although no further indication is given, an interpretative note to paragraph 8 suggests that one possible way to implement this provision would be for States to establish a simplified extradition procedure for persons who consent to their surrender.

This is exactly the purpose of the 1995 Convention on simplified extradition procedure, which outlines a very detailed regime applicable to cases where the person consents and there is the agreement of the requested State. After ensuring that the consent of the person involved has been given before a judicial authority and that it is expressed voluntarily and in full awareness of its consequences, surrender can take place without the formal extradition procedure being applied. The 1995 Convention also introduces very tight deadlines for surrender following provisional arrest: 20 days after the requested party has notified the requiring party of the person’s consent; 20 more days if surrender was not possible due to circumstances beyond the requesting party’s control, after which the person must be released in any case.

It is just worth noting that, before the 1995 Convention was adopted, back in 1990 the original signatories to the Schengen Convention agreed that surrender could take place without formal proceedings, if extradition was not obviously prohibited, and persons involved had expressed their consent after being informed of their rights (Article 65).

Apart from the special case where the person involved consents, legislation has been introduced to speed up the procedure for submitting an ordinary request for extradition. Ever since the 1957 Convention, whose Article 12 provides for a request to be forwarded through the traditional and time-consuming diplomatic channel unless other means have previously been arranged, there have been steady and gradual changes. Under Article 5 of the Second Protocol, the rule is modified in the sense that a request should be submitted through Ministries of Justice, although the diplomatic channel still remains possible.

Finally, EU Member States agreed in 1996 to establish a central authority in each Member State responsible for transmitting and receiving extradition requests and all supporting documents; also, any documents may be sent by fax if they are fitted with special devices to guarantee the authenticity of the transmission.

(d) Provisional arrest: Paragraph 9 of the UN Convention implicitly recognises that the 'presumption of innocence' principle may only be compatible with deprivation of liberty in exceptional circumstances. Provisional arrest is therefore subject to a number of conditions: the circumstances must be urgent, there must be a request by the requesting party, and the purpose of the arrest must be to ensure the person's presence at extradition proceedings. However, these are meant to be minimum standards, without prejudice to the application of more stringent domestic provisions.

Article 16 of the 1957 Convention is in line with the UN instrument as to the prerequisites of provisional arrest. In addition, it contains specific guarantees for the person concerned. The most important one entitles the requested State to terminate the arrest if the request for extradition has not arrived within 18 days of the date of the arrest, and requires it not to keep the person in custody for over 40 days. Also, Article 16 envisages the possibility of provisional release at any time.

(e) Extradition of nationals: This is a controversial matter which the UN Convention deals with by following the traditional rule that permits States to refuse to extradite their own nationals. However, such refusal is not without consequences, as Article 16 requires the refusing State to 'submit the case without undue delay to its competent authorities for the purpose of prosecution'(paragraph 10), in application of the principle *aut dedere aut judicare*.

Paragraph 11 also allows the required State to surrender a person on condition that he/she is returned to serve the sentence.

Paragraph 12 applies the same rule as paragraph 10 to the event of extradition for the purpose of enforcing a sentence already issued in the requesting State (as opposed to extradition for the purpose of prosecution). Not only is the requested State entitled to refuse extradition, it is not even obliged to enforce the sentence imposed by the requesting State.

The 1957 Convention, too, provides for the possibility of refusing extradition of nationals. Like the UN Convention, it requests States to apply the *aut dedere aut judicare* rule. However, the two instruments differ in their interpretation of the *aut dedere aut judicare* principle: whereas under the UN Convention the competent authorities of the requested State are supposed to treat the offence ‘in the same manner as in the case of any other offence of a grave nature under its domestic law’, under the 1957 Convention the requested State shall institute proceedings only if it deems it appropriate. The wording used by the UN Convention suggests that the authorities of the requested State shall inevitably exercise jurisdiction over the offence, an outcome that is not granted under the 1957 European Convention.

Unlike previous instruments, the 1996 Convention attempts to introduce a very significant innovation in the extradition regime between EU Member States. Article 7, in particular, takes the revolutionary step of reversing the principle of the non-extradition of nationals, thus apparently removing one of the classic and most common obstacles to extradition and instead prohibiting EU Member States from refusing extradition ‘on the ground that the person claimed is a national of the requested Member State’. However, the opportunity for States to declare that they will not apply the new principle in Article 7 severely weakens the potentially major impact of this provision. It is true that the subsequent paragraphs of Article 7 limit the validity of such reservations to a maximum period of five years; it is also true that, in the absence of renewal within five years, the reservation unless it is renewed within six months; however, the departure from the traditional principle in the 1957 Convention (reaffirmed by the UN Convention), turns out to be less dramatic than it appears at first sight.

(f) Fair treatment guarantee: paragraph 13 of the UN Convention requires State Parties to guarantee the fair treatment of persons involved in extradition proceedings, ‘including enjoyment of all the rights and guarantees provided by the domestic law of the State Party in the territory of which that person is present’.

Paragraph 13 therefore spells out a general rule, without indicating which specific rights should make up the notion of ‘fair treatment guarantee’. Paragraph 13’s most obvious application will be in the obligation on the requested State to apply minimum standards of protection at all stages of proceedings leading to surrender. It does not say, however, if the guarantees of fair treatment should also apply to proceedings instituted by the competent authorities of the requesting State, for example when extradition is subsequently sought for the purpose of enforcing a sentence. The issue would be of practical relevance when the requesting State has passed its judgment *in absentia*, i.e. without the defendant being present at their own trial. Paragraph 13 does not even say if the requested State may invoke a judgment *in absentia* as a legitimate ground for refusing extradition, although during the negotiations on the UN Convention a proposal was made to introduce a paragraph to regulate the issue (see interpretative note, Italian delegation).

Neither the 1956 Council of Europe Convention, nor the 1996 EU Convention has fair treatment clauses among their provisions. This does not mean that guarantees similar to those contained in the UN Convention do not exist at the European level. On the contrary, as is clearly stated in the preamble to the 1996 Convention, the progress achieved in extradition cooperation between EU countries was precisely due to ‘their confidence in the structure and operation of their judicial systems, and in the ability of all Member States to ensure a fair trial’.

Implicit reference is made to the fundamental provisions of the ECHR, in particular Article 6, Right to a fair trial.

Although European-level extradition agreements have no general rule of fair treatment, the Second Protocol to the 1957 Convention contains a specific provision on judgments *in absentia*, in the event of extradition being requested for the purpose of carrying out a sentence. Article 3 introduces a new ground for refusing extradition if, in the opinion of the requested State, ‘the proceedings leading to the judgment did not satisfy the minimum rights defence recognised as due to everyone charged with criminal offence’. The requested State will be under an obligation to surrender the person only if it receives sufficient guarantees that a retrial will take place.

(g) Extradition requested for discriminatory purposes: This is the only ground that Article 16 of the UN Convention mentions directly with a view to giving the requested State the right to refuse extradition. Paragraph 14 covers discrimination based on a person’s sex, race, religion, nationality, ethnic origin or political opinions.

Equivalent provisions are found in Article 3(2) of the 1957 Convention and Article 5 of the Terrorism Convention. However, compared to the UN Convention, they appear to provide a lower degree of protection for discriminated-against groups, inasmuch as they mention neither sex nor ethnic origin as grounds to refuse extradition.

(h) Fiscal offences: Under Article 16(15) of the UN Convention, State Parties are forbidden to refuse extradition on the sole ground that the offence is also considered to involve fiscal matters.

Compared to the UN Convention, the original provisions of the 1957 Convention were less favourable to the extradition of people charged with fiscal offences. Under Article 5 of the latter instrument, the requested State may have legitimately refused extradition in the absence of a previous arrangement with the requiring State.

However, Article 2 of the Second Protocol has amended this rule to the extent that extradition must now be granted ‘if the offence, under the law of the requested Party, corresponds to an offence of the same nature’. The 1996 Convention basically reaffirms the principle contained in the Second Protocol with a slight change: instead of ‘offences of the same nature’, it refers to ‘similar offences’. In both cases, for the dual criminality rule to be met there is no need for the offence to be identical in both States.

On the whole, European instruments now appear to be in line with Article 16(15) of the UN Convention.

(i) Obligation to consult: as part of its effort to strengthen extradition cooperation between State Parties, the UN Convention creates an obligation for the requested State to consult with the requesting State before refusing extradition. The latter shall thus be given ‘ample opportunity to present its opinions and to provide information relevant to its allegation’. However, the nature of this provision is such as to virtually free the requested State from any real obligation. In fact, paragraph 16 empowers the requested State to neglect its duties of consultation whenever it deems it appropriate, despite an interpretative note to Article 16(16) which indicates that the words ““where appropriate” should not affect, to the extent possible, the obligatory nature of the paragraph’.

Whereas the ability of paragraph 16 to effectively constrain the behaviour of States is questionable, the 1956 and the 1996 Conventions are completely silent on the matter.

2. Matters left to the discretion of State Parties:

(a) Minimum penalty requirements: The UN Convention requires that its provisions on extradition apply to the four crimes defined by it, as well as other serious crimes, i.e. those punishable with a maximum deprivation of liberty of at least four years. Under Article 16(3), 'each of the offences to which this article apply shall be deemed to be included as extraditable offences in any extradition treaty existing between State Parties'.

However, the provision in paragraph 7 risks seriously undermining the impact of paragraph 3. Under paragraph 7, extradition will in any case be subject to minimum penalty requirements set at the national level. In theory, therefore, a State may well choose to make UN offences extraditable in principle under its domestic law, and at the same time make them punishable with penalties lower than the minimum penalty requirements set for extradition. The practical effect would be to deprive Article 16 of the UN Convention of its meaning. (It will be remembered that the UN Convention does not indicate the penalties to be applied to the various crimes, except that State Parties shall make them 'liable to sanctions that take into account the gravity of the offence'(Article 11(1).) This outcome, though, is not likely to occur in the European context. In fact, the 1957 Convention sets relatively low penalty requirements. These vary depending on whether extradition is sought for the purpose of prosecution or execution. In the first case, it is sufficient that the offence is punishable by deprivation of liberty for a maximum period of at least one year in both the requesting and the requested State. In the second case, 'the punishment awarded must have been for a period of at least four months'. The 1996 Convention makes extradition even easier, by differentiating the minimum penalty requirements in the requested and the requesting State. As to the former, it is now sufficient for the offence to be punishable with a maximum period of at least six months. Secondly, unlike the 1957 Convention, reservations are no longer allowed.

Overall, in order to circumvent the UN Convention's provisions on extradition, EU Member States would have to make crimes such as corruption and money laundering punishable with extremely low penalties, lower than those set by the 1957 and 1996 Convention.

(b) Grounds to refuse extradition: European legislation provides the requested State with a variety of grounds for refusing extradition, some of which are mentioned above. Article 16(7) UN Convention leaves State Parties virtually free to set their grounds for refusal:

- political offences: European instruments still allow Member States to invoke the political nature of certain offences. However, successive instruments have increasingly tightened the notion of 'political offence'. Most recently, Article 5 of the 1996 Convention rules out the possibility of making reservations in relation to the offences mentioned in the 1977 Terrorist Convention. As a result, EU Member States are now prevented from refusing extradition for crimes of a terrorist nature.
- military offences: under Article 4 of the 1957 Convention, they are excluded from the extradition regime unless they are also crimes under ordinary criminal law.
- place of commission: in application of the territorial principle, a State may legitimately refuse extradition for offences committed on its territory (Article 7, 1957 Convention).
- pending proceedings for the same offence: the fact that the requested State is already proceeding against a person for the same offence entitles it to refuse extradition (Article 8, 1957 Convention).

- *non bis in idem*: extradition shall not be granted if the requested State has passed final judgment in relation to the offence for which extradition is requested (Article 9, 1957 Convention).
- lapse of time: under Article 10 of the 1957 Convention, a person shall not be extradited if, under the law of either the requested or the requiring State, that person has become immune from prosecution by lapse of time. The 1996 Convention has substantially reduced the impact of this provision between EU Member States: Article 8 provides that ‘extradition may not be refused on the ground that prosecution or punishment of the person would be statute-barred under the law of the requested Member State’.
- capital punishment: the requested State may refuse extradition for an offence punishable by death penalty under the law of the requesting State, unless it is persuaded that the death penalty will not be carried out.
- amnesty: under the 1996 Convention, this is a ground for refusing extradition on condition that the requested State ‘was competent to prosecute the offence under its own criminal law (Article 9). This provision is in line with both Article 4 of the Second protocol and Article 62(2) of the Schengen Convention.

(c) Speciality rule: it states that, in principle, the requesting State cannot prosecute persons for an offence committed prior to their surrender and other than that for which they were surrendered, unless the requested State consents. The 1957 Convention (Article 14) reaffirms this rule with only one exception (notably, a new prosecution becomes possible, even without seeking the requested State’s consent, if the person has voluntarily remained in the territory of the requiring State for over 45 days after his final discharge, or has returned to that territory after leaving it).

The 1996 Convention further restricts the scope of the speciality rule, on the premise that it should not be used as a means to protect a person in relation to offences which do not provide for the deprivation of liberty.

(d) Re-extradition: as with the speciality rule, the 1957 Convention makes surrender to a third State subject to the consent of the requested State (Article 15). However, the 1996 Convention sets out a new rule whereby, in principle, the consent of the requested State shall no longer be necessary among EU Member States (Article 12).

Concluding remarks

The UN Convention only provides for a broad legal framework for extradition. For most of the conditions, procedures and requirements, it relies on the domestic laws of State Parties. In accordance with its approach, Article 16 encourages the conclusion of bilateral and multilateral agreements.

For its part, the EU extradition law system builds on the landmark 1957 Council of Europe Convention. Ever since, steady progress has been made with innovations updating the restrictive rules in the 1957 Convention. The result is a complex network of multilateral, regional and bilateral arrangements; they have partly achieved the aim of restricting the scope of traditional rules of extradition law, making extradition procedures simpler and less subject to conditions imposed by States’ sovereign prerogatives.

EU attempts to innovate have concentrated on the following areas, with mixed success: the dual criminality principle, no longer applicable for acts of conspiracy and association; the extradition of nationals, which in principle can no longer be invoked as a ground for refusal; the simplification of procedures where the person to extradite consents; the notion of political offences, increasingly narrow; the speciality rule, no longer valid for all kinds of offences; re-extradition to a third country, now possible between EU Member States without the need to seek the consent of the requested State.

However, despite progress encouraged by the climate of mutual confidence, no uniform EU extradition regime exists. Moreover, recent instruments still give ample room for reservations.

The goal of the EU for the coming years will be to eliminate the remaining obstacles to extradition. In doing so, the EU could possibly take as a model the recent Italian - Spanish Treaty, signed in Rome on 28 November 2000, whose main feature converts extradition procedures between the two countries into ordinary 'administrative transfers' for a wide range of offences. Grounds for refusal would thus automatically be drastically limited, and the dual criminality principle abolished.

Article 17

Commentary

Article 17 of the UN Convention encourages States to conclude international agreements to set up a regime whereby people sentenced in one State may be transferred to another State, 'in order that they may complete their sentences there'.

Article 17 only provides two guidelines: First, the detailed procedure and conditions to be established for the transfer are left entirely to the State Parties, which in turn are invited to enter into specific agreements; secondly, the transfer should concern 'persons sentenced to imprisonment or other forms of deprivation of liberty'. Neither the purpose for which the transfer may take place, nor the State to which a person may be transferred is specified.

Despite its vagueness, Article 17 may be understood as primarily serving the interests of sentenced persons in completing their sentence in a country where their social rehabilitation is most likely, i.e. most often the country of nationality. As the purpose of the UN Convention is mainly to strengthen cooperation against organised crime, its drafters did not think it necessary to lay down any specific rules rooted in humanitarian considerations, but merely invited States to consider the issue in a separate context.

There are specific provisions for the physical transfer of persons in the work of the Council of Europe. Under the 1983 Convention, 'foreigners who are deprived of their liberty as a result of their commission of a criminal offence should be given the opportunity to serve their sentences within their own society'. The 1983 Convention regulates thoroughly the conditions for the transfer of sentenced persons to the State of which they are nationals, through the provision of a simple and expeditious procedure. As such, it amends parts of another Council of Europe Convention (the 1970 Convention on the International Validity of Criminal Judgements), which provides for a much more cumbersome procedure and has been ratified by few State Parties (only nine).

