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EDITORIAL COMMENTS

I am pleased to present Volume 10 of the *University of Uyo Law Journal*. The Editorial Team has worked tirelessly to bring you this issue, comprising ten scholarly papers of nine articles and a statute review. This edition of the journal offers a range of topical and insightful ideas on themes in the fields of international investment arbitration, access to information law, trade dispute and industrial jurisprudence, insurance law, testamentary disposition, pension administration law, taxation law, international criminal law, and legal/constitutional theory. This is in accord with the aim of the *University of Uyo Law Journal* to provide a forum for the widest discussion of subjects on the law and contemporary issues of sub-national, national and global concern.

This edition opens with a paper by Osawe Omosede Andre, which examines the nexus between access to information law and corruption. It argues that corruption impact on access to public information as it works to promote secrecy. As such, any advancement towards opening governments to public scrutiny must foster anti-corruption efforts, which must of necessity validate the demand for openness in government actions and inactions as a right. Thus, the paper notes that a virile public information system will engender transparency that is necessary to expose corrupt acts, as access laws promote public right as well as serve as deterrent to corruption.

The joint paper by Francis Ohiwere Oleghe and Olusesan Oliyide examines the relationship between human rights and international investment arbitration using Weiler's concept of lost siblings. It argues that international investment arbitration (IIA) has elicited so much attention in recent times. So much so that the United Nations Commission on International Trade Law and the International Centre for the Settlement of Investment Disputes have engaged in programmes aimed at reforming the investor-state dispute settlement (ISDS) system, of which IIA is a subset. It makes the point that while the ISDS system has evolved with protection for investors, the experience of host states remains that of misgivings about the system's usefulness, which have resulted in agitations for its reform to give adequate consideration to human rights norms in ISDS cases. The aim of which is to strike a balance between investors' bilateral investment treaty (BIT) rights and their human rights obligations.

The papers by Ogancha Ogbole and John Inaku offer exposés on trade dispute jurisprudence. On the one hand, the former paper examines the constructions of 'trade disputes' and 'state trade disputes' under Nigerian labour laws and regulations. It argues that the recognition of the concept of state trade disputes under Nigerian labour law contributes in expanding the frontiers of trade disputes in the workplace, which poses recondite challenges for the current constitutional arrangement for labour jurisprudence in Nigeria. It therefore recommends the unbundling of labour, as an item under the Exclusive Legislative List, to pave the way for the involvement of state legislative assemblies if the notion of state trade dispute as conceived by Nigerian labour law is to be properly harnessed. On the other hand, the latter paper examines the impact of the finality of the decision of the Court of Appeal on labour and industrial disputes and how it impacts on the development of labour and industrial jurisprudence in Nigeria, in view of the level of expertise available to the Court of Appeal. It therefore proposes packing the Court of Appeal with judges from the National Industrial Court or, in the alternative, for the establishment of a National Labour Appeal Court, constituted of labour and industrial law experts, to hear appeals from the National Industrial Court of Nigeria.

Kehinde Anifalaje's paper considers the regulation of compulsory liability insurance in Nigeria as a means of public protection from the risk of death, bodily injury or loss of property. The paper examines the laws regulating compulsory liability insurance in Nigeria and the enforcement of the rights of third parties within the context of the common law rule of privity of contract. It argues that the current tort-based system of compensation coupled with some regulatory challenges patently constitute a hindrance to a timely enforcement of the right of third parties under the contract of insurance, and suggests, among other things, the institutionalisation of a no-fault system of compensation that would guarantee quick and effective compensation of persons, who suffer losses by means of death, bodily injury or loss of property.

Also advancing the need for improved public protection, Lilian Nwabueze's paper examines public protection through a change in approach towards better Wills by means of legislative amendment to Wills law to include the use of technological devices in communicating Wills; while and the paper by the duo of Onikosi Adedeji and Ahmed Muhammed-Mikaaeel examines the legal regime for pension administration in Nigeria, which it argues possess inherent lapses, including lack of direct prosecutorial power on the part of relevant agencies, unjust and insensitive

exclusion of the state and local government workers from coverage under the extant pension scheme and non-compliance of the pension scheme to Shari'ah.

The focus then moves to taxation law, in which Uche Jack-Osimiri, Anthony Ekpoudo, Rowland Ipoule and Amara Ijeomah comprehensively examine jurisdictional issues that emanate in the administration and practice of tax laws, arising from the jurisdiction of the National Assembly and State Houses of Assembly to exercise legislative power to promulgate tax legislation within the limits conferred by the Constitution. It proposes certain measures to bring about reforms for the smooth administration and practice of tax laws in Nigeria. Glory Okebugwu's paper thereafter examines the investigative and prosecutorial approaches in combating transnational crimes under international law. It argues for a neutral body that will ensure balance of conflicting interests in the investigation and prosecution of transnational crimes, as transnational crimes universally present certain challenges to national criminal justice systems. The paper, therefore, recommends the collective involvement of the international community, as well as the adoption of more proactive investigative approaches with long term control guarantees with human rights considerations.

The paper by Olanrewaju Aladeitan and Adeboro Adamson focuses on the loss of proprietary interest by a private entity on the basis of overriding public purpose in the context of a liberalised and privatised regime, which raises critical legal issue regarding the extent to which the legal framework for the acquisition of land for energy infrastructure development impacts on the rights of a landowner and the correlation to the effective performance of the Nigerian Electricity Supply Industry (NESI). The paper proposes a legal regime that is fair and balanced for operators/investors in sector, as well as for other stakeholders. The final paper, a statute review by Ekokoi Solomon, evaluates the Akwa Ibom State Map Establishment Law 2023. It argues that the AKS map law appears to be inconsistent and out of step with the constitutional provisions on boundary adjustment. This, the paper argues, is in view of the nature of the extant constitutional order, which requires the exercise of legislative power to promote the integrity of the legal/constitutional order.

There is evidently a wealth of good reading, thoughtful analyses and helpful materials in this volume of the journal. In effect, the authors have worked diligently to provide innovative perspectives on the issues covered by their papers, which have sub-national, national and international

concerns. We therefore welcome constructive feedback and suggestions on the issues covered in this edition. If there are any questions, comments or concerns, please do well to contact us at facultyoflaw@uniuyo.edu.ng

With gratitude to members of the Editorial Team and our external reviewers, who volunteered their time and intellect to enhance the quality of the papers selected, I welcome readers to turn the pages of this volume of the journal and embrace the wealth of information and knowledge contained in them.

Prof. Mojisola Eseyin
LLB (Ago-Iwoye), LLM (Uyo), PhD (Calabar)
Editor-in-Chief, University of Uyo Law Journal
Email: mojisola.eseyin@uniuyo.edu.ng

A Synoptic View of Investigative and Prosecutorial Approaches to Transnational Crimes under International Law

*Glory Charles Okebugwu**

ABSTRACT

Dealing with transnational crimes present certain unique and pressing challenges to national criminal justice systems all around the world. States have individually embarked on legislative and procedural reforms, training and capacity building initiatives to combat the complexity of activities of transnational crime actors. These efforts have been met with setbacks as the nature of transnational crimes often require interrelations between states in investigating and prosecuting transnational crimes. The involvement of the international community to ensure cooperation among states in this regard becomes inevitable. This paper examines the investigative and prosecutorial approaches in combating international crimes, and calls for the adoption of more proactive investigative approaches with long term control guarantees and due regard for human rights.

Keywords: Transnational crimes, investigation, prosecution, international cooperation, states

I. INTRODUCTION

The international community recognises international cooperation in fighting transnational crimes as a necessity, thus it propagates international cooperation among states, and explores strategies and practical measures to strengthen the capacity for investigation and prosecution of transnational crimes.[1] The international community provides international policies, guidelines and standards to encourage convergence and compatibility of national legislations. The international community generally seeks to develop a much greater investigation and

* LLB, LLM (Uyo), PhD candidate at the University of Uyo, Nigeria. Email: gloryuche01@gmail.com

[1] See, eg, United Nations, *United Nations Convention against Transnational Organised Crime and the Protocols Thereto* (Adopted by the United Nations General Assembly on 15 November 2000 by Resolution 55/25, entered into force on 29 September 2003).

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prosecution capacity at the national levels as well as strengthen the capacity of states to cooperate at the international level. Such cooperation aims to improve international law in transnational crimes and achieve a coherence of states' actions represented by their law enforcement agencies, in investigation and prosecution of transnational crimes. However, it is clear that the efforts towards international cooperation rest upon states' compliance and the strength of existing national capacities to carry out effective investigation and prosecution of transnational crimes.[2]

The principal areas of cooperation between states in the fight against transnational crimes include:

(a) The joint identification of the range of generally dangerous acts that require joint efforts to stop them.
(b) A mutual exchange of information on transnational crimes.
(c) Assistance in searching for transnational crimes perpetrators and their extradition to the interested international law subjects.
(d) States' participation in international organisations specialising in the fight against transnational crimes.[3]

This cooperation involves standardising the qualification of international crimes and the provision of mutual legal assistance in transnational criminal matters, including extradition. It involves the coordination of joint investigations and ensuring punishment. The cooperation is expected at the interstate level, between international coordinating bodies, individual agencies, law and judicial agencies.[4]

International cooperation therefore, requires the comprehensive coordination of actions of sovereign states and international organisations to develop and coordinate measures to prevent and detect crimes as well as detain and bring offenders to justice. International legal norms in this regard include Multilateral Conventions on combating transnational crimes, agreements on legal assistance and agreements to govern the activities of relevant international and national agencies. In effect, cooperation between states in transnational crimes cases is carried out based on multilateral and bilateral principles.[5]

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[2] IO Nurullaev, 'International Cooperation in the Fight against Crime as an Integral Part of the Illegal Regulation of Public International Law' (2020) 1 243-249.

[3] V Zavydniak and others, 'States' Main Directions and Forms of International Cooperation against Transnational Crimes' (2022) 20(38) *Cordva Bogota* <https//doi.org/1021830/19006586,904> accessed 21 April 2023.

[4] ibid.

[5] IM Legan 'The Main Directors and Forms of International Cooperation in Preventing and Combating Transnational Crime' (2021) 1 *Current Issue of State and Law* 89-93.

The intensification of international cooperation against transnational crimes in the last two decades have borne modest fruits. However, despite the trend towards the convergence of legal systems to reflect integration processes in the fight against transnational crimes, significant differences between legal systems persist and pose a huge challenge to the efforts made so far. There is need for jointly developed legislative, organisational, social, moral-ethical and coercive measures of influence, persistently implementing them.

II. MUTUAL LEGAL ASSISTANCE IN TRANSNATIONAL CRIMES INVESTIGATION AND PROSECUTION

Ordinarily, states under traditional international law cannot enforce their jurisdiction extraterritorially. However, with the increasing transnational dimension of criminality, arose the need for mutual legal assistance between states in criminal matters. Mutual Legal Assistance (MCA) in criminal matters is an international cooperation process by which states seek and provide assistance in the gathering of evidence for use in investigation and prosecution of criminal matters. The said cooperation is also extended to tracing, freezing, seizing and ultimately confiscating of crime proceeds.[6]

Letters rogatory is the traditional, long standing formal method of pursuing mutual legal assistance among states before the advent of Mutual Legal Assistances Treaties (MLATS). However, they are still used by some states in the absence of an MLAT. Letters rogatory simply refer to a formal request from one state authority to another seeking the service of documents or a particular evidence.[7] There is always a judicial oversight over letters rogatory as a judge's signature is required for its validation. Although letters rogatory are usually transmitted through diplomatic channels, some countries use the International Criminal Police Organisation - INTERPOL (ICPO-INTERPOL) for their transmission,[8] or from a court, in which a criminal action is pending, to a court in a foreign jurisdiction to perform some judicial act.[9]

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[6] AM Itazim, 'Identifying and Understanding Mutual Legal Assistance Obligations under International Law: The Case of Afghanistan' (2021) 26(1) *Gonzaga Journal of International Law* 66-68.

[7] ibid.

[8] ibid.

[9] Legal Information Institute, '22 CFR S 92.54 – "Letters Rogatory" Defined' (Cornell Law School) <https://www.law.cornell.edu/cfr/text/22/92.54> accessed 23 September 2023.

Letter rogatory rarely convey a legal obligation as it is basically founded on the principles of comity and respect for foreign sovereignty. A jurisdiction seeking evidence through letters rogatory cannot assert legal rights to such evidence. Another challenge posed by the use of letter rogatory is that it is an extremely time consuming slow process that usually takes up to a year. Also, letters rogatory does not have a central authority where decisions are made by expert staff. By this reason, misunderstanding may arise as to what information is been sought or requested and the authority to make the request to. The above shortcoming necessitated the evolution of a more reliable and effective mode. Thus, Mutual Legal Assistance Treaties were birthed.[10]

A Mutual Legal Assistance Treaty (MLAT) creates a binding obligation on the treaty parties to render assistance to each other in criminal investigations and proceedings. The MLAT carry the force of law, creating a more reliable and efficient means of obtaining evidence in a promptly, and in an admissible form. The MLAT introduced administrative efficiency into the investigation of criminal cases. Unlike letters rogatory, the use of MLAT is available for governments and prosecutors and not to defendants.

The MLAT may be bilateral or multilateral. Bilateral MLATs are negotiated and entered into by two states. The two states can devise a clear medium for the reconciliation of differences in their legal systems as well as create an enforcement mechanism by virtue of the treaty, making the provisions of the treaty unique and peculiar to them. Multilateral MLAT have been incorporated into many International Conventions to promote reciprocity. Multilateral MLAT are beneficial as they provide a strong legal basis for member states to access evidence to engage in cross-border cooperation to fight transnational crimes. They also provide strong legal basis for member states to use mutual legal assistance tools in the absence of a bilateral treaty. Multilateral MLAT further set standards for states to develop and design their bilateral MLAT. They provide a general framework for states to follow.[11] There is no overarching international convention, exclusively addressing mutual legal assistance in criminal matters. However, the United Nations (UN) adopted a non-mandatory Model Treaty on Mutual Legal Assistance in Criminal Matters in 1998.[12]

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[10] LS Richardson, 'Due Process for the Global Crime Age: A Proposal' (2008) 41(2) *Cornell Int'l L.J.* 350-51.

[11] ibid.

[12] Model Treaty on Mutual Legal Assistance in Criminal Matters, 1998 (adopted by General Assembly Resolutions 45/117) subsequently amended by Resolution 53/112 G.A Res 45/117 of the General Assembly.

The non-mandatory treaty was to serve a template for state parties in developing their own mutual legal assistance mechanism.

The Palermo Convention also contains a set of detailed obligations for the provision of mutual legal assistance, the said provision in the convention being referred to as a Mini Treaty or treaty within the treaty. Article 18 of the Palermo Convention embodies the detailed mini treaty on mutual legal assistance. Article 18(1) encourages states to oblige each other the widest measure of mutual legal assistance in investigation, prosecution and judicial proceedings in relations to offences covered by the Convention as provided for in its article 3. A state is under an obligation to extend assistance to another state where the requesting state has reasonable grounds to suspect that the offence committed is transnational in nature and that victims, witnesses, proceeds and evidence of such offence are located within the requested state.