In particular, the 1983 Convention updates the previous instrument in these respects: it provides for a simplified procedure; the transfer may be requested not only by the sentencing State, but also by the administering State (the State of which the sentenced person is a national); and it is subject to the consent of the sentenced person.

Moreover, the 1997 Protocol to the 1983 Convention regulates two cases where the consent of the sentenced persons is not required for their transfer. The first concerns sentenced persons who are subject to an expulsion or deportation order. Their consent to the transfer is deemed unnecessary as they would in any case be obliged to leave the sentencing State after serving the sentence (Article 3).

The second case (Article 2) assumes that the sentenced persons are seeking to escape justice by fleeing to their State of nationality. The latter State may thus 'take over' the execution of the sentence without the need for the consent of a person who has voluntarily tried to frustrate the judicial process. Contrary to the previous case, here the rationale for the transfer is not rooted in humanitarian grounds, nor in the need to ensure that the social rehabilitation of the offender takes place in his home country. Rather, the taking over of the sentence by the administering State will often be the only way to ensure that the sentenced person does not go unpunished. In

fact, whereas extradition will often not be a viable option because of the difficulties for many States to surrender their own national, the opening of a new trial in the administering State may infringe the *non bis in idem* principle. As a result, it can be said that the mechanism envisaged in the Additional Protocol seeks to ‘bypass’ traditional, and often inadequate, forms of international cooperation.

Concluding remarks

The UN Convention does not lay down a specific regime for the transfer of sentenced persons. It simply encourages States to add this issue to their cooperation in criminal matters on a bilateral or multilateral basis.

Although Article 17 does not spell out the purpose of such a transfer, its rationale can be regarded as twofold: not only to strengthen international cooperation with a view to restricting the opportunities for offenders to escape justice, but also to improve the prospect of their social rehabilitation, by allowing them to serve their sentences in their home countries.

A 1983 Council of Europe Convention, supplemented by a 1997 Protocol, covers the issue. These instruments also take account of recent trends in penal policy towards humanitarian consideration. The repatriation of sentenced persons is often in the interest of prisoners whose completion of sentence in a foreign country may have detrimental effects due to language barriers, alienation from local customs and cultures, absence of contacts with parents, etc.

The comprehensiveness of the 1983 Convention has not required the adoption of an equivalent instrument by the EU. However, the EU could still play an important role by promoting ratification of the 1997 Protocol to the 1983 Convention, which so far has been ratified by only two Member States (Austria and Sweden).

Article 18

Commentary

Article 18 of the UN Convention covers all matters relating to requests for legal assistance. (As we have seen, Article 13 also covers this area, although the latter focuses more specifically on requests for the purpose of confiscation. However, given its broad scope, Article 18 is also applicable to requests for assistance in the field of confiscation, for all matters not covered by Article 13.)

The UN Convention does not lay down detailed rules. Its aim is to set a broad legal framework, simply ensuring that States adopt minimum standards.

The other fundamental feature of Article 18 lies in its stated goal of having the lightest possible impact on existing bilateral/multilateral arrangements. This emerges clearly from the fact that State Parties already linked by a mutual assistance agreement are only supposed to apply a few of its paragraphs (1-8). The entirety of the UN mutual assistance regime (paragraph 1-29), therefore, is binding only on those States that have not concluded any previous agreement.

Secondly, the remaining provisions binding on all States Parties are applicable only as long as they do not 'affect the obligations under any other treaty, bilateral or multilateral, that govern or will govern, in whole or in part, mutual legal assistance' (paragraph 6).

Thirdly, the imposition of too detailed a regime would have clashed with the broad scope of application of Article 18. Unlike other articles of the UN Convention, provisions on mutual assistance apply not only to the serious offences defined by it, but to all cases where there are 'reasonable grounds to suspect' the commission of an offence of a transnational nature. It may thus be possible to use Article 18 for requests for assistance involving any offence: the supply of such assistance will then enable the requested State to clarify whether or not the offence really is transnational and should thus be subject to the UN Convention regime in its entirety.

For their part, a complex web of mutual legal assistance arrangements, adopted in at least four different institutional contexts, binds the EU Member States. Some were concluded in the framework of the Council of Europe, such as the European Convention on Mutual Assistance in Criminal Matters (1959 Convention) and its 1978 Additional Protocol. These two instruments represented the main starting point for all subsequent developments in the EU: in particular, for a 1998 Joint Action on good practice in mutual legal assistance and the recent Council Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (2000 Convention). Although not yet into force, the 2000 Convention is already being criticised for not going far enough. Under a recent French proposal, a new Convention is being drafted that should remove the final obstacles to full and smooth cooperation between EU Member States.

All EU initiatives have their source of legitimacy in Title VI of the Amsterdam Treaty. Article 29 states that the EU's goals shall be achieved, inter alia, through closer cooperation between judicial and other competent authorities. In addition, Article 31 specifies that common action in judicial cooperation in criminal matters shall include 'facilitating and accelerating cooperation between competent ministries and judicial or equivalent authorities of the Member States in relation to proceedings'.

Also, before the integration of the Schengen legislation in the *acquis communautaire*, the 1990 Convention implementing the 1985 Schengen Agreement contained provisions on mutual assistance originally linking only six EU Member States.

Other international instruments include the numerous bilateral agreements, which all multilateral conventions accept as useful tools to complement their own provisions.

Despite the heterogeneous context making up the regime of mutual legal assistance between EU Member States, recent initiatives have all witnessed a common trend towards the elimination of obstacles and simplification of procedures. In addition, the 2000 Convention takes advantage of technological changes to regulate new specific forms of assistance, such as hearings by videoconference, and is the first multilateral instrument dealing specifically with the issue of international interception of telecommunications.

On the whole, this trend can be broadly explained by two factors. First, increased reciprocal confidence between EU Member States has paved the way for more mutual trust in their exchanges and in the dealing of requests for assistance. Secondly, the strengthening of legal assistance between Member States represents the inevitable response to the abolition of border checks. Criminal organisations are exploiting the creation of a common European space to enjoy an unprecedented situation: that of operating in an area without internal frontiers, which nonetheless allows them to take advantage of loopholes and significant differences in national legislation and practices.

As noted above, not all State Parties are required to apply Article 18 of the UN Convention in its entirety, but only those which are not bound by any mutual legal assistance treaty. As a result, in their 'internal relations', EU Member States will only be required to apply provisions from paragraph 1 to paragraph 9. This is not to say that provisions from paragraph 9 to paragraph 29 could be neglected: full application of Article 18 may well be invoked in relations with non-EU States, where no other agreement is in place. Moreover, even if the provisions contained in paragraphs 9-29 were not applicable, they would still constitute a useful term of comparison and a source of ideas for legislative improvements.

The following comparative analysis will distinguish between the two categories of provisions:

(a) Paragraphs 1-9: provisions binding on all State Parties

- **Scope of application:** under paragraph 1, Article 18 will cover investigations, prosecutions, and judicial proceedings in general, without further specification. A request for assistance under Article 18 would be legitimate whenever a State Party has reasonable grounds to suspect the commission of one of the offences defined by other articles of the UN Convention.

The 1959 Convention (Article 1) is only applicable to judicial proceedings, as opposed to administrative ones. This distinction has created the need to specify the role of public prosecutors in the context of requests for legal assistance, since under certain legislation prosecutors are treated as administrative authorities. (The *travaux préparatoires* to the 1959 Convention overcame the impasse by allowing States to declare which authorities they would consider as judicial authorities for the purpose of the 1959 Convention.) However,

Article 1(2) excludes arrests and enforcement of verdicts from the scope of the 1959 Convention.

The 1978 Additional Protocol partially modifies this situation, by extending the Convention's reach to the service of documents concerning the enforcement of a sentence, recovery of fines, payment of costs of proceedings, and other measures (suspension of a sentence, conditional release, pardon, etc). But arrest and other enforcement measures not mentioned remain outside its scope.

Finally, the 2000 Convention takes a big step forward by extending the legal grounds for assistance to include administrative proceedings, where decisions taken by administrative authorities 'may give rise to proceedings before a court having jurisdiction in particular in criminal matters'(Article 3(1)).

- **Offences involving legal persons:** paragraph 2 aims to ensure that mutual legal assistance is granted by the requested State in cases of serious offences involving legal persons and an organised criminal group. This is a logical corollary to Article 10 of the UN Convention, which requires State Parties to establish some form of liability for legal persons (not necessarily criminal, but also civil or administrative).

The 2000 EU Convention and the 1990 Council of Europe Convention on laundering include similar provisions: the former instrument requires that assistance be given in both criminal and administrative proceedings, if the legal person may be held liable in the requesting State (Article 3(2)). The latter merely prevents a State Party from invoking the circumstance that the person under investigation or subject to a confiscation order is a legal person for the purpose of refusing international cooperation (Article 18(8)(a)).

- **Activities covered by mutual legal assistance provisions:** The kind of activities mentioned in paragraph 3 substantially coincide with those provided for in the 1959 Convention. The only difference lies in the fact that the UN Convention contains a detailed list of specific actions to be taken by the requested State, whereas the latter, under Chapter II, Letters Rogatory, includes a catch-all provision. It refers in general to 'procuring evidence or transmitting articles to be produced in evidence, records or documents'(Article 3). A separate Chapter III of the 1959 Convention deal more specifically with 'service of writs and records of judicial verdicts', as well as the appearance of witnesses, experts and prosecuted persons.

(As already pointed out, the regime of legal cooperation for the purpose of confiscation is, given its peculiarity, dealt with separately by another article of the UN Convention (Article 13), although the general provisions of Article 18 are still applicable to the matters not specifically covered by it.

Similarly, under the Council of Europe, the 1990 Convention contains specific provisions on cooperation in the field of laundering-related crimes (obligation to assist in the identification and tracing of instrumentalities (Article 8), the taking of provisional measures, such as freezing and seizure (Article 11), and requests for confiscation (Article 13)). It is noteworthy that, under Article 29 of the 1990 Convention, State Parties can choose to apply previous agreements covering the same subjects in lieu of the 1990 Convention itself. The implicit result is that a request for the purpose of confiscation may

well give rise to application of the 1959 Convention, which as we have seen regulates the subject in general, without reference to any specific request for mutual assistance.)

- **Regime of spontaneous information:** the aim of paragraphs 4-5 of the UN Convention is to encourage States to exchange information on criminal matters regardless of a prior request. The receiving State may well use the information provided at a later stage to submit a formal request for assistance. Paragraph 4 only creates a general obligation for the receiving State to keep the information confidential, and to comply with any restriction on its use. However, if the information received is exculpatory to an accused person, conditions imposed on its use will cease to apply. The receiving State will be entitled to freely disclose it in its domestic proceedings. In balancing the need for the information to remain confidential and the right of the accused to prove their innocence, the drafters of the UN Convention have evidently given priority to the latter.

Whereas the 1959 Convention does not contemplate any regime of spontaneous information, the 2000 Convention is in line with the UN instrument. Here, too, Article 7 entitles the providing State to set conditions, although nothing is said about a possible use of the information for ‘exculpatory purposes’. Thus, contrary to the corresponding UN provision, the need to comply with such restrictions has been deemed to prevail over any other consideration.

The 1990 Council of Europe Convention on laundering also allows for spontaneous information being given on instrumentalities and the proceeds from crime, but there are no provisions on the handling of such information by the receiving State (Article 10).

- **Banking secrecy:** Paragraph 8 of the UN Convention prevents States from invoking it as a ground to refuse to render assistance.

The 1959 Convention does not have an equivalent provision.

Article 18(7) of the 1990 Council of Europe Convention on laundering actually prevents banking secrecy from being invoked as a barrier to legal cooperation, but the reach of this provision is limited to requests for the purpose of confiscation. In addition, the requested State may ask for any request ‘which would involve the lifting of banking secrecy’ to be authorised by a judicial authority.

The UN Convention appears to facilitate international legal cooperation to a greater extent than even the 2000 Convention, which, despite its stated aim of making cooperation faster and more efficient, is silent on the issue of banking secrecy.

A recent French proposal for a new Convention on Mutual assistance in criminal matters includes a suggestion for preventing Member States from invoking the ‘confidentiality applicable to banking activities and other commercial activities in order to refuse to implement a request for mutual assistance from another member State’(Article 3).

(b) Paragraphs 9-29: provisions binding on States not linked by a mutual legal assistance agreement

- **Dual criminality:** This is also a key principle of extradition regimes. Paragraph 9 allows State Parties to refuse assistance if the request relates to an offence that is not punishable under the law of both the requesting and the requested State.

The 1959 Convention softens this principle, since for assistance to be rendered it is sufficient that the offence ‘falls within the jurisdiction of the judicial authorities of the requesting State’(Article 1(1)). The same solution can be found in Article 3 of the 2000 Convention. However, the scrapping of the dual criminality principle is not complete: Article 5 of the 1959 Convention still allows States to declare, at the time of signature or ratification, that requests for search or seizure of property will depend on the offence being punishable in both States. Only in relation to fiscal offences (for the purpose of search or seizure) does the 1978 Additional Protocol mitigate the dual criminality principle by requiring that the offence for which assistance is required must correspond to an offence of the same nature, as opposed to being exactly the same offence, under the law of the requested State (Article 2).

European instruments thus appear ready to soften the reach of a classical principle, perceived as an obstacle to both extradition and other legal cooperation arrangements, to a significantly greater extent than the UN Convention does.

- **Transfer of detained or sentence-serving persons:** this form of cooperation is regulated by paragraphs 10-12 of the UN Convention. It is subject to a series of conditions. There must be an agreement between the two States, or the consent of the person to be transferred in the territory of the requesting State; the transfer ‘shall be necessary for purposes of identification, testimony or otherwise providing assistance in obtaining evidence’. In addition, the requesting State is subject to a number of obligations relating to the treatment of the persons transferred. These include keeping them in custody (if they were detained in the requested State); returning them to the requested State without expecting the latter to initiate extradition proceedings; and granting them immunity from prosecution for acts committed prior to their departure.

Unlike the UN Convention, the 1959 Convention permits the transfer of persons in custody on a more limited number of grounds. Whereas the former mentions the broad need for a person to ‘assist in obtaining evidence’ (thus possibly including the identification of other persons or objects), the latter seems to limit a person’s appearance in the requesting State to helping as a witness or appearing for the purpose of confrontation.

Another limitation, not to be found in the UN Convention, is the laying down of grounds for refusal. Article 11(1)(d) gives the requested State virtually a free hand in the decision whether or not to transfer, based on the vague condition that it finds ‘overriding grounds’ for refusing this kind of assistance.

Thirdly, unlike the UN Convention, the 1959 Convention does not find it necessary to remind States that the return of the transferred person will not be conditional on extradition proceedings being initiated. Article 11(1) simply provides for the obligation to send the person back within the period stipulated.

Apart from these differences, the 1959 Convention is in line with the UN instrument, for instance in its requirement that the person will not be prosecuted in the requesting State for acts committed prior to their transfer (Article 12(2)). Also, the 2000 Convention has introduced a provision similar to that contained in the UN Convention, whereby the person transferred will receive credit for periods of detention spent in the requesting State (Article 9).

- **Establishment of a central authority:** paragraph 13 of the UN Convention requires that each State party set up a central authority charged with receiving requests for mutual assistance and either execute them directly or forward them to the competent authorities. To ensure that States comply with this provision, they must notify the UN Secretariat as to which authorities they have designated. Although it remains possible to forward requests through the traditional diplomatic channel, paragraph 13 aims to simplify and streamline the whole procedure, especially by removing the uncertainty for the requesting State as to the authorities of the requested State with which they should communicate.

On the other hand the 1959 Convention designates different competent authorities depending on the kind of request involved:

(a) Letters rogatory and applications for appearance of persons in custody: to be sent in principle through Ministries of Justice.

(b) Requests for information concerning judicial records needed in criminal matters: direct transmission through judicial authorities is possible.