Article 18(3) provides for an obligation to afford assistance in regard to a range of different purposes in taking evidence abroad including taking statements, service of judicial documents, search, seizure, providing information and evidence, tracing the proceeds of crime and facilitating the appearance of witnesses. Article 18 (15) contains guidelines as to the forum the request for assistance should take, though it only bothers on legal assistance. Article 13 requires states to designate a central authority with power to receive requests and either execute such requests or transcript them to a competent authority. Article 18(15) further provides for the speedy and proper execution or transmission of the received requests. Execution of requests follow the law of the requested state on the principle of *locus regit actum* and also follows the procedure the requested state insists upon.[13]

Article 18 (18) of the Palermo Convention provides for the use of video link so long as it is consistent with the fundamental law of the requested state. In a procedure standing outside normal process, article 18(4) provides for unsolicited transmission of material when the competent authority of the transmitting state party believes the material could be of assistance in law enforcement. Article 18 thus provides a set of minimum standards for mutual legal assistance. It does not eliminate the material and procedural obstacles that flow with mutual legal assistance because it

[13] M Boister, 'The Cooperation Provisions of the UN Convention Against, Transnational Organized Crime: A Tool Box Rarely Used?' (2016) 16 (1) *International Criminal Law Review* 11-12.

does not compel major changes in domestic law and practice. However, it provides for complementary mechanisms to be developed.[14]

Several other United Nations transnational crimes suppression conventions embodying a mini treaty on mutual legal assistance include The United Nations Convention on Illicit Traffic in Narcotic Drugs and Psychotropic substances[15], the United Nations Convention Psychotropic Substances of 1971 (UNCPS),[16] the United Nations Convention Against Corruption,[17] the Financing Convention,[18] etc. In addition, many international organisations relating to transnational crimes have promoted mutual legal assistance standards by tracking the enforcement and implementation of multilateral MLATS, providing capacity building trainings and tools to relevant institutions of member states. Their efforts which are non-binding are known as soft law.[19] Some of these organisations include the Financial Action Taskforce (FATF), The United Nations Office on Drugs and Crime, (UNODC) amongst others.

III. INVESTIGATIVE APPROACHES TO TRANSNATIONAL CRIMES

The investigation and prosecution of transnational crimes have a distinctive character. They often involve particularly complex and prolonged activities because of the sheer quality of criminal activities involved. They also require specialized practitioners and use of special investigative techniques and prosecutorial methods. Specialisation is essential to effectiveness. In fighting transnational crimes, the indispensability of a proactive approach is notable.[20] A proactive approach implies that the criminal justice response is only one component of the fight against transnational crimes and it is necessarily complemented by preventive measures. A proactive approach entails the establishment of offences that extend the purview of incrimination (conspiracy and criminal association). A proactive approach does not necessarily correspond to an exclusive typology of investigative measures but instead to a shared

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[14] ibid.
[15] (1582 UNTS 95, 11 November 1990), art 7 (hereinafter Vienna Convention).
[16] (1019 UNTS 175, 16 August 1976) (hereinafter UNCPS).
[17] (14 December 2005) art 14(b) 8 46.
[18] United Nations International Convention for the Suppression of Financial Terrorism, arts 12-17 (21 78 UNTS 197, 10 April 2002) (hereinafter Financing Convention).
[19] FATF Recommendations: Becoming Soft Law, 37 *MICH Int'l L.* <mjitonline.org> accessed 24 April 2023.
[20] ibid.

professional attitude towards taking initiative instead of reacting to events.

Two general aspects are identifiable in the proactive approach. The first involves the law enforcement initiatives being intelligence-led: the collection and analysis of information on the history, composition, means, objectives and modus – operandi of criminal groups as well as illicit networks and markets are indispensable components of investigations and also frequently their trigger. The second aspect is that an investigation regardless of its origin is purposely developed into an extended inquiry, potentially concerning the entire structure and criminal conduct of groups or networks and aimed at preventing possible future offences.[21] Investigative techniques such as surveillance of communications, undercover operations and controlled delivery are also some of the proactive approaches to investigation.

However, it is important to high light that the approach entails long-term investigation which presupposes adequate preparatory phase involving detailed planning and careful analysis of the information obtained. The time span of an investigation and evidence collection depends clearly on the structure of the criminal group identified. Experience has proven that often time, a kind of criminal solidarity where by people caught in transnational crimes are replaced in the illegal activity holds sway.[22] People close to the arrested person are almost automatically involved in the activity while he is in detention in order to ensure the criminal structure remains operational. The interchange of people makes it necessary to draw up a final criminal offence notice and follow up requesting for continuation of investigation thereby avoiding the immediate re-establishment of the criminal activities.

The continuance of investigation even after arresting an initial offender is very crucial in order to identify the general managers and financers of the whole criminal activity. These managers if not dealt with sponsor lawyers of choice and press political buttons for the release of the initial offender in custody. The methodological lesson here is that the process of gradually moving investigations from the low level of the final retailer up to producers and financers in order to uncover the entire human and material structure of the criminal organisation can be profitably maximized. The policy observation in this regard is that efforts to dismantle or annihilate transnational crime organisations or networks, as

[21] ibid.
[22] ibid.

well as criminal patterns are of a fundamental strategic value in the fight against transnational crime.[23]

The Palermo convention is not silent as to guiding investigative procedure. Article 28 of the convention provides that state parties in carrying out transnational crime investigations should consider analysing trends relating to the transnational crime in question, in consultation with the scientific and academic communities. The circumstances in which the crime is being perpetuated as well as the professional groups and technologies involved. Article 28 (3) further highlights the importance of constantly evaluating the impact of the policies and approaches applied.

There is also need for initiation, development and improvement of specific training programmes for law enforcement personnel charged with the responsibilities of prevention, detention and control of transnational offences. These personnel includes prosecutors, investigating magistrates, customs personnel, immigration officers, etc. The trainings shall deal with issues relating to methods used in the prevention, detection and control of transnational offences, Routes and techniques used by suspects, how to monitor movement of contrabands, knowledge of transit states, detection and monitoring of proceeds of crime, crime equipment, collection of evidence, modern law enforcement equipment and techniques, protection of victims and witnesses etc. The Convention also highlights the need for inter-state assistance in planning, implementing investigative strategies. Use of international conferences and seminars to promote cooperation and to stimulate discussion on problems of mutual concern including the special problems and needs of transit states.[24] International cooperation in investigation processes also promotes technical assistance.

Article 20 of the Palermo Convention obliges parties to take necessary measures to allow for the appropriate use of controlled delivery where it deems appropriate. The use of other special investigative techniques such as electronic or other forms of surveillance and undercover operations in national proceedings as well as in the context of international cooperation is permitted.[25] Phone tapping is one of the frequently used investigation technique, it is often combined with undercover operations and controlled delivery. Wiretapping is also used as one of the traditional techniques. These constitute the techniques types of investigative actions referred to as special techniques. They are referred to as special not because they are

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[23] ibid.
[24] Palermo Convention, art 29.
[25] ibid 29(2).

exceptional or rare but because their use is often costly and complicated, requiring specialized expertise and sometimes advanced technological knowledge and instruments. Their use in most cases poses ethical problems and endangers operators. Most importantly the issue of infringement of human rights e.g the right to privacy also constitutes a challenge in use of these special techniques. In principle, these techniques can only be resorted to when there is no reasonable alternative to obtain information or evidence.[26]

Despite the problematic nature of the special techniques, they are at the root of the successful results achieved in most transnational crime cases. In human trafficking offences, special investigative techniques such as telephone interceptions and other forms of surveillance have served as supporting source of evidence, corroborating the statements of witnesses or other forms of evidence.[27] In other significant cases, however, surveillance, undercover agents and controlled delivery have provided the fundamental information on international networks, the composition and modus operandi of criminal groups, identification of individual offenders, preparation of future offences etc. The above results are essential to the intelligence led, proactive investigative approaches that probably would not have been possible with only basic techniques. However, use of special investigative techniques require detailed domestic regulation which is lacking in most countries. If a country has no law on special investigative techniques, evidence gathered through such techniques even though legally adopted by the cooperating authorities of another country cannot be used.[28]

The Palermo Convention refers to electronic and other forms of surveillance to include all types of surveillance other than controlled deliveries or undercover operations. The term surveillance covers traditional modalities of police actions as well as use of modern electronic technologies such as interception of emails, telephones and other electronic messaging: listening and tracking devices. The objects of such surveillance can be the communication, movements or other behaviours of the person under investigations. As regards undercover operations, a precise definition was not given under the Palermo Convention, however, the term

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[26] However the use of these techniques must be permitted by the basic principles of the domestic law applicable.

[27] UNODC, *The Use of Criminal Intelligence and Special Investigative Techniques in the Fight against Transnational Organized Crime* (2010) 3.

[28] ibid.

usually indicates operations distinct from surveillance and controlled delivery, involving the infiltration by an individual into an organised criminal group or illicit network to participate in its general criminal activity or in a specific illicit business. The infiltrator plays an appropriate role in order to discover and report on crimes committed and planned as well as on the structure and membership of the organisation.

The Palermo Convention defines controlled delivery as 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 the offence. Among the special investigation techniques, controlled delivery has the longest history in international law as it was initially developed to combat transnational drug trafficking.[29]

During the investigative and prosecution stage in transnational crime situations, all the relevant information on the criminal activities is gathered and synthesized in a coherent manner to reach a final verdict. Whether a case will remain a simple isolated case or whether it has the potential to develop into a complex transnational investigation is determined during this phase. At the investigation stage, practitioners ought to ensure that the overarching criminal policy to pursue and dismantle the entire criminal organisation or network and to deprive it of its illicit assets to prevent future criminal activities by the group is effectively implemented. Thus, it is very important to adopt an appropriate investigative approach and strategy and follow a structured investigation plan to search for and collect relevant evidence as well as establish the necessary connections among persons and facts.[30] It is hardly undeniable that the use of special investigative techniques such as controlled delivery, surveillance and undercover operations impact upon an individual's rights to privacy, such interference requires a clear legal basis in domestic legislation and must be necessary, reasonable and proportionate.

Special investigative techniques must balance the competing interests of ensuring public safety through arrest and detention of criminals with the need to ensure the rights of individuals. It is trite in law that a person's

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[29] The system of General warrants applicable in Canada by virtue of section 487.01 of the Criminal Code of Canada the General warrant are judicial authorisations permitting the use of investigative techniques even where they infringe on the suspects right privacy.

[30] UNODC, 'Digest of Organized Crime Cases: A Compilation of Cases with Commentaries and Lessons Learned (United Nations Office Vienna English Publishing Section 2012)

right stops where that of another begins. In other words both the right of a victim and an offender are considerable in investigations. The following principles are important in achieving a balanced approach in the above regard:

(a) Adequate control of implementation of investigative techniques by judicial authorities or independent bodies through prior authorisation, supervision or after the fact review.
(b) Proportionality in use of the techniques. Use of the least invasive method suitable to achieve objects sought should be applied.
(c) The need for states to enact laws permitting production of evidence gained through special investigative techniques in court while having regard for fair trial.
(d) The need for operational guidelines and trainings in the use of special investigative techniques.

An important and often problematic factor encountered during investigation of transnational crimes is the precise identification of offenders.[31] Identification of an offender can prove very difficult if the laws of the alleged offender's country of origin make it easy for person's to change their names or identity and acquire new documents. The identification of a person under investigation is a typical mandatory investigation activity. Suspects can be identified through their document, by taking their finger prints, photographs and anthropometric details, as well as through other types of enquires. Fingerprints allow the law enforcement officers to determine whether a suspect has already been fingerprinted and to compare the finger prints with those taken at the crime scene. The fingerprints are immediately fed into national databank accessible to all domestic law enforcement agencies: This provides important data for the identification of offenders.[32]

Deoxyribonucleic acid (DNA) profiles from hair, sweat, blood, bodily fluids and epithelial cells provide a reliable means of identification too. The presence of DNA at a crime scene is an important element in investigations. It can be compared with the suspects DNA profile (if available), it can be used to search for the person to whom it belongs and it can be used to exclude other suspects. Facial composites and physiognomic comparisons can facilitate an identification when an eyewitness makes a

[31] UNODC, 'Digest of Organized Crime Cases' <unodc.org> accessed 19 July 2022.
[32] ibid.

statement describing the suspect's facial features or other distinctive features, for example, scars, tattoos, missing limbs.[33]

Another approach to investigation is the use of confidential informants. A confidential informant is an individual who is willing to testify or provide information or assistance to the authorities in return for a promise that his identity will be kept confidential. Confidential informants are typically motivated to provide information with money or lenient treatment regarding charges pending against them in most cases confidential informants are themselves engaged in criminal activities. That explains why they are able to provide valuable direct evidence of criminal activities against their criminal associates. Confidential informants can also provide information enabling officials to obtain judicial warrants authorizing electronic surveillance.[34]

IV. SPECIALISED INSTITUTIONAL SETTINGS FOR TRANSNATIONAL CRIMES

Cooperation at the levels of law enforcement and prosecution is seldom restricted to the provision of assistance in relation to single limited acts rather it consists of series of continuous and interlinked activities conducted in complex combinations by countries in transnational crime matters. This implies coordination of investigative processes including their programming, timing and division of labour. This form of cooperation is often supported by more or less formal structures that provide a framework for facilitation of coordination. The establishment of joint investigative teams emerges as the highest level of institutional measures in investigative cooperation however even in their absence, the transnational nature or transnational crimes drives the concept of co-management of investigations and prosecution.

The approach of joint investigation and prosecution encompasses appropriate criminalisation of acts and investigative tools, organisational arrangements such as the creation of offices or units specifically charged with transnational crime related duties. In other words there is a necessity for special and specialised entities as active participants in the investigation and prosecution of transnational crimes. Although the Palermo Convention and its Protocols include several provisions on the

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[33] ibid.

[34] BG Ohr, 'Effective Methods to Combat Transnational Organized Crime in Criminal Justice Processes' (Research Material for the 16th International Training Course Visiting Experts Papers Series 58, 2001) <unafei.org> accessed 19 July 2022.

need to provide adequate training for personnel[35] including international cooperation, the Convention does not explicitly address the establishment of these special/specialized entities. This is probably as a result of the fact that decisions on the organisation, funding and distribution of public functions are usually considered to belong to the realm of domestic law.[36] The function of the special entities are provided briefly as well as their operational functions. An in-depth comparative study on the nature and aims of different national solutions is basically the guide useful to demonstrate both potential and tested models for countries intending to reform that aspect of their system.