(c) Requests for information concerning judicial records in other cases: to be sent through Ministries of Justice.

(d) Other requests for assistance (such as service of writs, requests for preliminary investigation): direct transmission through judicial authorities is possible.

(In all cases where direct contacts with judicial authorities are possible, the 1959 Convention allows the request to be sent also through the Interpol.)

What emerges from the above-mentioned regime is a reluctance on the part of State Parties to surrender the 'political supervision' of Justice Ministries for requests that are deemed to be of special importance.

However, increased mutual confidence between EU Member States allowed the 2000 Convention to significantly modify the existing Council of Europe regime in two respects. First, any procedural documents (such as summons to appear) to be served on people located in another Member State will be sent directly to them by post. A number of exceptions are made when, for instance, the address of the person is unknown, or delivery has failed. In these cases, communication will still take place through the competent authorities. Secondly, Article 6 provides for all other requests and information to be exchanged directly between the local judicial authorities of the various Member States. Even in comparison with the UN Convention's requirement for a single central authority, therefore, the new EU regime is based on a faster and more direct means of communication.

Recourse to a central authority remains necessary only for requests that may lead to the transfer of persons held in custody and for notices of information from judicial records.

- **Form of request:** Paragraph 14 of the UN Convention provides for requests to be transmitted in writing, without the need for any formalities except that the requested State must be able to establish its authenticity. Explicit reference is made to ‘any means capable of producing a written record’, which implies that requests submitted by electronic media should also be accepted. Paragraph 14 even suggests that requests may be forwarded orally in urgent cases, subject to written confirmation. The possibility of oral communication appears to be an innovation of the UN Convention, since it is not envisaged by either the 1959 or the 2000 Convention. For the rest, European instruments are in line with the UN Convention.
- **Content of request:** No significant differences exist between the UN Convention and European instruments. Requests for the purpose of confiscation are dealt with separately from ‘ordinary’ ones by Article 13 of the UN Convention, which is in line with the equivalent provision of the 1990 Council of Europe instrument.
- **Hearing of witnesses or experts by videoconference:** Article 18(18) of the UN Convention encourages State Parties to use this modern means of communication as a substitute for the physical transfer of persons to another Member State, when such transfer is either not possible (old age, disability) or desirable (for instance for security reasons). The UN Convention does not lay down any detailed regime, although this would have been added to the text under a proposal from the Italian delegation. The Italian proposal, which the interpretative notes recommend should be used by State Parties at least as a guideline, subjects hearings by videoconference to a number of safeguards, including the right of the requested State to interrupt the videoconference if it infringes fundamental principles of its domestic law, and the right of the witness to have an interpreter, and not to testify if provided for by the law of either the requesting or the requested State. Moreover, the law of the requested State should be applied in case of perjury.

The only European instrument dealing with hearings by videoconference is the 2000 Convention. Article 10 is entirely devoted to setting out a detailed regime whereby the requested State is obliged to set up a videoconference unless it violates its fundamental principles. This requirement has to be understood in the sense that a videoconference could not be refused simply on the grounds that it is not provided for in the domestic law of the requested State; there must be outright incompatibility with its basic norms.

On the whole, the regime emerging from Article 10 is in line with the UN Convention (and would perfectly coincide with it had the Italian delegation’s proposal been added to the UN text), concerning safeguards for witnesses, their right not to testify and to have an interpreter, and the principle that the costs of the operation should in principle be borne by the requesting State. The requested State is also given the right to take ‘appropriate measures’ if the videoconference violates fundamental principles of its domestic law; the possibility of interrupting the operation is not explicitly laid down, but appears to be included in such measures.

The 2000 Convention departs from the UN provisions in so far as it allows the videoconference to be used also for hearings of an accused person, not just witnesses or experts. In this case, however, it can only take place with the consent of the accused person. Moreover, given its special nature, the videoconference must be carried out under rules specifically agreed upon by both the requested and the requesting State, taking into account national as well as international law, especially the ECHR.

Finally, unlike the UN instrument, the 2000 Convention has special provisions for hearings of witnesses or experts by telephone conference. Article 11 sets out a regime similar to that provided for the hearing of an accused person by videoconference.

- **Use of information received by the requesting State:** Article 18(19) of the UN Convention aims to limit the possibilities for the requested State to use the information received in proceedings other than those specifically mentioned in the request for legal assistance. The only case in which ‘information and evidence’ obtained can be used elsewhere without the consent of the requested State, is when they provide exculpatory evidence for an accused person. Thus, the need to prove the innocence of someone subject to criminal proceedings in the requesting State has been deemed to prevail over the general confidentiality rule in the interest of the requested State.

The UN Convention sets out a much stricter regime for the handling of information than the 2000 Convention, which is the only European instrument dealing with such issue. This is true in two respects. First, the UN Convention is wider in scope since the regime set out in paragraph 19 is applicable to all forms of evidence and information received without distinction, not only to the more limited category of ‘personal data’, as required by Article 23 of the 2000 Convention (by personal data, Article 23 implicitly refers to the definition contained in the 1981 Council of Europe Convention, i.e. to ‘any information relating to an identified or identifiable individual’).

Secondly, the UN Convention requires the consent of the requested State for the use of information in any proceeding other than that for which assistance is needed. This is in stark contrast to Article 23 of the 2000 Convention, which does not require such consent when either the information received is used in a directly-related proceeding, or, more generally, for ‘preventing an immediate and serious threat to public security’(paragraph 1(b)). It may thus be possible for personal data to be used in proceedings that are by no means related to the one forming the object of the request.

Overall, the UN Convention sets a higher standard of protection for personal data and extends it to cover other forms of evidence.

- **Grounds to refuse legal assistance:** Article 18(21) of the UN Convention lays down a number of grounds upon which the requested State may refuse to execute the request for assistance. Most of these coincide with the list contained in Article 2 of the 1957 Convention: for instance, the requested State may legitimately refuse to provide assistance if this would prejudice its ‘sovereignty, security and *ordre public*’.

However, the UN Convention appears to make it more difficult to refuse assistance in relation to political offences. This could only happen if the requested State argued that its ‘other essential interests’ are threatened by assistance being given for a political offence.

On the other hand, the 1959 Convention mentions ‘political offences’ explicitly as a ground for refusal.

There is a move for the draft text of the new Convention (under a French proposal) to limit the grounds for refusing cooperation. The notions of sovereignty, security and public order are discarded, and only the notion of essential interests is maintained. It is possible, though, that this notion will be further restricted if an amendment by the European Parliament is accepted whereby a request may only be refused by invoking the principle of protecting fundamental rights which would also be observed in a national case of a similar nature.

- **Fiscal offences:** under paragraph 22, assistance may not be refused only because the offence involves fiscal matters.

Originally, Article 2 of the 1959 Convention contained the opposite rule whereby assistance could be denied in relation to fiscal crimes. However, Article 1 of the Second Protocol has put fiscal and ‘ordinary’ offence on the same footing, thus placing the Council of Europe instrument in line with the UN provision.

- **Execution of requests:** Under paragraph 24, States are under a general obligation to carry out a request for assistance in a diligent way. This is particularly true for the requested State, which is expected to execute a request as soon as possible, to take full account of any deadline suggested by the requesting State, and, if asked, to report on the progress made. For its part, the requesting State should promptly inform the requested State if or when assistance is no longer needed. Under paragraph 25, however, the latter is entitled to postpone assistance when it interferes with ongoing investigations or proceedings.

The 1959 Convention does not contain explicit provisions on ‘good behaviour’ in the handling of requests. Apart from the right of the requested State to ‘delay the handing over of any property, records or documents in connection with pending criminal proceedings’(Article 5), the only obligation (not related to any specific request) is to exchange information at least once a year on all criminal conviction involving nationals of other State Parties (Article 22).

However, not only does the 2000 Convention contain explicit rules on ‘good behaviour’, but it even goes beyond the UN Convention. In addition to the obligations mentioned above, for instance, the requested State is also supposed to promptly inform the requesting State if execution has become impossible, and to suggest possible means to overcome the difficulties.

Finally, in 1998 the EU Council of Ministers adopted a Joint Action that requires Member States to deposit a Statement of Good Practice with the Council Secretariat. This document will commit them to a number of obligations in their handling of requests for legal assistance. These include acknowledging all requests and written enquiries, giving priority to requests marked urgent, and treating requests as favourably as comparable domestic ones.

- **Immunity for witnesses and experts:** with a provision equivalent to that of paragraph 12 (concerning the transfer of an accused person), paragraph 27 prevents the requesting State from restricting the personal liberty or prosecuting witnesses or other persons that find themselves on its territory, as a result of a request for mutual assistance, for offences committed prior to their departure.

The 1959 Convention is perfectly in line with the UN Convention, including the requirement that such a ‘protection measure’ will cease to apply if the persons have not left the territory of the requesting State after 15 days, despite having been informed that their presence is no longer needed; or the persons have spontaneously returned there after having left it (Article 12).

- **Costs of executing a request:** under paragraph 28, such costs will in principle be borne by the requested State. Only if the expenses are of an extraordinary nature, consultation will be necessary with the requesting State. Although no examples are given of what may constitute extraordinary expenses, the interpretative notes to the UN Convention suggest that costs associated with hearings by videoconference and the transfer of persons will be such.

Article 20 of the 1959 lays down the same principle. Instead of referring to the concept of ‘extraordinary expenses’, it mentions the attendance of experts in the requesting State and the transfer of persons detained as grounds on which the requested State may ask for refunding of expenses.

- **Availability of government records:** paragraph 29 amplifies the general rule of paragraph 3(f), whereby assistance will entail ‘providing originals or certified copies of relevant documents and records, including governmental, bank, financial, corporate or business records’. Paragraph 29 limits significantly the scope of application of mutual assistance concerning government records by distinguishing between documents available and those not available to the public. States are only under an obligation to make the former available to other States, whereas they may refuse to disclose the latter at their complete discretion. The UN Convention thus places a serious limitation on the ability of requesting States to obtain records that are not already public.

Although legislation exists and is being prepared (COM(2000) 30, Right of public access) setting criteria concerning the public availability of documents from EU institutions, European arrangements on mutual legal assistance leave Member States free to set their own rules relating to the disclosure of records from national governments.

Concluding remarks

The purpose of Article 18 of the UN Convention is to provide a broad legal framework for the handling of requests for legal assistance, which will not affect existing arrangements.

European instruments consist of a complex web of multilateral/bilateral agreements building upon the 1959 Convention. This latter still provides the basic regime for mutual legal assistance between Council of Europe States. However, the recent 2000 Convention, adopted in the narrower context of the EU and not yet in force, takes account of technological changes and increased confidence between EU Member States to significantly modernise the 1959

instrument, which is more protective of State sovereignty and does not take stock of modern means of communication. The aim is to make cooperation easier and subject to less cumbersome procedures.

Compared to the 2000 EU Convention, the UN provisions are much less detailed, and are silent on a number of issues, such as telephone conferences, videoconference for accused persons, and the interception of telecommunications. Whereas the UN Convention is still reluctant to entrust judicial authorities directly with the handling of requests for assistance, the 2000 Convention provides in most cases for direct contacts between local authorities, bypassing political supervision by Ministries of Justice. Also, the 2000 Convention makes cooperation easier by laying down a less strict regime for handling by the requesting State of the information received. Unlike the UN Convention, such information can be used without the consent of the requested State in some proceedings other than those forming the object of the request.

However, there are a number of areas where the UN Convention eases traditional restrictions on legal assistance to a greater extent than the European regime resulting from both the 1959 and the 2000 Convention. These include banking secrecy and political offences, neither of which can be invoked as grounds to refuse assistance. Moreover, the UN Convention permits the transfer of detained persons for a wider range of reasons and makes it more difficult for States to refuse this form of assistance. In urgent cases, the UN Convention takes the innovative step of suggesting that requests for assistance may be made orally.

In all the above-mentioned areas, a commitment by the EU to bringing its legislation into line with the UN provisions would be welcome for practical reasons and would also signal the EU's intention of abiding by the highest standards in the field of legal assistance in criminal matters.

An interesting opportunity to move in this direction arises with the draft proposal for a new Convention on Mutual Assistance in Criminal Matters to supplement instruments already in force. The aim is to eliminate the remaining obstacles to full and smooth cooperation between EU Member States, which the 2000 Convention, although not yet in force, was unable to remove. The French proposal suggests, for instance, that reservations made to the dual criminality principle should no longer be admissible. Also, banking secrecy would be abolished, and the grounds to refuse legal assistance would be based on a very restrictive interpretation of the concept of 'essential national interests'. Overall, the adoption of such a Convention represents the next opportunity for bringing EU legislation fully into line with the most innovative and cooperation-oriented provisions of the UN Convention.

Article 19

Commentary

Article 19 of the UN Convention encourages States to set up joint investigative teams. The aim is to ensure that States benefit from joining forces to improve the effectiveness of international cooperation.

There are no specific provisions on establishment and the conditions under which such teams should operate. Article 19 only recommends that joint investigations be carried out under bilateral or multilateral agreements, although case-by-case agreements may also be considered in the absence of previous institutional arrangements. However, given the special nature of this form of cooperation, which would normally involve ‘foreign’ law-enforcement officials taking investigative measures outside their own Member State, Article 19 contains a special clause ensuring full respect for the ‘sovereignty of the State Party in whose territory such investigation is to take place’.

The EU has only recently adopted legislation to set up joint investigative teams. Under Article 30 of the EU Treaty, reference is made to ‘specific investigative actions’ including representatives of Europol in a support capacity, to be established in the framework of enhanced cooperation in criminal matters. The Amsterdam Treaty does not set out any specific conditions for the functioning of joint investigative teams, although it does set a maximum period of five years after its entry into force for the Council to adopt appropriate measures.

Following the conclusions taken at the Tampere European Council, which basically reiterated the commitment of the Amsterdam Treaty, the 2000 Convention now deals with the issue. In Article 13, it spells out the conditions and procedures for the setting up of joint investigative teams as a special means of cooperation in the context of a comprehensive mutual legal assistance instrument.

Article 13’s innovative regime has provisions on joint investigative teams touching upon the following issues:

- the specific purpose and periods of validity of joint bodies;
- the composition of such bodies, including the role and functions of ‘team leaders’ and ‘seconded members’, i.e. members of the joint investigative team from Member States other than the Member State in which the team operates;
- the use of the information obtained in criminal proceedings and in other circumstances;
- the participation in the team of persons other than ‘the representatives of the competent authorities of the Member States’, such as international civil servants ‘(including Europol officials as recommended by Article 30 EU Treaty);

The EU Convention is silent on the issue of respect for national sovereignty. However, two provisions contained in Article 13 appear to provide solid safeguards in the interest of the State where joint investigations are to take place, thus at least complying with a broadly-defined notion of sovereignty. First, joint teams can only carry out their operations in accordance with the law of the Member State in which they operate (Article 13(2)(b)). Secondly, team leaders

may prevent seconded members of the team from participating in investigative actions for the vaguely defined 'particular reasons'.

Concluding remarks

Article 19 of the UN Convention does not lay down the conditions and procedures to be followed for setting up joint investigative teams, except that the territorial sovereignty of States shall not be affected, but it recommends that State Parties enter international agreements for this specific purpose.

A detailed regime for joint investigations has been established by the 2000 EU Convention on mutual legal assistance, which envisages joint investigative teams as a special means of cooperation. Article 13 of the 2000 Convention, in particular, implements Amsterdam Treaty provisions as well as indications adopted at the highest political level (European Council Tampere Conclusions) calling for the setting up of such bodies.

Since joint investigations have so far been carried out only on a case-by-case basis, Article 13 represents the first attempt to establish a broad legal and multilateral framework for cooperation.

However, only the practical application of Article 13 by law-enforcement authorities, once the 2000 Convention enters into force, will reveal any weaknesses in the system.

Article 20

Commentary

Article 20 of the UN Convention is divided into two parts. The first requires States Parties to provide for special investigative methods to be adopted as part of their domestic law for all offences punishable under the UN Convention. However, paragraph 1 may be considered as creating only a 'light' obligation. State Parties will be bound by it as long as the special techniques mentioned in it do not infringe 'basic principles' of domestic legal systems. Article 20, for instance, may not be applicable if it clashes with constitutional provisions on the protection of privacy.

The second part encourages States to conclude international agreements (or to act on a case-by-case basis) for the use of such techniques in the framework of international cooperation.

As with the article on joint investigations, no detailed regime is set out apart from the requirement that the 'principle of sovereign equality of States' be respected in the context of cooperation at international level.

While not providing a detailed list, Article 20 mentions a number of such techniques. These are:

- controlled deliveries (defined in Article 2(i) as the 'technique of allowing illicit or suspect consignments to pass out of, through or into the territory of one or more States, with the knowledge and under the supervision of their competent authorities, with a view to the investigation of an offence and the identification of persons involved in the commission of an offence');
- electronic surveillance;
- undercover operations.

In the EU framework, the 2000 Convention on Mutual Legal Assistance has provisions on certain specific techniques.

Article 12 deals with international cooperation in controlled deliveries at the request of one Member State (Article 74 of the Schengen Implementation Convention, now an integral part of the *acquis communautaire*, also had a provision on controlled delivery). Rather than setting out a detailed regime, reference is made to the law of the requested State.

Article 12 is applicable to criminal investigations into all extraditable offences. It will be remembered that, under Article 2 of the 1996 extradition convention, these are all offences punishable by deprivation of liberty for a maximum period of at least 12 and 6 months in the requesting and requested State respectively. As a result, the regime of controlled deliveries permitted under the 2000 Convention fully covers the notion of 'serious crimes' as defined by the UN Convention.

As to the requirement posed by the UN Convention that the sovereign equality of States be respected, Article 12(3) of the 2000 Convention appears to comply with it by granting the requested State the right to act, direct and control operations under its national law.

Article 14 deals with another special technique mentioned in the UN Convention. ‘Covert investigations’ are defined as those carried out by officers under covert or false identity. As with controlled deliveries, Article 14 refers to the specific arrangements between the two Member States as to the duration, operating conditions, and legal status of the officers concerned. Unlike Article 12, though, Member States are given the option of declaring that they do not intend to apply provisions on covert investigations.

Finally, the 2000 Convention devotes its whole Title III to international cooperation in the field of telecommunications interception. This is the first case where a multilateral treaty regulates the subject explicitly. It is true that the 1957 Council of Europe Convention makes this form of cooperation possible, as State Parties pledged to afford each other ‘the widest measure of mutual assistance’ (Article 1), but States have so far been reluctant to consider this instrument as a proper basis for responding favourably to a request for an interception of telecommunications.

Title III lays down a detailed legal framework, although it remains relatively flexible and general to prevent rapid technological change from rendering its provisions obsolete.

It should be pointed out that, although the UN Convention does not mention interception of telecommunications, it certainly does not oppose it. The importance of this investigative technique is indirectly recognised where reference is made to ‘other (non electronic) forms of surveillance’.

Concluding remarks

Article 20 of the UN Convention does not provide for a detailed regime for the application of special investigative techniques. Apart from encouraging inter-state cooperation, it merely mentions a number of possible techniques and reiterates its call for full respect of state sovereignty (as is the case with the article on joint investigations). This cautious approach reflects the suspicious attitude with which national delegations accepted the introduction of new non-traditional forms of cooperation at the drafting of the UN Convention. Even the interpretative note to Article 20 stresses that States are under no obligation to ‘make provisions for the use of all the forms of special investigative techniques noted’.

In the European legal framework, specific provisions of the 2000 EU Convention on mutual legal assistance apply to covert investigations, controlled deliveries, and telecommunication interceptions. However, the use of other techniques remains possible under general provisions on mutual legal assistance, in particular Article 1 of the 1957 Council of Europe Convention.

The issue of telecommunications interception deserves a special mention, since the 2000 Convention represents the first multilateral treaty dealing with the subject explicitly. The issue is dealt with in a relatively flexible and general way, with a view to clearly preventing rapid technological change from rendering its provisions obsolete.

However, flexibility may come at the expense of other interests, such as the protection of individual privacy. The article in the 2000 Convention on telecommunication interception, for instance, has been criticised on the grounds that interception can be authorised by any competent authorities of the requesting Member State, bypassing the ‘safeguards’ provided by careful judicial consideration.

More generally, any new legislative proposal covering relatively unexplored investigative techniques needs careful thought before it is allowed to become part of enforceable EU legislation. This area, more than others, reveals the importance of striking a delicate balance between the need to take effective action against crime and the need to protect fundamental freedoms.

Article 21

Commentary

Like other articles of the UN Convention (see for instance Article 19 and Article 20), Article 21 stops short of creating 'direct' obligations for State Parties: it merely calls upon them to consider establishing a legal framework for the transfer of proceedings.

A request for transfer of proceedings is technically a request for legal assistance. The difference from the situation covered by the general provisions of Article 18 lies in the fact that the requested State is not asked to take specific action (for instance, the sending of evidentiary documents to the requesting State), but to handle a whole criminal proceeding. Hence the need to set up a separate regime, in both the UN and the European legislative framework.

Article 21 states, rather vaguely, that the purpose for which a transfer of proceedings shall take place is the 'proper administration of justice', especially when several national jurisdictions are involved. In practice, the need for a transfer of proceedings will most frequently occur when a person, after committing a crime in State A, takes refuge in State B. If the latter refuses to grant extradition to State A (for instance, because the fugitive is one of its nationals), State A may request it to prosecute the offence by transferring the whole proceeding to State B.

In the European legal framework, the 1959 Convention on mutual assistance in criminal matters deals with transfer of proceedings marginally, by providing for a request to be transmitted as a rule through Ministries of Justice (Article 21).

The 1972 Council of Europe Convention regulated the subject in a comprehensive way. In addition, responding to the increasing climate of confidence between them, in 1990 EC Member States concluded an Agreement to supplement and facilitate the application of these two conventions and replace the provisions of previous bilateral agreements.

The 1972 Convention makes a distinction between two categories of cases. The first (dealt with in Part III) is when proceedings are instituted in one State and that State requires another one to take on the proceeding; the transfer is only possible on a limited number of grounds listed in Article 8. These include the fact that the suspected person is a national, or an ordinary resident of the requested State. In this case, the transfer of proceedings is intended primarily to serve the purpose of reintegration of the person in society.

However, Article 8 contains grounds which may be more closely assimilated to the UN Convention's suggestion that transfers should be aimed at the proper administration of justice, for instance when it mentions the 'interests of arriving at the truth', and indicates in particular that a transfer may be useful when 'the most important items of evidence are located in the requested State'.

The second category of cases, dealt with in Part IV, assumes a situation in which proceedings have been opened in more than one State, either in relation to the same offence and the same person, or several offences committed by a single person, or a single offence committed by several persons acting in unison. In all these situations, a conflict of jurisdiction arises that Articles 30-34 attempt to solve by providing for a consultative procedure between the interested States, aimed at determining 'which of them alone shall continue to conduct proceedings' (Article 31(1)).

Concluding remarks

The transfer of proceedings is a special case of legal assistance provided by one State to another, in that it involves not just the taking of specific measures (for instance, the sending of documents), but a whole criminal proceeding. As such, it requires a number of safeguards in the context of a separate and detailed legal regime.

This is the reason why the UN Convention limits itself to encouraging States to consider transferring proceedings to one another for the sake of the smooth administration of justice. On the other hand, instruments have been adopted in the European legal framework (in particular, the 1972 Council of Europe Convention on the Transfer of Proceedings in Criminal Matters and an EC Agreement) dealing exclusively with this issue.

Apart from aiding the social rehabilitation of offenders (who are given the chance to serve their sentences in their home country), transfer of proceedings is viewed as an essential tool to avoid the disadvantages of conflicts of competence between national jurisdictions. The increasingly international character of crime is making such conflicts much more likely. In this context, the EU may soon consider it appropriate to devise a new legal instrument strengthening the loose 'consultative procedure' envisaged by the 1972 Council of Europe Convention for settling conflicts of competence.

Article 22

Commentary

Article 22 of the UN Convention encourages States to recognise certain effects of previous foreign judgments in domestic criminal proceedings. In particular, previous foreign criminal convictions should be allowed to play some role in providing useful information in proceedings relating to offences covered by the UN Convention.

However, Article 22 does not specify how information originating from foreign convictions should be used in subsequent domestic proceedings. The issue is left entirely to each Member State to decide. (For instance, the Italian criminal code allows for the use of previous foreign decisions as documentary evidence, but only with a view to obtaining information on the personality of the alleged offender or the victim of the crime (Article 236 CPP).)

No provision can be found in the European legal framework requiring States to adopt national measures on the use of information from foreign judgements. Articles 13 and 22 of the 1959 Convention deal with the issue of judicial records, but only from the perspective of procedural steps to be taken in the context of mutual legal assistance. While Article 13 ensures that the requested State makes its criminal records available, Article 22 grants each State Party the right to be kept regularly informed by any other State Party of all criminal convictions regarding its nationals. These two articles, therefore, regulate procedural aspects of the inter-State transmission of judicial records, but do not say anything on how such information could be allowed to influence the conduct of domestic proceedings.

Concluding remarks

There are no European instruments dealing with the use of foreign judgments in criminal domestic proceedings. However, the UN Convention does not create an obligation to this end. It simply states that legislation or other measures should be taken into consideration by national authorities.

It is important that future European-wide legislation dealing with this issue should specify with extreme care the extent to which foreign criminal records may be used domestically. One possibility would be for them to be used as documentary evidence, possibly to prove only a limited number of facts relevant to the domestic proceeding. Another possibility, one with potentially greater impact on the status of the alleged offender, would be to take previous foreign convictions into account to determine the level of the punishment. In this case, foreign judicial records may supplement other legal grounds necessary to establish recidivism.

Article 23

Commentary

As already seen, Articles 5, 6, and 8 of the UN Convention require States to introduce a number of new crimes in their national legislation (if they have not already done so). In the same way, the purpose of Article 23 is to ensure that certain acts of intimidation, threat, and the use of physical force against witnesses or law-enforcement officials are established as criminal offences.

The location in another part of the Convention can be explained by the special nature of these offences in the UN Convention system. They are punishable only if they aim to interfere in investigations or trials for one of the offences under Articles 5, 6, or 8. In other words, they are instrumental in ensuring that the regular course of a proceeding for the three ‘core crimes’ mentioned in Articles 5, 6, and 8 is not obstructed.

Article 23 draws a distinction between two categories of people involved in acts of obstruction of justice: witnesses and law-enforcement officials.

In the case of witnesses, criminal behaviour is considered not only the act of inducing false testimony, but also any form of interference ‘in the giving of testimony or the production of evidence’. As to law-enforcement officials, the UN Convention requires that any act of interference with the exercise of their official duties be subject to punishment. As already mentioned, in both cases the obligation to make these acts punishable exists only if they relate to the commission of one of the offences mentioned in the UN Convention, although State Parties remain free to introduce criminal sanctions also when false testimony is given in proceedings for crimes that fall outside the UN’s reach).

However, a significant difference exists between the two cases: unlike the case of witnesses, when law-enforcement officials are concerned Article 23 rules out acts of ‘promise, offering, or giving of an undue advantage’ as elements of crime. Such a difference can be easily explained by the fact that the offering of an undue advantage to the latter category of people is truly an act of corruption, falling within Article 8 of the UN Convention.

Article 23 of the UN Convention has no equivalent instrument at the European level. Neither the Council of Europe nor the EU requires States to criminalise acts of obstruction of justice. A Recommendation adopted by the Committee of Ministers of the Council of Europe, i.e. a non binding instrument, only goes as far as suggesting that ‘acts of intimidation of witnesses should be made punishable either as separate criminal offences or as part of the offence of using illegal threats’ (Recommendation No R(97)13).

Dealing with such crimes at the European level may have seemed unnecessary, since offences already exist at the national level (at least in EU countries) covering various forms of obstruction of justice. However, not all national legal systems have provisions specifically dealing with crimes of obstruction of justice. For instance, Articles 610 and 336 of the Italian Criminal Code deal with acts of ‘violence or threat’ aimed respectively to ‘force someone to commit a crime’ and at a public official. Article 610 can certainly be used to punish the behaviour of someone who gives false testimony, although its reach is much broader and

applicable to any cases where someone is under physical or moral pressure to commit any kind of offence, not just false testimony.

Concluding remarks

The UN Convention requires States to adopt legislation to criminalise various forms of obstruction of justice. The aim is to ensure that national proceedings for serious offences do not slow down or lead to unfair sentences because of undue pressure exercised on witnesses and law-enforcement officials.

No European instrument has been adopted in this area, thus placing the UN Convention a step ahead of both the EU and the Council of Europe in multilateral efforts to harmonise substantive criminal law. The reason for the lack of European-wide provisions may well lie in the fact that most national criminal codes, though not explicitly criminalising obstruction of justice acts, already make them punishable as generic acts of threat or violence.

This approach, however, does not take into account the advantages of drawing up common definitions of offences in the fight against transnational organised crime. Without common definitions, highly mobile criminal groups are already finding it extremely easy to exploit loopholes and differences in national legal systems.

In addition, if the need to adopt common definitions of corruption acts is universally recognised, it is not clear why the same benefits could not derive from harmonising acts of physical intimidation directed at law-enforcement officials, as opposed to acts of simply promising or offering them an undue advantage (the latter falling within commonly accepted definitions of corruption).

Article 24

Commentary

Articles 23 and 24 of the UN Convention usefully complement each other. Whereas the former ensures that any attempt to give false testimony is subject to criminal sanctions, the latter aims to provide witnesses with the protection necessary to allow them to give free and safe testimony.

Article 24 mentions ‘potential retaliation or intimidation’ as grounds for taking ‘appropriate measures’ of protection. Clearly, any decision on the specific measures is up to each State. States, therefore, are expected to evaluate the specific circumstances and the degree of danger to which the witness is subjected.

Article 24 sets out a list of possible measures, by making a distinction between two categories: measures of physical protection, and special evidentiary rules to ensure the safety of the witness during trial.

The first category, which includes relocation of witnesses, and non-disclosure of their identity and whereabouts, implicitly recognises the importance of maintaining an appropriate level of protection well after the trial. Measures of relocation are not necessarily confined to the territory of one State; the UN Convention also thought it important to encourage States to conclude international agreements for the purpose of relocating a witness in another State.

The second category covers all measures which may shield the witness from undue influence during the trial, and includes the taking of testimony through ‘video links or other adequate means’. (It will be remembered that the same need to protect the safety of witnesses was recognised in Article 18(18), in connection with a request for mutual assistance, if it was not ‘possible or desirable’ for the witness to appear in person in the territory of the requesting State.)

In the European legal framework, the only binding instrument for the protection of witnesses is a 1995 EU Council Resolution. Its provisions coincide significantly with Article 24 of the UN Convention. In both cases, the choice of measures is left entirely to the Member States; protection may be extended to family members; the list of measures recommended also includes changes of identity, although relocation is not mentioned.

As to the use of communications technology for the taking of testimonies, the 1995 Resolution allows it on condition that the ‘adversary principle’ is not infringed. (Article 24 of the UN Convention contains a similar provision that protection measures shall not in any case ‘prejudice the right of the defendant, including the right to due process’.) In other words, both instruments acknowledge the fact that the adversarial principle risks being undermined whenever a witness is not physically present on trial, as this circumstance may jeopardise the right of the defence to cross-examine. Members of the Council of Europe, in particular, will have to take into account provisions of the ECHR whenever they decide to adopt a protection measure affecting the rights of the defence during the trial. In fact, Article 6(3)(d) of the ECHR states that ‘everyone charged with a criminal offence’ has the right to ‘examine or have examined witnesses against him’.

On the other hand, Article 6 does not impose face-to-face confrontations between the defendant and the witnesses, thus in principle enabling the competent authorities to take witness-protection measures using long-distance audio-visual methods.

Apart from the 1995 Resolution, provisions concerning witnesses can be found in the framework of the Council of Europe. The only binding instrument is the recent Corruption Convention (not yet in force). However, Article 22 does not make any significant innovation relative to the 1995 Resolution: it limits itself to requiring that States give 'effective and appropriate protection' to witnesses in corruption-related proceedings.