The operational functions expected of the specialized or special entities include facilitation of gathering, managing and effectively using information about the criminal activity of concern, development of specific expertise in criminal policies and related methods against transnational, creation of enhanced capability in the use of specialized investigative and prosecutorial legal tools, coordination or unification of investigations and prosecution to avoid possible clashing initiatives and maximize the results of prosecutorial efforts against specific criminal groups or networks. There is no doubt that institutional specialised entities are very essential for efficiency in the fight against transnational crimes. Reasons may abound why international police to police assistance should be as rapid and informal as possible and also directly available to the widest possible range of national law enforcement agencies and units. However, a certain degree of specialisation can help achieve the most productive use of the mechanisms of international cooperation. This can lead to the centralisation of activities related to international investigation in special offices and units.[37]

This ambiguous dialectics is exemplified by Interpol operations at the national level. The National Central Bureaus of Interpol tend to serve as a de facto central medium for some international investigative activities. Interpol itself encourages national offices to directly contact and use its services. These are factors facilitating international cooperation, however, this in no way erases the possibility of establishing individual national

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[35] Palermo Convention, art 2.

[36] The only relevant exception is Article 18 paragraph 13 of the Palermo Convention which obliges the parties the establishment of a central authority to receive the request of mutual legal assistance; exceptions are justified by the function of international cooperation performed by that ad hoc office.

[37] UNODC 'Special Investigative Techniques and Intelligence Authority' (2018) <unodc.org> accessed 20 July 2022.

offices responsible for some basic functions of cooperation in transnational investigations. For instance, the creation of a single national 'international operations room' to carry out at least some of the activities needed to coordinate with foreign and international entities.[38]

Institutional arrangements at the international level have proven to affect the effectiveness of cooperation even more than those at the national level. An international law enforcement system that is strongly characterized by continuous and extensive exchange of intelligence and prolonged coordination or co-sharing of investigative information can only benefit from a permanent structure at both the bilateral and multilateral level to assist specific investigations and assure a permanent channel of communications. At the bilateral level, law enforcement structures that are more complex than liaison offices can be created by agreements or arrangements. These structures need not amount to the establishment of an international police office but they can enable officers from the two states to cooperate closely on a permanent basis. Their main responsibility being to facilitate logistical cooperation although each state's officers continue to operate within the powers and the functions of their national law and under the direction of their superiors. They may be required to contribute to the investigation needs of colleagues in other state through information exchange and joint analysis as well as to support their activities generally. The German-Swiss Agreement[39] best describes this form of arrangement.[40]

Article 19 of the Palermo Convention provides that states should consider adopting general agreements to establish joint investigative bodies, however, the convention does not describe the main characteristics of these bodies. In other words globally valid theories are yet to be developed in this regard. In comparison with the more limited measures of cooperation provided for by article 27 of the Convention and based on existing regional experience, it seems assumable that the concept of having specialized investigative entities for transnational crimes exceeds the coordination of investigative actions to encompass the co-sharing of investigative powers. In line with this conception, establishing a special joint investigative team transforms bilateral and multilateral coordinated

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[38] ibid.

[39] Palermo Convention, art 23.

[40] On the institution of Europol and Euro just see respectively European Union Council decision 2009/371/GAI and European Union Council decision 2002/187/GAI and related legislative acts of the union.

investigations into a single common investigation. A joint team therefore would simply entail the creation of a new official legal entity or entities with its own investigative functions and powers, even if such powers are to be exercised in a non-exclusive way to leave intact the rights of national law enforcement agencies and prosecutorial officers, respecting the national rules governing investigative and prosecutorial processes. The importance of this is to ensure neutrality in investigative and prosecutorial processes.

V. PROTECTION OF WITNESSES

The protection of witnesses is critically important to ensuring the success of investigations and prosecution of perpetrators of transnational crimes. The process of investigating and prosecuting offenders depend largely on the information and testimony of witnesses. In other words, witnesses are the cornerstones of any evidentiary construct in transnational crimes proceedings. It is therefore very crucial and good practice for victims and witnesses to be provided with strong support and assistance in order to facilitate their ability to participate in the criminal justice system for the maintenance of the rule of law. It is often the case that most witnesses hardly want to cooperate with law enforcement or judicial authorities for perceived or actual intimidation or threat against their person or family. The protection of witnesses in transnational crime cases is provided for under article 24 and 25 of the Palermo Convention.

These provisions are to the effect that states shall take appropriate measures within their means to provide effective protection as well as assistance to victims and witnesses of crime. Such measures may include establishing procedures to safeguard the physical security of people who give testimonies in criminal proceedings from threats against their life and intimidation. Although the Organised Crime Convention gives no clear cut definition of who a witness is, from the provisions of the Convention a witness is deduced be a person in possession of information important to the prosecution of a transnational crime.[41] Witnesses can be classified in to three categories which are justice collaborators, victim witnesses and other types of witnesses such as innocent by standers, expert witnesses etc.

A justice collaborator is a person who has taken part in an offence connected with a criminal organisation, who possesses important knowledge about the organisation's structure, method of operation,

[41] UNODC, 'Good practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime' (United Nations 2005) 19.

activities and links with other local or foreign groups. Article 26 of the organised crime convention requires state parties to take appropriate measures to encourage such persons to cooperate with law enforcement authorities for investigative and evidentiary purposes. These persons go by a variety of names such as cooperating witnesses, crown witnesses, justice collaborators, witness collaborators, state witnesses, supergrasses, *pentiti* (Italian for repentant criminal). Usually most of them cooperate with the expectation of being accorded immunity, reduced prison sentence and physical protection for them and their families. The practice of granting such witnesses leniency or even immunity have raises serious ethical issues as it is perceived to be rewarding criminals with impunity for their crimes.[42]

This ethical concern has made a growing member of legal systems to provide that the benefit to collaborators is not complete immunity for their involvement in criminal activities but rather a sentence reduction that may be granted only at the end of their full cooperation in their trial process. The witness protection measure usually accorded justice collaborators is the witness protection programmes. Following their release from prison, they are resettled to a new, secret location under a different identity if the threat to their lives persists and other conditions are also fulfilled. Family members of the justice collaborators may however be admitted to the programme while the witness is still in custody.

A victim witness is described by the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (General Assembly Resolution to 134 Annex) as persons who individually or collectively have suffered harm including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights through acts or omissions that are in violation of criminal laws operative in member states. Victims play a central role in criminal proceedings as they may be the complainant thereby initiating the proceedings or they may be witnesses for the prosecution. As a result, they are considered vulnerable and should be protected and assisted before, during and after their participation in a trial. Such protection may entail general police and in court use of shields and police escorts. They may also be included in a witness protection programme where there is existence of serious threat.

[42] M Fyfe and J Sheptycki, 'International Trends in the Facilitation of Witness Cooperation in Organized Crime Cases' (2006) 3(5) *European Journal of Criminology* 347-349

The use of informants, expert witnesses or intelligence providers by the police during investigation is an important element in combating transnational crimes. Their roles is different from that of witnesses as they are not called to testify in covert, in some countries. It is not necessary to disclose the assistance they provide. In most countries they are not also included in witness protection programmes except in exceptional circumstances. Intimidations or threats against their lives are often considered to relate to their posts and the performance of their duties. They can therefore qualify for special police protection, job transfers or early retirement but their protection differs in nature from the protection measures intended for at risk witnesses. The protection of witnesses is based on three building blocks complimenting and supporting each other. These include police protection/target hardening and good operational practices, judicial and procedural protection and covert witness protection programmes.[43]

Witness Protection Programmes

The UNODC good practices for the protection of witnesses manual defines a witness protection programme as a formally established covert program, subject to strict admission criteria that provides for the relocation and change of identities of witnesses whose lives are threatened by a criminal group because of their cooperation with law enforcement authorities.[44] These programmes are usually used for the protection of collaborators of justice. They are basically persons facing criminal charges or who has been previously convicted for being part of a criminal association or organisation but has decided to cooperate with law enforcement agents by giving out information about the criminal organisation in hope of obtaining some leniency from the law.[45]

When a justice collaborator decides to break the code of silence between him and his criminal organisation to join forces with the law enforcement authorities by testifying for the prosecution against members of his organisation, the criminal organisation would naturally keep their disaffected members in line to ensure a retaliation which would usually be to assassinate the witness or collaborator of justice. The witness protection programmes is therefore used to provide a safe haven for collaborators of

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[43] ibid.