More detailed (though non-binding) guidelines are supplied by the Council of Europe Committee of Ministers in Recommendation No R (97)13. Its list of measures mostly reiterates the list in the 1995 Resolution. However, particular attention is drawn to the importance of setting up comprehensive witness-protection programmes, involving a series of special measures ranging from the preservation of anonymity, relocation, and assistance in finding new jobs, to the provision of bodyguards. Also, like the UN Convention, the cross-border relocation of witnesses is considered as an important issue that should supplement existing international cooperation instruments.

Concluding remarks

Article 24 of the UN Convention on the protection of witnesses is covered by a 1995 Council Resolution (if we exclude a Council of Europe non-binding Recommendation). The two instruments coincide significantly, although neither outlines all possible protection measures to be taken before, during and after trial, nor the conditions on which they may be imposed, lifted or suspended. The decision to leave a high degree of discretion to national authorities can be explained by three sets of reasons:

1. each measure is to be decided on a case-by-case basis in relation to the seriousness of the threat to which the witness is exposed (for example, in some cases a simple decision not to disclose their identity may be enough, in others a change of domicile and identity may be necessary);
2. the taking of atypical measures may be necessary to meet special circumstances;
3. concerning protection measures to be taken during trial, the need arises to balance them with the specific rights of defence applicable under domestic law and international standards.

On the other hand, the issue of the international relocation of witnesses would require an agreement to be negotiated at the European level, covering the implementation of protection measures across borders as well as the exchange of information between authorities responsible for witness protection programmes. So far, only non-binding recommendations have been adopted in the framework of the Council of Europe.

Article 25

Commentary

Article 25 of the UN Convention requires that State Parties take a number of measures in favour of victims of crimes defined by the Convention itself. Such measures are divided into three categories:

1. assistance and protection, particularly in cases of threat of retaliation or intimidation (paragraph 1);
2. compensation and restitution for the (physical and/or psychological) damage suffered (paragraph 2);
3. access to justice systems, in particular measures to ‘enable views and concerns of victims to be presented and considered at appropriate stages of criminal proceedings’ (paragraph 3).

In the European legal framework, instruments have been adopted within both the Council of Europe and the EU.

The 1983 Council of Europe Convention deals exclusively with issues of compensation to victims from State funds, when compensation from other sources is not available (for instance, because the offender, who in many systems is required to pay compensation by order of civil or criminal courts, has not been brought to justice or lacks the means to pay). The Convention covers in detail the conditions upon which State funds shall be granted, identifies beneficiaries, sets deadlines for victims to apply, outlines grounds for refusal to grant compensation, makes sure that victims do not obtain ‘double compensation’. Despite its providing for a detailed regime, the 1983 Convention only covers one of the three categories of measures indicated in the UN Convention.

However, a recent Council Framework Decision on the standing of victims in criminal proceedings has finally put the EU in a position to fully comply with the UN requirements. Having entered into force on 22 March 2001, the new instrument sets out a comprehensive regime to establish a high level of protection and entitlements for victims. As such, it represents the outcome of a number of initiatives pursued at EU level following the Amsterdam Treaty, including a Commission Communication of 14 July 1999 on ‘Crime victims in the EU: reflections on standards and action’, and a European Parliament resolution adopted in response to the Commission initiative. Also, the conclusions of the European Council summit in Tampere (15-16 October 1999) reaffirmed the need to set minimum standards for the protection of victims and their access to justice, as well as national programmes to finance public and non-governmental measures (point 32).

In addition to covering protective and compensation measures, as also required by the UN Convention, the Council Framework Decision guarantees ‘respect and recognition’ of the status of victims in national legal systems (Article 2); it has provisions ensuring ‘the possibility for victims to be heard during proceedings and to supply evidence’ (Article 3); it grants victims the right to receive information relating to the kind of support and services that they are entitled to obtain (Article 4), and asks Member States to set up special programmes ‘within its public services or through recognition and funding of victim support organisations’ (Articles 13-14).

On the whole, the establishment of such a regime responds to the perception of EU governments that ‘victims’ needs should be considered and addressed in a comprehensive, coordinated manner, avoiding partial or inconsistent solutions which may give rise to secondary victimisation’.

Concluding remarks

Following the adoption of the recent Council framework decision, EU Member States now have the legal tools to provide victims of crimes with a common regime covering their physical protection, legal status in criminal proceedings and access to information and public/non-public funding. This new instrument, together with the 1983 Council of Europe Convention entirely devoted to victims’ compensation, complies with the requirements set out in Article 25 of the UN Convention.

However, the EU Framework Decision does not mention the possibility for ‘groups’ representing certain public interests to take part in criminal proceedings with a view, for instance, to seeking compensation. The issue is particularly sensitive in the field of environmental crime, the most likely to affect the interests of a whole group of people, and has so far only been addressed by the Council of Europe Convention on the protection of environment through criminal law. As the question of giving NGOs access to criminal proceedings is still highly controversial, Article 11 of the Council of Europe Convention has been given a ‘voluntary character’, simply leaving States free to grant such rights to groups, foundations or associations.

Although acknowledging that the damaging effects of certain crimes are increasingly felt directly by an indeterminate number of people, the EU has not yet taken steps to accord groups of people the legal status of victim. The current Danish initiative for adoption of a legislative instrument on combating serious environmental crime may be an opportunity for launching a debate on this issue, aimed possibly at introducing in the EU framework a clause similar to that of the Council of Europe Convention.

Article 26

Commentary

Acknowledging the crucial importance of statements made by members of criminal organisations in the fight against organised crime, Article 26 of the UN Convention encourages their cooperation with the judicial process in return for a number of benefits.

In the European legal framework, Article 26 has its equivalent in a Council Resolution of 20 December 1996, entirely dedicated to ‘individuals who cooperate with the judicial process’.

The two instruments coincide in almost every respect. Cooperation with judicial authorities may take the form of either the supply of substantial information, or the provision of practical and concrete help concerning the identification, structure, and activities of criminal organisations.

Although the measures to be taken will be decided by the national competent authorities after an assessment of the specific circumstances of the case, both instruments call on States to extend witness-protection measures to individuals who actively cooperate.

As to other kinds of measures, the 1996 Resolution calls on Member States to ‘assess the possibility of granting, in accordance with the general principles of their national law, benefits’. The UN Convention is also rather vague, referring to ‘appropriate measures’. However, unlike the 1996 Resolution, it suggests that the granting of immunity from prosecution and lighter punishments should be considered.

Concluding remarks

Article 26 of the UN Convention encourages States to set up schemes aimed at penalty reductions for members of organised criminal groups who actively cooperate with judicial authorities.

The drafters of the UN Convention undoubtedly had in mind the key role played by certain national legislations (such as the Italian law on ‘pentiti’) in bringing individuals to justice. However, the delicacy of this issue, as well as recent controversies over the ‘proper’ use of statements from collaborators of justice, clearly prevented the UN Convention from setting out a detailed regime.

As to the EU legal framework, the 1996 Council Resolution addresses most of the issues arising from the UN Convention. However, the possibility should be further explored of agreeing on an international instrument to allow statements by members of organised criminal groups before the authorities of one Member State to have an impact (including penalty reductions and immunity from prosecution) in another Member State. As transnational crime by definition affects various jurisdictions, such an instrument would play a key role in getting members of organised groups to disclose all of their cross-border operations.

Article 27

Commentary

Article 27 of the UN Convention encourages State Parties to achieve a high level of cooperation between their law-enforcement authorities. The notion of ‘law-enforcement authority’ is inevitably broad and includes not only magistrates, judges, prosecutors and police officers, but also other public agencies with a role in the implementation and enforcement of criminal law.

Cooperation under Article 27 thus encompasses mutual legal assistance as described in Article 18; the quick and effective handling of requests for legal assistance is clearly an important aspect of cooperation between national authorities. However, whereas Article 18 assumes that a formal request for assistance will be submitted for the execution of certain acts, Article 27 is concerned with the establishment of permanent and regular inter-state channels of communication, exchange of personnel and intelligence, regardless of a specific request.

Despite its broad reach Article 27 is not intended to list every possible means of inter-State cooperation. By providing only for a broad legal framework, it acknowledges implicitly that (a) rapid technological change may render certain forms of cooperation obsolete while opening the way for new opportunities; and (b) special agreements between State Parties, based on a high level of mutual confidence, may establish deeper and more extensive cooperation channels.

In particular, three areas are identified:

(a) exchange of information in general, ‘concerning all aspects of the offences covered by this Convention’ (paragraph 1(a)), and more in particular on ‘specific means and methods used by organised criminal groups’(paragraph 1(e));

(b) cooperation in the carrying out of inquiries (paragraph 1(b)), including the provision of ‘necessary items or quantities of substances for analytical or investigative purposes’(paragraph 1(d));

(c) exchange of personnel and liaison officers (paragraph 1(d)).

In the EU legal framework, there has been a gradual stepping up of measures on law-enforcement cooperation. The Amsterdam Treaty provides the legal basis (Articles 30 and 31 of the EU Treaty provide for common action in the field of police and judicial cooperation in criminal matters) and starting point from which the Council has launched a series of initiatives.

The Tampere Summit held on 15 and 16 October 1999, in particular, further specified the guidelines contained in Article 30 and 31 of the EU Treaty and set the legislative agenda for the next few years. As a result, a number of instruments have been adopted covering all three of the areas mentioned in Article 27 of the UN Convention:

- **Exchange of information:** the starting point is Article 30(1)(b) of the EU Treaty, under which police cooperation shall include ‘the collection, storage, processing, analysis and exchange of relevant information’.

A special role is played in this area by Europol, whose tasks under the 1995 Europol Convention include 'facilitating the exchange of information between the Member States'(Article 3(1)) on a number of crimes. (It is worth bearing in mind that the competence of Europol has progressively expanded from its original functions, restricted to drug trafficking and a few other crimes. The most recent and significant change in Europol's mandate is its new competence over money-laundering offences, regardless of the type of offence from which the laundered proceeds originate. In addition, two draft Council decisions are currently being considered: one to extend Europol's mandate to include computer crimes, the other to enable it to deal with all 'serious forms of international crime').

EU Member States have achieved significant progress in setting up a number of permanent 'structures' for the exchange of information to fight money laundering. On the basis of the 1991 Council Directive, a 'contact committee' has been established, made up of persons from Member States and Commission representatives, charged inter alia with facilitating consultation on more stringent or additional conditions that may be laid down at national level against money laundering.

In addition, each Member State has set up 'financial intelligence units' (FIUs), defined in Article 2 of the Council Decision of 17 October 2000, as 'central, national units which, in order to combat money laundering, are responsible for receiving, analysing and disseminating to the competent authorities disclosures of financial information which concern suspected proceeds of crime'. The same Council decision provides for a number of measures to overcome 'difficulties which still appear to prevent the communication and exchange of information between certain units having a different legal status'.

Another initiative, launched by the Joint Action of 3 December 1998, consists in the preparation of user-friendly guides, in which each Member State is asked to include information on how it can provide specific assistance to other States in identifying, tracing and freezing of proceeds from crime.

Finally, in line with the UN requirement that State Parties also exchange information on specific means and methods used by organised criminal groups, two 1996 Joint Actions of 15 October and 29 November respectively provide for the creation of directories of specialised competencies, skills and expertise in the fight against organised crime. The idea is for each Member State to contribute to the directory by indicating the specific expertise they have developed in dealing with certain crimes, with a view to making such expertise available to all Member States. The two directories established so far will include information on terrorism and other crimes within the competence of the Europol Drugs Unit.

- **Cooperation in the carrying out of inquiries:** here too, the legal basis is in Article 30 of the EU Treaty, which spells out Europol's role as 'encouraging the coordination and carrying out of specific investigative actions, including operational actions of joint teams comprising representatives of Europol in a support capacity'.

Article 30 of the EU Treaty reiterates what the Europol Convention already provides when it refers to 'aiding investigations in the Member States by forwarding all relevant documents to the national units (the liaison bodies between Europol and the competent national authorities)', but it also goes further by mentioning 'joint teams', a particularly close form of investigative cooperation.

The idea of joint investigative teams also appears in the Tampere Summit Conclusions, and has eventually been put into practice in Article 13 of the 2000 Convention on mutual legal assistance (see commentary to Article 19 of the UN Convention).

However, the most innovative form of law-enforcement cooperation is likely to emerge from the establishment of Eurojust, a unit composed of national prosecutors, magistrates or police officers seconded by the Member States for the purpose of fighting serious cross-border organised crime. Aware of the urgent need to create a fully functioning body, the Tampere Summit set the end of the 2001 as the target date for establishing Eurojust, and the EU Treaty was itself amended in Nice in December 2000 to include explicit recognition of its fundamental role (see Articles 29 and 31 of the EU Treaty as amended). However, intense debate between national governments has so far left several key issues unresolved, including the composition of Eurojust, its competence (over which type of crimes?), its right to access judicial records from Member States, its relationship with Europol and the European Judicial Network, and in particular, how to avoid duplication of activities and conflicts of competence with the latter.

A Commission Communication of 12 November 2000 covers the various issues that emerged in the debate and, in principle, favours combining proposals that have so far emerged from several Member States. One is from Germany, and the other from Portugal, France and Sweden, the latter recommending a more gradual two-phase approach to the establishment of Eurojust. The Commission asks the fundamental question: what will the functions of Eurojust be? Clearly, the debate in the forthcoming months will be crucial for taking a final decision on a body whose functions will lie somewhere between those of a mere documentation and information centre for national investigative agencies, and those of a European public prosecutor. Although the latter option still seems very remote, the Commission Communication suggests that the new body should have the power to address recommendations and send binding requests for information to national authorities.

Pending a final decision (on 17 May 2001 the European Parliament approved the report by Mrs Gebhardt at first reading), a 2000 Council decision set up a Provisional Judicial Cooperation Unit, supported by the infrastructure of the Council. The purpose is to gain experience with the functioning of an embryonic body as the 'basis for drawing up the instrument establishing Eurojust'. (Such a body actually began work in March 2001.)

Another form of cooperation, also mentioned in Article 27 of the UN Convention, concerns the provision of substances for investigative purposes. No EU-wide legislation has so far been enacted on this matter. However, the Swedish presidency recently put forward two legislative proposals. The first aims to establish a legal framework for the transmission of samples of seized illegal narcotic drugs between authorities of the Member States, for the purpose of prevention, detection, investigation and prosecution of criminal offences (on 11 April 2001, the relevant parliamentary committee adopted a report broadly approving this initiative). The second proposal is for setting up a European system of laboratories for the analysis of synthetic drugs from samples transmitted to them on behalf of Member States.

- **Exchange of personnel:** in line with the UN Convention, Article 30(2)(c) of the EU Treaty provides that, 'within a period of five years after the date of entry into force of the Amsterdam Treaty', the Council will 'promote liaison arrangements between prosecuting /investigating officials specialising in the fight against organised crime in close cooperation with Europol'.

Provisions for the sending of liaison officers are included in the Europol Convention. Under Article 5, each National Unit is required to second at least one liaison officer to Europol, to assist in the exchange of information between the unit from which they have been seconded and Europol. EU Member States currently have between them more than 300 liaison officers working outside their own countries. More than 50 per cent of these are posted in Europe.

A Joint Action of 22 April 1996 is entirely devoted to the exchange of liaison magistrates between Member States, with the aim of increasing the speed and effectiveness of judicial cooperation. Liaison magistrates may turn out to be particularly useful in the case of complex requests for mutual legal assistance, helping to ensure mutual understanding between judicial authorities from different legal traditions.

Concluding remarks

Article 27 of the UN Convention, on law-enforcement cooperation, covers issues that are dealt with thoroughly in a variety of instruments adopted within the EU legal framework. As such, Article 27 is directly comparable with the EU Treaty provisions on police and judicial cooperation, which constitutes the legal basis for all recent EU initiatives.