[44] UNODC Witness Protection Good Practices Manual – 5.

[45] Council of Europe Recommendation Rec (2005) 9 of the Committee of Ministers to Member States on the Protection of Witnesses and Collaborators of Justice.

justice from such deadly retaliation.[46] UNODC supports states to strengthen witness protection programs and strategies by providing technical assistance such as:[47]

1) Legal and institutional assessments.
2) Legislative assistance.
3) Awareness rising programmes targeting criminal justice authorities (including judges, prosecutors, police and prison officials).
4) Specialized support and advice to assist in the establishment of witness protection units, including advice on developing standard operating procedures, appropriate structures and staffing arrangements.
5) Strengthening international cooperation for the protection of witnesses.[48]

Some of the many challenges that have hampered on the effectiveness of witness protection programmes include:[49]

1) Absence of a clear legal or policy basis for designing a methodology for carrying out operations.
2) In adequate financing.
3) Strict personnel qualifications and vetting procedures.
4) Non protection of the programmes integrity.
5) Lack of close coordination with judicial and other government authorities engaged in law enforcement and intelligence, prison administration, public housing, health and social security services among others.
6) Lack accountability and transparency that confirm to the program's special security needs.
7) Inability of government authorities to provide appropriate assistance, safeguarding the information disclosed to them.
8) Ability to offer assistance to national and international law enforcement agencies.

Generally, speaking witness protection requires indispensable cooperation amongst states to thrive. National laws often define the main aspect of the protection regime for those requiring protection both the legal

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[46] The United States witness protection programme has been most successful because no witness has ever been killed while following the program's rules. Information provided by Mr Victor Stone, office of Enforcement Operations, U.S Department of Justice

[47] United Nations Office on Drugs and Crime 'Victim Assistance and Witness Protection' <www.unodc.org> accessed 8 September 2022.

[48] ibid.

[49] UNODC 'Witness Protection' <www.unodc.org> accessed 8 September 2022.

(definition, memorandum of understanding, procedural and non-procedural protection measures) and the operational measures (e.g the role of the law enforcement bodies, procedures and limits, setting up special witness protection units). Some countries have specific legislations governing the operation of their witnesses protection program while others have none, some view witness protection as largely a police function while others give a key role to the judiciary and government or specialized ministries, some states have one national or federal witness protection program while other countries have several regional or local programs. Also, there are significant variations between countries in the type of measures they have introduced to facilitate witness cooperation in organised crime investigations, partly reflecting differences in the scale and nature of the transnational crime and partly linked to differences in legal traditions and environments[50]

The use of protection measures affects the rights of the accused person or defendant and has the potentiality of influencing their right to a fair and unbiased hearing. It also virtually results in the disruption of a witness; life including persons related to him/her. These serious implications entail that protection measures especially protection programmes be well grounded in either legislation or policy. Such legislation should specify at a minimum protection measures to be adopted, conditions for application and criteria for admission of witnesses, procedure to be followed, authority responsible for the protection measure, person for protection termination, rights and obligations of parties and confidentiality of the programme operations. The existence of legislation is the most common scenario however most countries with established protection programmes have no legislation in that regard. An example of such countries is New Zealand. In those countries[51] without protection programme legislations, witness protection was developed as a regular police function drawn directly from the responsibility of the police to ensure safety of people. The United Kingdom exemplifies a country with a law on witness protection. The serious organised crime and police Act of 2005 placed a statutory footing to the arrangements for protection of witnesses in United Kingdom.[52]

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[50] F Eniko, 'The Rising Importance on the Protection of Witnesses in the European Union' (2006) 77 *Dans Revue Internationale De Droit Penal* 312-322.

[51] Austria, the Netherlands and Norway which are Civil Law Countries are yet to legislate on Witness Protection to mention but a few.

[52] United Kingdom of Great Britain and Northern Ireland, Home Office Serious Crime and Police Act 2005 Guidance Note 2005, 3.

Witness protection programmes may exist at the national or regional level or both. Where both national and regional programmes co-exist, the responsibilities of the respective protection agencies ought to be clearly delineated but ideally their decision making process should be centralized at the national level to ensure consistency of admittance criteria and applied measures. Staffing and funding are other crucial elements for the success of witness protection. Witness protection officers need to possess a particular set of qualities and skills. They are required to be vigilant protectors, interrogators and undercover agents as well as innovative thinkers, social workers, negotiators and even counsellors. The cost associated with setting up and operating witness protection programmes is huge. Expenses differ from country to country depending on the cost of living, crime rates other factors. The integrity of the criminal justice system of a country is also of utmost importance in guaranteeing a headway as far as witness protection is concerned. The basic principles of operation in witness protection therefore should include confidentiality, partnerships, neutrality, transparency and accountability.[53]

The initiative to include an individual in a protection programme could originate from number of sources which includes the witness, the police, the prosecutor or the judge. The power to admit witnesses to or remove them from a witness protection programme is usually vested in an authority outside the witness protection unit.[54] Such authority usually known as witness protection authority is mandated to oversee the implementation of the programme, decide the budget allocations and provide policy guidance for the programme. The decisions of the authority may or may not be subjected to external reviews. Decisions not to subject the authorities decision to external reviews are basically based or confidentiality and security reasons.

However under certain circumstances a judicial review of their decisions may be warranted. In admitting a witness to a protection programme an assessment ought to be conducted with respect to the level of threat to the witness' life, the suitability of the witness and nature of protection to be accorded him or her, the value and relevance of the witness' testimony and the voluntariness of the witness to participate in the programme. Upon meeting all the admission criteria, the witness shall be required to conclude with the witness protection unit a memorandum of

[53] United Nations, 'A More Secure World: Our Shared Responsibility' (Report of the High Level Panel on Threats, Challenges and Change, United Nations 2004) 2.
[54] ibid.

understanding which is the document that defines the terms of the programme and expectations from both the witness and the protection authority in details. In most countries the Memorandum of Understanding is not considered an agreement or contract and cannot be challenged before a court of law.[55]

The Memorandum of Understanding usually includes a declaration by the witness that his or her admission to the protection programme is entirely voluntary and that any assistance must be construed as a reward for testifying. It also specifies the scope and character of the protection and assistance to be provided, a list of the measures that could be taken by the protection unit to ensure the physical security of the witnesses, the obligations of the witnesses under the programme and possible sanctions for violations including removal from the programme as well as the conditions governing the programme termination.

Admission to a witness protection programme results in a new start in life and creates a relationship between the protection authority and the witness based on a series of agreed actions which may vary from country to country but usually includes making arrangements for the protection of the life of a witness, relocating a witness and issuing new personal documentation, providing financial support for a finite period of time, providing initial assistance with job training and finding new employment, providing counselling and other social services including education and extending protection and other benefits to persons accompanying the witness in the programme.[56] The witness has a duty however not to compromise directly or indirectly the protection or assistance accorded to him. He is under an obligation to comply with the protection authority's instructions regarding the assistance provided, to disclose information on his or her past criminal records, to provide true testimony, avoid commission of crime and disclose information relating to the investigation in issue.