At present, the trend in the EU points towards the development of increasingly close cooperation arrangements between its Member States. Starting with the mere exchange of liaison magistrates, and continuing with the creation of a network of national contact points (through the European Judicial Network), the next step will be the establishment of Eurojust. This body will consist of magistrates, national prosecutors and police officers to complement national authorities in the investigation of serious cross-border crimes. One of the key choices currently facing national governments is between entrusting the new body with binding powers vis-à-vis national authorities, and making it a simple duplicate of existing arrangements.

And yet, despite the intense debate still under way between national governments on its composition, functions and competencies, the idea is already circulating on the setting up of an independent European Public Prosecutor. For the moment, the proposal is for this body to bring prosecutions in the courts of the Member States only in relation to offences against the Community's financial interests. However, despite the Commission's reassurance that 'the point is not to communitarise the administration of criminal justice, which would remain within national powers', it is not difficult to see how setting up a 'single' European Prosecutor would be a further step towards creating a common judicial area. In fact, it would not be too hazardous to assume that its initial competence over a limited number of offences will rapidly expand. The same 'process' has taken place with regard to Europol, whose competence has been constantly expanded to include new crimes.

Article 28

Commentary

The form of cooperation envisaged in Article 28 is often the necessary prerequisite for an effective and well-calibrated response to criminal events, as it focuses on providing competent authorities (including legislative bodies) with the ‘theoretical background’ to keep pace with the constantly-evolving nature and practices of organised crime.

Article 28 of the UN Convention is divided into two parts. The first (paragraphs 1 and 2) highlights the importance of analysing current trends, and the structures and circumstances in which organised crime operates. Such an analysis will be particularly effective with the involvement of the scientific and academic community, and with States sharing their ‘analytical expertise’. In turn, inter-State cooperation will prove useful only if ‘common definitions, standards and methodologies’ are developed and applied.

The second part of Article 28 (paragraph 3) invites States to set up structures for the assessment of their own performance in implementing anti-crime policies. Nothing is said about international cooperation in this sector, although it can be assumed that entrusting this monitoring exercise to a supranational structure would be especially useful in safeguarding the effectiveness and impartiality of the evaluation process.

In recent years, the European Union has launched a number of initiatives for the effective collection and analysis of data on organised crime. The 1997 Action Plan recommended that for such a purpose States should identify a mechanism ‘which is so construed that it can provide a picture of the organised crime in the Member States and which can assist law-enforcement authorities in fighting organised crime’ (Recommendation 2). The use of common standards and participation of the academic and scientific world was also encouraged. Some of the 1997 Plan’s recommendations, in particular the setting up of a Contact and Support Network ‘to serve as advising mechanism for the collection of data and the analysis at European level’, have actually had practical results: Europol has produced annual reports on organised crime based on data provided by the Member States, and is expected to run, a ‘research, documentation and statistical network on cross-border crime’, based on a Council decision within five years of the entry into force of the Amsterdam Treaty (Article 30(2)(d) EU Treaty).

The New Action Plan, in its chapter devoted to ‘strengthening the collection and analysis of data’, reiterates the broad commitments of the 1997 Action Plan. It recognises that progress has been made in a number of areas: in particular, the Commission has used the Falcone programme on exchanges, training and cooperation activities to encourage closer involvement of academics and scientists (for instance, Article 6 of the Joint Action establishing the Falcone programme mentions the promotion of ‘research and specialised studies, including operational feasibility studies, and assessment’, among the activities eligible for funding). Research and studies are also a goal of other Commission-funded schemes such as OISIS, Grotius and STOP, all of which are due to undergo reform under a Commission proposal for a ‘strategic reorientation’ of programmes under Title VI of the EU Treaty (see commentary to Article 29 UN Convention).

However, the New Action Plan contains a series of guidelines on how to improve ‘the validity, reliability and international comparability of data on organised crime’. It notes, in particular, that a uniform concept of collection and use of data obtained has not yet been developed, and it

calls for a more ‘proactive, intelligence-led approach’. This is aimed at encouraging States to adopt a comprehensive working method in order to fight organised crime effectively. Effective action requires understanding crime in its global dimension, by considering the profiles, motives and modus operandi of the offenders, and the impact of organised crime on society. Operational data (on individual suspected and detected cases) should be combined with empirical data (qualitative and quantitative criminological data).

As to mechanisms aimed to monitoring Member States’ implementation of anti-crime policies (covered by Article 23(3) of the UN Convention), a Joint Action of 5 December 1997 sets out the legal framework for thorough assessment of the application at national level of international commitments in the fight against organised crime. This instrument draws up a procedure for such assessment in two steps. First, each Member State is required to reply to a questionnaire, prepared by the Council presidency, ‘designed to establish all information useful for the conduct of the evaluation’ (Article 5). Secondly, it provides for the creation of ‘evaluation teams’, made up of experts designated by the Member States and appointed by the Council presidency, with the task of carrying out on-the-spot visits of each Member State in order to meet various national authorities. The evaluation teams should then prepare a draft report outlining each Member State’s performance. Following the report, the Council ‘may, where it sees fit, address any recommendation to the Member State concerned and may invite it to report back to the Council on the progress it has made by a deadline to be set by the Council’ (Article 8). Although they cannot force Member States to follow a different policy course, the findings of the evaluation teams and subsequent Council recommendations may put them in the difficult position of having to publicly justify any misgiving or delay in the implementation of EU-wide strategies against organised crime.

Unlike the above-mentioned Joint Action, whose purpose is to ensure that Member States duly implement EU-wide strategies, another initiative has been launched with a view to monitoring steps taken by the EU itself in implementing measures and meeting the deadlines set by the Amsterdam Treaty, the 1997 Action Plan and the Tampere Conclusions. Under this initiative, the Commission is required to submit periodic reports on progress made in the creation of an area of freedom, security and justice. The last one to have been published is a biannual update in the form of a Communication to the Council and the European Parliament (COM(2000) 782). This sets out, for every subject, the objectives, the specific action needed, the organs responsible for the action (Council, Commission, Member States), the timetable for adoption of relevant measures and the state of play.

Concluding remarks

Article 28 of the UN Convention invites States to cooperate on research into the nature and trend of organised crime. This is often a crucial condition for the crafting of comprehensive and far-sighted action against it. The need for analysis and collection of statistical data will become more and more important given the ever-changing nature, activities, and resources of criminal groups.

A number of initiatives have been taken in the EU, although various non-binding recommendations stress that much work still has to be done. In particular, the new Action Plan identifies two sets of priorities on the way to strengthening the collection and analysis of data on organised crime.

First, deeper involvement of the academic and scientific community with a view to achieving a truly global understanding of the phenomenon (including its sociological implications). The second priority would be to develop common methodologies between Member States.

However, the New Action Plan acknowledges that some progress has been made over the past few years; for instance, Europol has produced annual report on the situation of organised crime.

It would be a sensible policy to build upon the expertise that Europol is already developing, perhaps by opening its annual reports to the contributions of scholars committed to the analysis of crime from different perspectives. A further challenge would be to make the outcome of specialised studies easily and effectively available to law-enforcement authorities, based on common standards and methodologies; according to the New Action Plan, this is to be considered a 'priority 1' objective (meaning that work should begin immediately with a view to rapid completion).

Article 29

Commentary

Article 29 of the UN Convention aims to ensure that national law-enforcement authorities undergo proper training to enable them to fight organised crime effectively. Training programmes should be implemented both at national and at international level, through ‘regional and international conferences and seminars’ (paragraph 2), and are not targeted at any specific category of persons. All personnel performing a role in the prevention, detection and control of the offences covered by the Convention are eligible.

Article 29 does not claim to set out a comprehensive list of training schemes. Traditionally, for instance, training programmes would focus on updating law-enforcement authorities through legislative innovation at national and international level. However, these areas are not explicitly mentioned, although they clearly represent an essential starting-point for any serious training activity. Instead, paragraph 1 mentions more specific training programmes, enabling law-enforcement personnel to deal with less traditional forms of organised crime (such as crime committed through the use modern technologies), or to take stock of recent technological developments in the fight against criminal activities (electronic surveillance, controlled deliveries).

Overall, the special importance attached to training activities reflects a concern that State Parties, unless their officials are adequately trained, may not be in a position to implement some of the UN Convention’s most innovative provisions. Legislative changes in domestic legal systems would only be a first step, as the successful handling of special investigative techniques (Article 20), complex witnesses protection programmes (Article 24), and comprehensive victim assistance measures (Article 25), to mention a few, require the action of specially-trained personnel.

Initiatives taken at EU level for the training of national law-enforcement personnel have followed three different paths.

Firstly, there are provisions on training in instruments dealing with specific offences. For instance, in addition to a number of measures against money laundering, a Joint Action of 3 December 1998 invites Member States to ‘acquaint their judiciary with best practice in international cooperation in the identification, tracing, freezing or seizing, and confiscation of instrumentalities and the proceeds from crime’(Article 6). This should be done, *inter alia*, through seminars for national officials and practitioners in cooperation with Europol and the European Judicial Network.

Similarly, a 2001 Council framework decision, which is entirely dedicated to the standing of victims in criminal proceedings, encourages States to take special account of training measures for personnel in contact with victims, suggesting that such training should focus in particular on ‘the needs of the most vulnerable groups’(Article 14).

The second category of initiatives includes the multiannual financing programmes adopted through Joint Actions on the basis of the Amsterdam Treaty. The Grotius, STOP, OISIN and Falcone programmes establish a source of Community funding for individual projects presented by public or private bodies, including research institutes and institutions responsible for basic and continuing training. The various projects are evaluated by the Commission, which is also responsible for drawing up a draft annual programme setting objectives, priorities and the distribution of appropriations between fields of activity. The presentation of projects with a transnational character is encouraged by the requirement that they ‘must be of European interest and involve more than one Member State’. Thus through a mechanism of incentives and co-financing, the EU aims to achieve the objective laid down in Article 29(2) of the UN Convention that ‘State Parties assist one another in planning and implementing research and training programmes designed to share expertise’.

The third set of initiatives consists in the creation of specific networks for the training of certain categories of law-enforcement officials. Based on the recommendations of the Tampere Summit, Member States have taken the first significant step in this direction by establishing a European Police College (CEPOL) for the training of senior police officers. A gradual approach has been chosen, in that CEPOL will initially function as a network of national training institutes (run by a governing body and a secretariat with administrative tasks), without ruling out its future development into a fully-fledged permanent institution. Although it will be up to the governing body to decide, on an annual basis, on the teaching content, type, number and length of training measures to be implemented (Article 3), Article 6 of the Council Decision setting up CEPOL identifies the broad objectives and tasks of the network. These are to increase knowledge of national police systems, cross-border police cooperation, international instruments, and, interestingly, ‘to provide appropriate training with regard to respect for democratic safeguards with particular reference to the rights of defence’. Overall, the purpose of CEPOL should be to ‘develop a European approach to the main problems facing Member States in the fight against crime’.

The same framework and legal approach chosen for the setting up of CEPOL is also guiding a parallel initiative to establish a European Judicial Training Network, as a *conditio sine qua non* for the success of the European judicial area, and a further step towards the creation of a ‘genuine European judicial culture’. Under the current French proposal, the network should be ‘made up of national schools and institutions of the Member States responsible specifically for training professional judges and prosecutors who are members of the judiciary’ (Article 2 draft Council decision). As with CEPOL, a Governing Board and General Secretariat should be set up, with the tasks of ‘fostering consistency and efficiency in the training activities carried out by the members of the judiciary of the Member States’ (Article 3).

Concluding remarks

Effective training ensures that law-enforcement officials acquire the skills to handle the increasingly sophisticated nature and tools used by organised criminal groups. In the context of the UN Convention, Article 29 attaches special importance to training activities, reflecting a concern that State Parties, unless their officials are adequately trained, may not be in a position to implement some of the UN Convention’s most innovative provisions.

The EU’s various programmes for the training of law-enforcement officials (in particular multiannual financing schemes, and networks of judicial and police training institutes) are of a

heterogeneous nature, but they all point to the global objective of creating a ‘common European culture’, thus facilitating police and judicial cooperation between Member States. In so doing, the EU is making significant progress towards complying with the UN Convention’s requirement that ‘State Parties shall assist one another in planning and implementing research and training programmes to share expertise’ (Article 29(2)). Numerous projects eligible for co-financing have been adopted. Also, the Commission has so far reported three times to the European Parliament and the Council on the implementation of programmes, showing that they have achieved their overall objectives.

However, efforts are under way to streamline the functioning of a number Community-financed programmes, with a view to establishing a single ‘Title VI framework programme’. In this context, the Commission is currently pursuing a policy of ‘strategic reorientation’ of all Community-financed training programmes, in order to achieve simpler budgetary procedures, an upgrading of training activities, and a ‘greater synergy between the currently separate four Title VI programmes (notably, Grotius, OISIN, STOP, and Falcone)’.

A global reorientation and streamlining of its training initiatives would also enable the EU to meet the UN Convention’s broad requirement that State Parties already linked by international agreements in the field of training ‘maximise’ their operational capacities within international and regional organisations (Article 29(3)).

Article 30

Commentary

Article 30 of the UN Convention reflects a concern that, unless they receive adequate assistance, the developing countries are likely to encounter insurmountable obstacles in the implementation of its various provisions. Since the very goal of the drafters of the UN Convention was to obtain universal acceptance of minimum standards in the fight against organised crime, Article 30 represents a key provision, introducing an element of ‘solidarity’: the developed countries are expected to contribute financial, technical and material help to provide the poorest State Parties with the training, know-how, expertise and equipment necessary to turn the UN Convention into an effective tool. The need to tackle the gap between developed and developing States, by focusing on the issue of resources, was raised by several government representatives during the Palermo signing conference.

Article 30 is based on the assumption of complex, multi-faceted links between sustainable development and the fight against organised crime. State Parties are explicitly called on to take into account the ‘negative effect’ of organised crime on sustainable development. On the other hand, it can certainly be said that countries will be able to face organised crime effectively only through relatively high levels of economic and social development .

Various forms of assistance are encouraged: material, financial and technical, as well as the provision of ‘more training programmes and modern equipment’. The provision of modern equipment, in particular, acquires special importance in the context of other articles of the UN Convention prompting States to make full use of the possibilities offered by technological advances. For instance, Article 18 allows for requests for legal assistance to be made ‘by any means capable of producing a written record’, thus including electronic media. Also, the possibility of carrying out hearings by videoconference depends entirely on the availability of the necessary technology. As a result, the supply of assistance to developing countries in the fight against organised crime will increasingly involve tackling problems related to the ‘digital divide’.

In addition to the direct technical, material and financial aid from State Parties, Article 30 puts forward a proposal to set up a special UN account to be funded through contributions originating from confiscated property in each State Party. Apart from the statement that such contributions should be of a ‘voluntary’ nature, there are no further details on how this funding mechanism is to operate, or on the ability of its administrators to determine the use of money for worthy projects independently of national governments.

Article 30 of the UN Convention also draws a distinction between developing countries and countries with ‘economies in transition’, to ensure that the latter too are eligible for assistance. The reference clearly includes Central and Eastern European States, and can be read as a call on the EU to continue to fully support its neighbouring countries.

The European Union supplies all forms of aid mentioned in the UN Convention, technical, material and financial, through a complex network of cooperation arrangements with most of the outside world. Such assistance is given both ‘directly’ and ‘indirectly’: directly, through international bilateral/multilateral agreements with third countries, Community legislation, instruments adopted under Title V (CFSP), such as Common Strategies, etc.

In this context, the European Council in Tampere suggested that the full range of possibilities opened up by the Amsterdam Treaty should be used with a view to the EU pursuing stronger external action in the field of JHA.

Moreover, it is worth noting that Article 24 of the EU Treaty explicitly allows the conclusion of international agreements covering JHA matters. The Nice Treaty, when it comes into force, will significantly facilitate the conclusion of such agreements by removing the need for a unanimous vote by the Council 'when the agreement covers an issue for which a qualified majority applies for the adoption of internal decisions or measures' (Article 24(4)). In this case, the Council will act by qualified majority voting.

Also, the Nice Treaty has added a new Title XXI on 'Economic, financial and technical cooperation with third countries'. Measures under the new Title will be 'complementary to those carried out by the Member States and consistent with the development policy of the Community (based on the provisions of Title XX, Development Cooperation)' (Article 181a). Measures envisaged under Title XXI will contribute, inter alia, to the consolidation of democracy and the rule of law. For most of them (excluding association agreements and agreements with States candidates for accession to the EU), the Council will act by a qualified majority voting on a proposal from the Commission.

As noted above, the EU also provides technical and financial assistance 'indirectly', through the presence and decision-making power of its Member States in other international fora. The New Action Plan recommends that 'the full political weight of the EU should be carried out in all fora where all Member States participate, such as the Council of Europe, the OECD, the FATF, Interpol, the UN' (Recommendation 37).

As far as the EC-UN relationship is concerned, attempts are under way to revitalise the link between the two organisations with a view to streamlining their respective functioning in areas of overlapping competence. Such efforts have received a boost following a Commission Communication (COM(2001)231 final) suggesting that EC-UN relations should shift from case-by-case financing to permanent financing, achieving a 'systematic, thematic, predictable and operational stability'. The Commission focuses on three administrative measures necessary to achieve the above-mentioned objectives:

- re-negotiation of the 1999 EC-UN Framework Agreement to concentrate on output-based budgeting;
- the conclusion of negotiations on a 'Verification Clause', enabling EC controllers to access information about the use of EC funds;
- speedy Council approval of the Commission's proposal to recast the financial regulation. The aim is to empower the Commission to fund larger programmes defined jointly with a given UN entity, or to co-finance together with other donors such programmes managed by a UN entity.

The Commission also underlines the ‘weak status’ of the Community in decision-making organs of the UN (where it has observer status), and indicates as a policy priority the acquisition of an ability to provide direct policy inputs to the governing bodies.

Whether it makes use of direct or indirect channels, the EU implements various technical cooperation programmes depending on the country concerned. Most strategies are devised to involve not just individual States, but groups of countries sharing homogeneous features, such as the same level of socio-economic development, or geographical proximity.

Countries applying for EU membership receive a special treatment and are the beneficiaries of a complex network of technical assistance programmes aimed to prepare them for accession. The 1998 Pre-accession Pact on organised crime provides the general framework and guidelines to be followed to achieve effective law-enforcement and judicial cooperation between EU Member States and candidate countries. The Pre-accession pact recognises the importance of various existing programmes and encourages their further exploration. Among these, for instance, the PHARE programmes all have provisions committing the EU to help applicant countries adapt their legal systems to the *acquis communautaire*. Since a significant part of such programmes involves institution-building, strengthening the rule of law, and ensuring the independence of the judiciary, their effect is not simply to prepare the ground for the next EU enlargement, but also to develop the ability of countries with economies in transition to tackle organised crime, thus giving them the necessary legal tools and expertise to implement the UN Convention properly. For example, Taiex, a Commission service supported by a PHARE multi-country programme, provides technical assistance for the Associated Countries of Central and Eastern Europe on the transposition, implementation and enforcement of the *acquis* through expert missions, seminars, workshops and study visits. In April 1998 Taiex organised seminars for the training of judges in Community law, and from 1999 started to address justice and home affairs in general.

Also, various EU programmes that were originally designed for EU Member States are increasingly being opened up to applicant countries. Especially in the field of training, the Pre-accession Pact recommends that it should be stimulated ‘with a view to obtaining a full understanding of organised crime as well as an assessment and improvement of the ways used to tackle them’(Principle 11). Following that, training sessions organised by the newly established European Police College include police officers from States applying for membership (Article 7(g)), Council Decision of 22 December 2001).

The Grotius, STOP, OISIN and Falcone programmes also support projects for training, exchanges of personnel, research, and provision of operational expertise, together with those responsible in the applicant countries, in order to ‘make them familiar with the achievements of the Union’.

A 1998 Council Resolution on the prevention of organised crime calls for a global strategy extended to non-member countries, particularly applicant and neighbouring ones, in the context of existing aid programmes.

The current trend to involve applicant countries in EU initiatives based on legislation also emerges from recent legislative proposals. Under the French proposal, the European Judicial Training Network will also be ‘open to exchanges with third States, and in particular with the

bodies responsible for legal training in the States applying for membership of the EU'(Article 8).

Also, a Draft Recommendation is currently being discussed in the field of the fight against terrorism. Its aim is to enhance relations between anti-terrorist services of the Member States and those of candidate countries. In particular, three initiatives are recommended: the organisation of a seminar by 2001 'on mutual knowledge of structures and laws'; the establishment a Community-financed, multi-annual programme of contacts; and the participation of candidate States in anti-terrorist programmes run by the European Police College.

The EU also provides comprehensive technical cooperation assistance to Central Asian States through the TACIS Programme. A recent Council Regulation has adopted a new strategy whereby projects will focus on a more limited number of initiatives. Interestingly, among the areas eligible for assistance, support for justice and home affairs activities is included in the broader context of support for institutional and administrative reform.

Programmes for CEECs and Central Asian States are particularly extensive, as these countries clearly represent a special foreign policy priority for the EU. However, in the framework of broader technical assistance schemes for developing countries the EU, in partnership with third States, has in recent years created cooperation strategies in the field of justice and home affairs. The most comprehensive of such partnerships links the EU with the ACP countries. Article 33 of the new Lomé Convention is entitled 'Institutional development and capacity building' and provides for cooperation to strengthen the rule of law and the independence of the judiciary, and accelerate reforms of the banking and financial sector. It places special emphasis on the fight against corruption and bribery.

A 1999 Council Regulation lays down the requirements for the implementation of Community operations to consolidate democracy, the rule of law and respect for human rights, on the basis of a multi-annual financing programme (for the period 1999-2004) administered by the Commission. Among the projects eligible for Community financial assistance are those focusing on the fight against corruption, assistance to victims of human rights violations and support for the establishment of international criminal tribunals, as well as traditional institution-building operations and training measures for law-enforcement officials.

Concluding remarks

Article 30 of the UN Convention reflects the widespread concern that, unless they receive adequate assistance, the developing countries are likely to encounter insurmountable obstacles in the implementation of its various provisions. For this reason, the developed countries are expected to contribute financial, technical and material help to provide the poorest State Parties with the training, know-how, expertise and equipment necessary to turn the UN Convention into an effective tool.

The European Union is currently committed to using the full range of its legislative instruments, taken from all 'three pillars', to bring technical and financial aid to developing countries, including special schemes to prepare the CEECs for EU membership.

Many of these programmes, however, do not focus directly on the fight against organised crime. Their aim is rather to finance projects representing ‘preconditions’ for effective anti-crime policies. For instance, most schemes support the rule of law and the independence of the judiciary. Although UN Convention does not mention them explicitly, these goals are clearly a *sine qua non* for its successful implementation.

Traditional development policies, such as programmes aimed at poverty eradication, contribute to the same goal. External debt reduction, for instance, may well release resources that could be usefully employed for the training of police officers.

The most innovative proposal put forward in Article 30 of the UN Convention concerns the establishment of a UN fund, made up of voluntary contributions from States, to finance projects for developing countries. Such contributions would originate from confiscation of the proceeds from crime in each State Party.

This idea should influence forthcoming action by the EU in three respects. First, it should be seen as encouraging the EU to go further in the development of a new partnership with the UN. The proposed UN fund is likely to be feasible only if the functioning of the two organisations is streamlined and better coordinated along the lines recommended by the Commission in its recent Communication.

Secondly, the idea of a ‘common fund’ highlights the inadequacy of current arrangements for the disposal of confiscated property. Under the 1990 Council of Europe Convention, ‘any property confiscated by the requested Party shall be disposed of by that Party, unless otherwise agreed...’(Article 15).

Thirdly, the EU may find it easier and faster to establish a fund limited to contributions from its Member States. This could be a first step, with a view to replicating the same financing mechanism within the UN at a later stage, taking stock of the experience acquired in the running of a similar fund at the EU level.

Another practical proposal for future action emerges from the requirement in Article 30 of the UN Convention that State Parties should provide ‘modern equipment to developing countries in order to assist them in achieving the objectives of this Convention’ (paragraph 2(d)). This provision should influence the way in which the new Draft Convention on Mutual legal Assistance (a French proposal) is formulated, with a view to possibly amending the 2000 Convention (see commentary to Article 18). The latter instrument, in fact, provides that if the requested State has no access to the technical means for videoconferencing, such means may be made available to it by the requesting State by mutual agreement (Article 10(2)). However, there is no obligation or any incentive for the requesting State to provide such technology. The Convention currently being drafted could thus represent an opportunity for the EU to bring itself into line with the UN requirement, for instance by introducing provisions facilitating the supply of equipment to developing countries on special price conditions.

Article 31

Commentary

Article 31 of the UN Convention deals with prevention. It recognises that action aimed at reducing the chances of a crime being committed is as important as repression. No single definition is given of what is meant by prevention, but Article 30 identifies five broad areas where a State's response would be crucial in implementing an effective preventive policy:

1. preventing organised crime from participating in lawful markets with proceeds of crime;
2. preventing recidivism by encouraging the reintegration into society of persons convicted of offences;
3. carrying out periodical evaluations of existing legal instruments to prevent their shortcomings from being exploited by criminal groups;
4. promoting public awareness and public participation in combating crime;
5. addressing social marginalisation as a main cause of recruitment into organised crime.

The European Union has set about dealing seriously with preventive measures only since the Amsterdam Treaty, which for the first time included prevention as one of the objectives of police cooperation between Member States. Since then prevention has become a central issue of various Action Plans (in particular, the 1997 plan and the New Action Plan). The European Council Summit in Tampere addressed prevention issues, calling for the identification of priorities in both the external and internal policies of the European Union.

All relevant EU instruments, including a 1998 Council Resolution setting out broad guidelines for a 'comprehensive strategy', have developed an open-minded approach to prevention that recognises the importance of acting at various levels.

The 2000 Commission Communication on prevention provides a global view of EU policies, and reaffirms the validity of earlier instruments by stressing the need to involve national, regional and local entities, each in its own field of competence, as well as public and private bodies. A call is implicitly made for the 'social mobilisation' of various figures in the prevention of crime, involving enterprises, teachers, educators, local communities, etc. Most importantly, prevention should be regarded as a cross-sectoral issue. Policies adopted in the social area should play a key role in this respect; tackling unemployment, providing for extensive social security systems, devising programmes which are as inclusive as possible for the most vulnerable groups of society is seen as the best way to achieve a situation conducive to lower crime rates. The call for a multi-faceted strategy to tackle prevention has even prompted the Commission Communication to talk of a 'European model of crime prevention'.

What follows is a brief analysis of initiatives taken by the EU, compared with each of the five broad areas of action identified in Article 31 of the UN Convention.

1. Preventing organised crime from participating in lawful markets with the proceeds of crime (paragraph 2)

(a) Strengthening of cooperation between law-enforcement agencies and private entities

Developing a cooperative relationship between law-enforcement authorities and the private sector is the specific goal of the 1991 Directive on the prevention of money-laundering. Article 6 places an obligation on credit and financial institutions to cooperate fully with the authorities responsible for combating money laundering, including the obligation to ‘inform those authorities, on their own initiatives, of any fact which might be an indication of money laundering’. Under the current proposal to amend the 1991 Directives, such ‘reporting obligations’ will be extended to other non-financial activities and professions, including accountants, real estate agents, notaries and other independent legal professions. Moreover, the European Parliament’s first reading has further extended the scope of the Directive by including tax inspectors, dealers in luxury items, auctioneers, and tax agents.

Another recent Commission initiative based on the strict involvement of the private sector in crime prevention relates to fraud and the counterfeiting of non-cash means of payment. The Commission Action Plan (COM(2001) 11 final) is primarily intended to engage the payment card industry and calls for a partnership between card-holders, retailers, infrastructure network providers and national and international authorities.

Outside specific criminal areas, two recent proposals aim to closely involve private entities in prevention actions. The first is the French and Swedish proposal to establish a European crime prevention network by providing for the involvement of the private sector in the composition of national contact points designated by each Member State (Article 2).

The second is a Commission initiative to set up a financial instrument for projects relating to prevention, following the same structure of already-functioning programmes such as OISIN, Falcone, STOP and Grotius. It is suggested that the aim of the new scheme’s (known as ‘Hippocrates’) should be to ‘encourage cooperation between all the public and private organisations in the Member States involved in the prevention of crime, whether or not organised’ (Article 2).

(b) Preventing the infiltration of organised crime in lawful activities through the development of codes of conduct for relevant professions, in particular lawyers, notaries, tax consultants and accountants

There is strong encouragement from the 1997 Action Plan and the 1998 Council resolution for the drafting of codes of conduct for the professions mentioned in the UN Convention. The aim is to shield certain vulnerable activities from infiltration by organised crime.

The recent Commission Communication on the protection of the Communities’ financial interests (COM(2001) 254 final) reiterates the need for such professions to draw up their internal rules, adding that a system of public control should be introduced ‘for penalising for any shortcomings in these self-regulation arrangements’.

However, no EU-wide instrument setting binding guidelines for professions has been put forward, although the Commission has worked closely with the liberal professions on the drafting of a Charter of European professional associations in support of the fight against organised crime. The Charter was signed on 27 July 1999.

(c) Preventing the misuse by organised criminal groups of tender procedures and of subsidies and licences granted by public authorities

Both the 1997 plan and the New Action Plan call on the Commission and Member States to ensure that applicants in tender procedures for the award of public contracts can be excluded from the procedure if they have committed offences connected with organised crime.

Accordingly, a recent proposal for a directive on the coordination of procedures for the award of public contracts suggests that anyone convicted of serious crimes involving the activities of a criminal organisation should be automatically excluded from participation in the contract. The same prohibition should also apply to those convicted of corruption and fraud, whereas in other situations (such as bankruptcy and grave forms of professional misconduct) Member States simply have the option to provide for exclusion in the regulation of tender procedures at national level.

Despite repeated calls, no EU-wide legislation has so far been adopted or put forward for the introduction of equivalent rules concerning applications for subsidies and government licences.

(d) Preventing organised crime from misusing legal persons, including: the possibility of disqualifying convicted people from acting as managers of legal persons, the establishment of public records on legal or physical persons involved in the management of legal persons, including records of persons who are disqualified

Both the 1997 plan and the New Action Plan are in line with the UN Convention as far as the setting up of records of physical persons is concerned; in addition, Member States are invited to study how such information can be compiled in a systematic way so as to be made available for exchange with other Member States. However, neither Action Plan mentions the establishment of records of legal persons, nor do they address the issue of court orders being used to disqualify convicted persons from acting as managers of corporations.

The Second Protocol to the Convention on the protection of the Communities' financial interests actually provides for a number of possible sanctions (including 'temporary or permanent disqualification from the practice of commercial activities' (Article 4 (1)(b)), but these measures only target legal persons. The Second Protocol thus does not address the issue of physical persons, who may in theory 'recycle' themselves in new activities under the name of a different legal person.

2. Reintegrating convicted people into society

This principle is explicitly endorsed by the 1998 Council Resolution (paragraph 7), which mentions diversion measures as a way to prevent the repetition of offences. However, no EU instrument fully addresses the issue of the re-education and rehabilitation of offenders. The possibility of persuading Member States to adopt measures alternative to detention could be explored.

3. Carrying out periodical evaluation of legal instruments to assess their vulnerability to misuse by organised criminal groups

The debate in the EU is currently centred on how to ensure that existing or planned EU legislative instruments should be screened using the yardstick of crime-proofing, in particular ‘fraud-proofing’ of legislation which could be exploited by organised crime to affect the Communities’ financial interests. The main problems concern the amount or nature of legislation needing to be screened (it does not seem realistic to screen every single piece of legislation), the stage of the legislative procedure at which the screening should take place, and the actors to be consulted in the screening process.

4. Promoting public awareness and public participation in combating crime

Though recognising the key role of civil society groups and initiatives taken at the local level in the prevention of organised crime, the 1998 Council Resolution did not explicitly instruct Member States to take measures to increase public awareness of the dangers caused by organised crime (through the media, as the UN Convention suggests), nor did it recommend measures for active public involvement in the fight against crime.

5. Addressing social marginalisation as a main cause of recruitment into organised crime

As already mentioned, policies against social exclusion probably represent the EU’s most favoured approach to crime prevention. The conclusions of the Lisbon European Council regard the fight against social exclusion as a new strategic objective.