Severe violations of the conditions for granting a witness protection may lead to sanctions and ultimately the termination of the programme. In cases of international relocation, the agency in the receiving country may consider not only ending the protection but also returning the witness to the sending country. Also a witness may voluntarily decide to opt out of the protection programme. In cases of voluntary withdrawal, witnesses

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[55] K Kramer, 'Witness Protection as a Key Tool in Addressing Serious and Organized Crime' 16 <www.unafei.or-jp> accessed 15 September 2022.
[56] ibid.

may be asked to sign a termination paper or protocol to officially end the protection programme. They are not permitted to keep any documentation, proof or records of their involvement in the programme.[57]

International relocation is at the top end of witness protection services. This is owing to the significant costs, resources and impact or a witness and his family as well as the complicated nature of international relations. However, international relocation is often the most effective means of guaranteeing protection. The choice of the receiving country is defendant on the extent of threat, where the witness would fit in best and the willingness of a country to receive the witness.[58] Article 24, paragraph 3 of the Organised Crime Convention provides that state parties are authorized to enter into agreements or arrangements with others states for the international relocation of protected witnesses. In practice such cooperation is based on regional or bilateral agreements and special agreements or Memorandums of Understanding concluded directly between police forces, prosecutors, judicial or law enforcement authorities of the respective countries. Such agreements become the basis for the direct assistance and do not require ratification by the national legislature.

Following the decision to relocate a foreign witness, the terms and conditions are open to negotiation between the sending and receiving countries. A detailed agreement is signed providing for the mutual rights and obligations of the countries as regards the relocation. The agreement covers responsibility of ensuring the safety of the witness by the receiving state, provision of financial support to witnesses by the sending state, ensuring of social integration by the receiving state, for example, employing or getting a work permit for the witness, etc. In most situations, the need for the support of a third country may arise. The support may be as simple as facilitating the transit of witnesses through the territory or through the ports and airports of the third country to prevent a security compromise during passport or immigration control. It may also involve other complicated operations like providing a safe haven for reunions between the protected witness and family members or providing assistance in giving court testimony by video conference.

While in a protection programme, witnesses are often required to severe ties with their past life. That includes getting rid of any property,

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[57] ibid.

[58] UNODC, 'Good Practices for the Protection of Witnesses in Criminal proceedings Involving Organized Crime' (United Nations Office on Drugs and Crime Vienna 2008) 77-86.

registered electronic devices and software that would potentially be traced. Before entering a witness protection programme, it is usually necessary for participants to declare all their possessions to the witness protection authority, which would provide advice on which items to dispose. Part of the proceeds of the forfeited properties may subsequently be used to fund the witness programme or related programmes such as victim's compensation fund.[59]

Since the evolution of the idea of witness protection in the 1970's,[60] witness protection programmes have undergone several changes, mostly as a result of experience gained, to make the system more effective. However it must be noted that clogs abound in the wheel of the effectiveness of the various witness protection programmes. Significant differences exist among the legal traditions, political environments, stages of development, society and culture as well as levels and types of criminality in different countries. These differences often determine the extent of countries can go in ensuring the protection of witnesses. Very few countries have the willingness and financial strength to follow up certain witness protection programmes to an effective end. Most jurisdictions resort to simple police measures such as temporary placement of witnesses in safe houses or the provision of psychological support even where the circumstances warrant more measures.

Other challenges to the effectiveness of witness protection programmes include the rise in the form and level of transnational crimes. Gang problems have spread to previously unaffected areas, offences are taking new forms, violence have increased in frequency, the daily innovations in technological developments have also been a major issue in effectively concealing protection programmes. The growing number of directories, addresses and customer profiles available online increases the risk that a programme will be compromised by the inadvertent posting of the details of a witness who has been relocated and given a new identity. The significant increase in the number of potential witnesses in need of protection has also put a strain on protection programmes.

The use of biometrics has also hampered the effectiveness of protection programmes. Biometrics refers to the use of digital technology to record

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[59] ibid.

[60] The United States established a formal program of witness protection run by the US Marshals Service under the Organized Crime Control Act of 1970.

and recognise a person's physical or behavioural traits.[61] Even its use has proved problematic for witness protection. The increased use of biometrical identification documents with features such as iris or facial scans limits the possibilities of changing a witness' identity for protective purposes. The problem is not only peculiar to the public sector but extends to privately run data bases containing biometrical information such as those operated by financial institutions. Even most insurance companies refuse pay-outs without DNA[62] samples being provided as evidence of a person's identity.

Discussions involving biometrics is a necessity with reference to the difficulties it poses to witness protection. There is a great need for coordination among wide range of associations and experts in that field.[63] While legislations provide methodologies, tangible cooperation are required. Authorities may have great difficulty having to trace all places where an applicant for witness protection may have left a finger point or forms of biometric data before affording them protection. To guarantee the effectiveness of witness protection programmes, there is need for clarity of legal or policy basis for designing a methodology and carrying out operations, adequate and stable financing, strict personal qualifications and vetting procedures, integrity of the programme, close coordination with judicial and other government authorities engaged in law enforcement and intelligence gathering, accountability and transparency that conform with the programmes needs, development of agreed minimum standards warranting international relocation, simplification of application and admission procedure, harmonisation of policies and terminologies, creation of networks of agencies and databases, development of common criteria for the determination of living standards and benefits for witnesses under protection, etc.

The insufficiency of coordination among states, lack of elaboration in policies, strategies and programme related to protection of witnesses, poor use of existing networks of relevant national bodies, the absence of a comprehensive vision on what has been achieved so far, of lack of data absence of commonly agreed good practices to ensuring effective protection

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[61] NK Raffa, JH Connell and RM Bolle, 'Enhancing Security and Privacy in Biometrics Based Authentification System' (2001) 40 *IBM Systems Journal* 614-634.

[62] A federal law passed in the United States in 2008 known as the Genetic Information Non-Discrimination Act (GINA) makes it legal for health insurance providers in the United States to use genetic information in decisions about health insurance eligibility

[63] Results from the second meeting of the Intergovernmental Expert Group to prepare a study on fraud and the criminal misuse and falsification of identity (E/CN 15/2007/8 and Add 1 – 3).

for protected persons pose huge clogs to the international efforts at effectively propagating the interest of witnesses protection wise.[64]

VI. APPLICATION OF EXTRADITION AND EXPULSION

Extradition and expulsion are essential tools of international law enforcement in the wake of increasing transnational crime rates. Cooperation of states through these international tools offer a potentially promising media for states seeking to extend the long arms of the law and justice beyond borders.[65] Both concepts have been studied over time and scholars have written insightfully on their history and technical aspects. However, there is considerably less analysis of many of the practical and political considerations involved in wielding them. There has been less explicit examination of the power relationships, strategic dynamics and political considerations related to their use.[66]

A. The Extradition Procedure

Countries typically follow a set of procedures laid down in accordance with domestic law and where applicable international treaties in carrying out extraditions. In order to begin an extradition process, the prosecutors must determine whether the offence for which a fugitive is sought is an extradition offence. Once it is established that the offence is extraditable, the prosecutors prepares a package which has two components such as affidavit explaining the domestic law that was broken, the punishment and any relevant statutes of limitation as well as verifying that the offence is extraditable under bilateral treaty. The investigators affidavit explaining the facts of the case and the fact that there are substantial and sufficient evidence (including copies of arrest warrants, photographs, other documentation and physical evidence) linking the suspect to the crime are also packaged along. The investigators affidavit also contains the probable location (jurisdiction) of the suspect.[67]

This package is sent to the Office of the International Affairs (OIA) of the requesting state. Once of the OIA approves the petition, it is further sent to the Department of State or State Department for its review and approval.[68] The Department of State (DOS) then forwards the request to