The 1998 Council Resolution on prevention recognises that innumerable benefits could derive from efficient social security systems, comprehensive education and training systems, humane urban planning, and measures to tackle unemployment.

The 1997 Action Plan mentions the European Social Fund as a vital way of assisting the labour market and indirectly preventing large cities from becoming ‘breeding grounds for organised crime’ (Recommendation 9).

Problems of social marginalisation in large cities are also the underlying concern of the proposal for a European crime prevention network, which is intended to focus, once it becomes operational, on urban, juvenile and drug-related crime.

Concluding remarks

Article 31 of the UN Convention urges States to devise a multi-faceted policy for the prevention of organised crime. Action should be taken at various levels and with the involvement of as many actors as possible, not simply national legislators and law-enforcement authorities; recognising that the phenomenon of crime has its roots in poverty and social marginalisation, an effective prevention policy must include public and private entities, educators, etc.

This is also the broad approach taken by the EU following the Amsterdam Treaty, which for the first time introduced the concept of prevention as a goal of police cooperation in criminal matters. Various Action Plans have also been adopted, gradually drawing up a comprehensive strategy. Their recommendations for preventive measures of a heterogeneous, inclusive and socially oriented nature (an approach which prompted a recent Commission Communication to talk of a ‘European model of prevention’) are basically in line with the overall approach of the UN Convention.

However, despite setting out the guidelines for a comprehensive strategy, the EU has so far adopted only a few binding instruments in the field of prevention. The only instrument tackling prevention issues from a more global a perspective contains very loose obligations on Member States, and for the most part reiterates the broad guidelines already set out in the 1997 Action Plan.

In addition, Article 31 of the UN Convention recommends that action be taken in a number of areas that are not even mentioned in the Action Plans, and should therefore encourage the EU to put forward fresh innovative proposals in various directions: the promotion of public awareness campaigns, the possibility of disqualifying persons convicted of serious offences from the management of legal entities, the establishment of public records for such disqualified people, and the prevention of misuse by organised criminal groups of subsidies and licences granted by public authorities for commercial activities.

The EU is taking practical steps only in specific areas, one of these being the prevention of money-laundering. Moreover, the obligations placed by the 1991 Directive on financial and credit institutions to cooperate fully with law-enforcement authorities will soon be extended to other non- financial activities and professions.

Also, a positive sign emerges from a recent proposal to streamline the procedures for the award of public contracts. Among its provisions is exclusion from the contract of people previously convicted of serious offences linked to an organised criminal group (Article 46, Personal situation of the candidate or tenderer). If adopted, this instrument will be a major step towards complying with the broad UN requirement that tender procedures should not be misused by organised criminal groups (Article 31(2)(c)).

Other initiatives have the potential for significantly improving Member States' cooperation on prevention issues more generally. This is the case of the proposed multi-annual financing programme for prevention-related projects ('Hippocrates').

In addition, interesting developments may come from the operation of the European crime prevention network, once it is established, although its relevance to the purpose of 'implementing' Article 31 of the UN Convention is mixed, as it will mainly deal with urban, juvenile and drug-related crime, three areas that the UN Convention only touches upon marginally.

This prompted the Commission to launch the initiative of a European Forum for the prevention of organised crime. The idea is to set up a framework for the networking of experts and the widening of the debate. On 17/18 May 2001 the Forum organised its first full meeting and set up four working groups, on 1. the application of prevention to human trafficking; 2. prevention of credit card fraud; 3. the role of the private sector in preventing financial and business crime; and 4. prevention of the smuggling of cultural artefacts.

Articles 32 and 33

Commentary

Article 32 envisages the establishment of a Conference of State Parties to ‘promote and review the implementation of this Convention’. Article 33 charges the Secretariat General of the UN with the task of providing the necessary assistance to the Conference.

The drafters of the UN Convention were well aware of the fact that fighting organised crime will require a constant effort on the part of the international community. However detailed and updated, an international convention will not suffice: As any legislative instrument is always exposed to the risk of becoming obsolete, this holds particularly true for one tackling a form of crime that keeps changing its nature, channels and activities. The drawing up of legal norms is only a first step, to be followed by careful monitoring of its implementation and assessment of the problems and obstacles arising. Hence the Conference is primarily intended to act as a forum where State Parties can discuss new initiatives, exchange views, and facilitate the exchange of information

Article 32 only indicates the broad areas of competence of the Conference, which is itself required to agree upon the detailed mechanisms for achieving its objectives.

As a regional economic integration organisation which signed the UN Convention, the EC will be a Party to the Conference on the same footing as the other States. This represents an opportunity for it to organise its action in a consistent way, ensuring that its activities are well coordinated with those it is already pursuing in other international fora where issues of organised crime are tackled (in particular, the Council of Europe, the OECD, the Financial Action Task Force, Interpol, and the UN).

Article 34

Commentary

Article 34 is divided into three paragraphs.

Paragraph 1 merely reminds State Parties of their obligation to implement the UN Convention by taking all necessary measures, including administrative and legislative ones. The only case in which a State may legitimately refuse to implement its provisions is when certain implementing measures would clash with fundamental principles of its domestic law. As the concept of 'fundamental principles' is not defined, the risk exists that States will exploit the ambiguity of this formula in order not to comply with vast parts of the UN Convention.

However, a reasonable interpretation of the UN Convention text would suggest that, for a principle to be considered fundamental, it is not sufficient that it should rank as a constitutional norm. In this perspective the notion is restricted to those core principles that represent the very cornerstone of a State's democratic system and identity, whether or not they are formally embodied in a constitution.

In the context of the UN Convention, it is most likely that this notion will be invoked for the protection of privacy, for instance to protect against investigative techniques considered too intrusive. According to this view, therefore, there could be parts of EU legislation that legitimately clash with the UN Convention, for instance provisions on data protection contained in the recent EU Convention on mutual legal assistance.

Paragraph 2 seeks to prevent States from establishing the four offences defined in Articles 5, 6, 8 and 23 too narrowly, by making them punishable only on condition that they are transnational in nature or involve a criminal organisation. Unlike other serious crimes, to which the UN Convention will apply only if their transnational character can be proven, their establishment as criminal offences is considered highly important. The UN Convention encourages their establishment in as broad and inclusive terms as possible.

Paragraph 3 implicitly acknowledges the nature of the UN Convention as a broad legal framework: the need to ensure its acceptance by over 120 States may have resulted in the drafting of provisions that could otherwise have been stricter or more severe. Thus, the drafters of the UN Convention thought it important to stress that any State wishing to take a tougher stand against transnational organised crime will clearly comply with the spirit of the Convention.

Conclusion

This study has shown how far EU and Council of Europe initiatives in the fight against organised crime coincide with the provisions of the recent UN Convention, signed in Palermo on 12 December 2000, the first instrument of a universal character to deal comprehensively with this form of crime.

The comparison was intended to serve various purposes. First of all, to assess the 'state of progress' in the European Union, with particular reference to activities pursued under the justice and home affairs 'pillar': where does EU legislation on police and judicial cooperation stand vis-à-vis the UN Convention? Do EU Member States need to significantly improve their cooperative arrangements in order to meet the high standards agreed upon in the UN legal framework?

Secondly, analysis of the UN Convention proved useful both as a starting point and a source of new ideas to guide the European Union in its future activities for the gradual establishment of an area of freedom, security and justice.

The comparison has produced mixed results. On the one hand, the EU appears to have set up more sophisticated and advanced cooperative structures and procedures between its Member States. This is particularly true of procedures for extradition and requests for legal assistance.

As to extradition, on one of the most contentious issues, the extradition of nationals, the EU is placing itself well ahead of the more traditional approach followed by the UN Convention. The EU is also progressively easing extradition procedures: under a 1995 Convention, for instance, the consent of the person to be surrendered may suffice in many cases to bypass the lengthy formalities usually required. The next logical step may well involve turning extradition procedures into mere administrative transfers. An agreement between Spain and Italy, signed on 28 November 2000, has put this idea into practice and could become a reference model for future EU action.

As to mutual legal assistance, the recent 2000 Convention includes an innovative chapter on the interception of telecommunications. More generally, whereas the UN Convention is still reluctant to entrust judicial authorities directly with the handling of requests, the EU has already taken a significant step ensuring that the majority of requests are exchanged between local judges. The servicing of certain procedural documents may even be sent directly by post to people located in the territory of another Member State.

Overall, strengthened and more advanced arrangements in the EU can be easily explained if one considers the context in which the UN Convention was negotiated. Its provisions reflect the inevitable compromise of forging agreement between over 120 States. This led necessarily to a certain degree of ambiguity and a number of watered-down provisions. In this respect, the UN Convention witnesses the constant tension between the search for universality and the need for efficiency. On the other hand, increasing mutual confidence between EU Member States, and the fact that they already have relatively homogeneous legal systems and practices in place, have allowed them to go much further in reciprocal concessions to the principle of national sovereignty. Crucially, the existence of the single market and the virtual abolition of borders between them have represented a powerful incentive for the easing of obstacles in cross-border cooperation rooted in the traditional rules of international law.

However, the comparison has shown that the UN Convention has the potential to significantly influence the way in which EU Member States will be proceeding in the near future with the integration of their domestic systems of criminal law and criminal procedure. This holds true in more than one respect.

First, the UN Convention can be regarded as a stimulus and a source of legislative ideas upon which the EU may usefully draw to improve its legal framework for cooperation in criminal matters. What follows is a concise list of the main points, taken from the articles of the UN Convention, which may constitute a useful starting point for fresh debate in the EU:

- Article 8 (Criminalisation of corruption) calls on State Parties to establish as criminal offences acts of corruption involving foreign public officials and international civil servants. EU legislation only covers the more limited category of Community officials.
- Article 9 (Measures against corruption) requires that law-enforcement authorities develop special competencies to fight corruption. The EU has so far concentrated on repression, by focusing on common definitions and approximation of penalties, whereas the UN Convention stresses the need to develop expertise also on the prevention and detection side.
- Article 10 (Liability of legal persons) indicates that some form of corporate liability (not necessarily criminal) should be established for all ‘serious crimes’: consequently, the EU should consider adopting an instrument calling on States to impose criminal, civil or administrative sanctions on corporations involved in offences punishable with the deprivation of liberty for at least four years.
- Article 11 (Prosecution, adjudication and sanctions) ensures that States adopt effective measures on custody pending trial, early release after conviction, and limitation periods for serious crimes. So far the EU has focused on the approximation of penalties, but has left each Member State free to regulate these other elements. A debate could be launched with a view to at least fixing common guidelines on all issues involving the deprivation of liberty before and during trial.
- Article 12 (Confiscation and seizure) attempts to facilitate the confiscation of proceeds from crime by suggesting that the burden of the proof concerning the demonstration of the lawful origin of proceeds should switch from the prosecutor to the alleged offender. The UN Convention thus reiterates the call for a procedural measure that an EU Action Plan has already recommended.
- Article 14 (Disposal of confiscated proceeds from crime or property) suggests that international agreements be concluded to ensure that at least part of confiscated proceeds go to either a special UN account designed to deliver economic assistance to developing countries or other intergovernmental bodies specialising in the fight against organised crime. The EU should seriously consider these proposals. So far, the only instrument dealing with the disposal of confiscated property is a 1990 Council of Europe Convention that merely refers to the domestic legislation of each State Party.
- Article 18 (Mutual legal assistance) calls for the easing of restrictions still to be found in the European legal framework, in particular the abolition of banking secrecy as a ground for rejecting a request for legal assistance; also, the UN Convention makes the cross-border transfer of detained persons for evidentiary purposes possible on a wider number of grounds than the EU legislation, and takes the innovative step of encouraging the oral transmission of requests for assistance in urgent cases.

- Article 22 (Establishment of criminal record) may influence future EU initiatives regulating the use of information originating from a criminal conviction made by the courts of one Member State in subsequent criminal proceedings taking place in another Member State.
- Article 23 (Criminalisation of obstruction of justice) requires the establishment of certain behaviours as criminal offences in the domestic law of each State Party. Despite its intensive work to establish common definitions for various other crimes, the EU has not dealt with obstruction of justice.
- Article 24 (Protection of witnesses) calls for the adoption of agreements on witness protection schemes, including their international relocation. The 1995 EU Council Resolution, the EU instrument entirely dedicated to this issue, envisages no measure aimed at the cross-border coordination of witness protection programmes.
- Article 26 (Measures to enhance cooperation with law-enforcement authorities), recognises the importance of statements made by members of organised criminal groups who actively cooperate with judicial authorities. In particular, it suggests that such statements made before the courts of one State should also pave the way to penalty reductions and other benefits in another State. In the EU, the adoption of a legislative instrument for the ‘mutual recognition’ of statements made by persons collaborating with the courts may help shed light on the whole spectrum of criminal groups’ cross-border activities.
- Article 30 (Other measures: implementation of the Convention through economic development and technical assistance) calls for the setting up of a UN fund to which State Parties will make voluntary contributions to finance technical assistance projects for developing countries in their fight against organised crime. The EU may find it useful to establish and run a similar fund limited to contributions from its Member States. If the system proves effective, it could be replicated at a later stage within the broader UN framework.
- Article 31 (Prevention) recommends action in various areas of crime prevention where the EU has not yet produced practical initiatives: the promotion of public awareness campaigns on the threats posed by organised crime, rules on the disqualification of people convicted of serious offences from managing legal entities (including the setting up of public records for disqualified people), and the prevention of the misuse of governmental subsidies and licences granted by public authorities for commercial activities.

Secondly, the very way in which the UN Convention is structured, regardless of the content of its specific provisions, may be taken as a ‘model framework’ for the streamlining of current EU legislation in criminal matters, possibly with a view to drawing up a single EU instrument. Such an instrument should at least set out the guiding principles needed to deal comprehensively and homogeneously with transnational crime.

Indeed, the ambition of the EU to create an integrated common judicial area, supported by smoothly-working law-enforcement authorities and a high degree of convergence in criminal law and procedure, will no longer be compatible with a situation where the bulk of its legislation is scattered in a variety of partially overlapping documents from heterogeneous legal sources. EU legislation co-exists not only with national domestic law but also with Council of Europe instruments, whose membership is not only varied but still allows State Parties to make extensive reservations to its provisions. The high level of fragmentation of the European legal framework runs the risk of affecting the certainty of the law and eventually giving rise to contradictory outcomes, thus playing straight into the hands of the very organised criminal groups it originally set out to fight. On the other hand, the UN Convention has the advantage of

including all aspects of inter-State cooperation in one homogeneous and carefully crafted document.

The need to streamline EU legislation may become compelling after the next enlargement of the EU. If the decision-making process in the field of JHA remains centred around the principle of unanimity, the number of reservations and opt-outs will increasingly affect the negotiation of new instruments between 30 or so States, each of them bringing to the negotiating table their own legal systems and peculiarities. To avoid further fragmentation, the usefulness of the UN Convention as a 'model' may become even more convincing.

Finally, the EU will derive benefits from its ability to persuade third countries to regard the UN Convention as the main legal basis for cooperation and fully implement its provisions. This will require additional effort by the EU: first of all, given the nature of large parts of the UN Convention as a 'framework agreement', it will need to draw up detailed arrangements with non-EU countries, making skilful use of its external relations instruments.

However, the setting up or strengthening of formal channels of cooperation may not be enough to stamp out the increasing flow of criminal activities originating in third countries and infiltrating into lawful and unlawful markets in Europe. Acknowledging that, unless they receive adequate assistance, the developing countries are likely to encounter insurmountable obstacles in the implementation of its provisions, the UN Convention has called on the industrialised world to act as a provider of technical and economic assistance. Such a call has a special significance to the case of the EC, not least because of its official status as a 'regional economic integration organisation'. Indeed, the role of the EC-EU has only just begun with the signature of the UN Convention in Palermo. The Conference of the State Parties, a body that will start meeting after the entry into force of the Convention, will be an invaluable forum in which the EU will have the opportunity to confirm its commitments, update its policies and exchange knowledge on all matters relating to organised crime.

List of relevant instruments

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