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[64] ibid.
[65] A Hassan, 'Extradition' (2020) <www.researchgate.com> accessed 31 January 2023.
[66] GG Ginsburgs, 'Extradition Issues in Russia-Turkmen Relations' (2004) 24(4) *Review of Central and East European Law* 437-456.
[67] Hassan (n 65).
[68] ibid.

the requesting states embassy in the requested state where lawyers convert the package into a Diplomatic Note to be sent to the requested state's Ministry of Foreign Affairs. By virtue of article 16(9) of the Palermo Convention, subject to the provisions of the requested states domestic law and the extradition treaty, the requested state upon being satisfied that the circumstances so warrant and are urgent and at the request of the requesting state takes the person whose extradition is sought and who is present in its territory into custody or takes other appropriate measures to ensure his or her presence at the extradition proceedings.[69]

National rules governing how a requesting state should handle an extradition request varies, however, they follow a standard sequence in which the Ministry of Foreign Affairs reviews, evaluates the extradition request in accordance to their bilateral treaty with the requesting state. If it does comply with all the requirements, the petition is turned over to the requested state's Attorney General who presents it to a Federal/National Judge who then issues a detention order for the suspect for the purpose of extradition. The Attorney General's Office then works with the law enforcement to execute the warrant and apprehend the suspect. Once the suspect is in custody, he/she must be presented with the extradition order. Again, each country's law governing the legal options available to suspects will vary but in most Western Countries, suspects have an opportunity to appeal or make a case for why they should not be extradited. Once the appeal process has been exhausted, either the prosecutor or office of International Affairs arranges with foreign law enforcement agency for the transfer of the suspect. Clearly the extradition process is complex and cumbersome. It should come as no surprise that an average extradition generally takes six months and more likely up to a year to complete.[70] However many efforts are being made to simplify and expedite extradition processes. Article 16(8) of the Palermo Convention lends a voice to the above by providing that states should endeavour to expedite extradition procedures as well as simplify evidentiary requirements relating to extradition under their domestic laws.

B. Expulsion Procedure

The concerned individual is informed of the expulsion decision in person and he signs an undertaking to leave the country. Where the person fails

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[69] United Nations Model Treaty on Extradition, art 9.

[70] A Power, 'Justice Denied? The Adjudication of Extradition Application' (2002) 37 *Texas International Law Journal* 277, 284-285.

to comply with an expulsion decision and does not contest it in court or through an administrative appeal, he/she may be placed in temporary detention and subjected to forcible deportation. An Expulsion triggered by an administrative sanction is usually imposed by a judge or competent public official.[71] No free legal aid is provided to defendants at any stage of the expulsion process. In deciding an expulsion on national security or public order grounds, the authorities must access the individuals circumstances to ensure that public interest in deportation outweighs the interests of the person staying in the state.[72]

Where a non-national is wrongly expelled for no just cause, exposing him/her to risks of serious human rights violation, he/she have an effective right to a remedy that is conducted promptly by an impartial and independent authority capable of overturning the decision of expel.[73] Such remedy is generally provided before a judicial body with the power to cease the violations and ensure appropriate reparation which includes restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

VII. MEASURES RELATED TO PROCEEDS OF CRIME

Confiscation of the proceeds of crime have acquired a crucial place among measures for the suppression of serious crimes particularly transnational crimes. The strongest argument in favour of confiscation of proceeds of crime is that depriving an offender of the profits of criminality is not only an appropriate punishment but a deterrent. Confiscation is a strong deterrent to profit-motivated criminality as well as an efficient mechanism to remove financial and other materials that could be used to continue crime from the hands of habitual criminals. It also prevents a likelihood of the proceeds being reinvested, thus significantly helping in the fight against the penetration of transnational crimes into licit business.[74]

The United National Convention against Illicit Traffic in Narcotic Drugs and Psychotropic substances was the first multilateral instrument to provide for confiscation of the proceeds of crime and closely related matters such as tracing, freezing, seizure and related international

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[71] International Commission of Jurists, *Transnational Justices National Security Transfers and International Law* (Eugeny Ten 2017) 98.
[72] ibid 99.
[73] ICCPR, art 2.3; see also United Nations Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, art 12.
[74] UNODC (n 30).

cooperation. The Convention was also the first to criminalize money laundering. The Palermo Convention subsequently came up with almost identical norms and provisions on international cooperation that essentially target the discovery of money laundering. The United Nations Convention against Corruption further adds to this other measures of international cooperation. It establishes rules on the return of confiscated assets to the state of origin.[75]

There is no imposition of a single model for confiscation under international law. International norms however prescribe a short set of substantive principles and very limited number of procedural rules,[76] the law enforcement and judicial machinery needed for confiscation and the provisions governing substantive limits and requirements are left to legal traditions or autonomous legislative initiatives of individuals, states or regions to determine. The Palermo Convention requires each national legal system to pursue and order the confiscation of proceeds obtained through the commission of crime. The Convention also broadly identifies the categories of assets subject to confiscation which includes properties into which illicit assets have been converted or transformed as well as illicit assets that are intermingled with licit ones.[77] Variety of confiscation schemes can be found in national legal systems. Confiscation proceedings may fall under criminal or civil law. Confiscation can be strictly connected to proceeds of individual offences or it can include all illicitly acquired wealth. It can be hinged on a criminal conviction or occur independently.

The Financial Action Taskforce (FATF) is an inter-governmental body with worldwide membership whose purpose is the development and promotion of national and international policies to combat money laundering and terrorist financing. The FATF published the Forty Recommendations on Money Laundering and Nine Special Recommendations on Financing of Terrorism in order to set standards and to meet its objectives. FATF has also produced the methodology for cultural evaluation process in cases relating to money laundering. Recommendation 3 of the FATF Forty Recommendations deals with measure for confiscation and encourages countries to consider confiscation measures without requiring a criminal conviction or requiring an offender to demonstrate the lawful origin of the property alleged to be liable to confiscation.

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[75] Convention against Corruption, art 54.
[76] Palermo Convention, art 12.
[77] ibid.

Recommendations 27, 28 and 32 also deals with institutional and other measures as well as statistics also related to confiscation of proceeds.[78]

A well-developed financial investigative system is a pre-condition for a successful confiscation proceeding. In order to ensure a final confiscation, it is necessary to have an efficient investigative and provisional measure to identify, trace and freeze or seize rapidly properties which are liable to confiscation.[79] Based on a request for confiscation of instrumentalities or proceeds of crime situated in its country, a state shall enforce a confiscation order by a court of a requesting state or submit the request to its competent authorities for the purpose of obtaining an order of confiscation and if such order is granted, enforce it. In this case, the state can use the confiscation proceedings under its own law. A request for confiscation does not affect the right of the requesting state or party to enforce the confiscation itself. The Palermo Convention[80] suggests that states may consider the possibility of requiring that an offender demonstrates the lawful origin of alleged proceeds of crime or other properties liable for confiscation to the extent that such a requirement is consistent with the principles of their domestic law and with the nature of the judicial and other proceedings.

The Palermo Convention provides for seizure and confiscation of criminal proceeds under article 12 and reinforces its provisions in article 12 by emphasizing the need for international cooperation in confiscation matter in article 13. The Convention requires a requested state party to take particular measures to identify, trace and freeze or seize proceeds of crime for eventual confiscation. It further describes how requests for confiscation matters are to be drafted, submitted and executed. Article 14 of the Palermo Convention finally provides for disposal of the confiscated assets in accordance with domestic law. The Convention however, calls on the disposing party to prioritize requests of other countries for the return of such assets for use as compensation to crime victims or restoration to legitimate owners or for the fund technical assistance activities under the Convention for Economic Cooperation Development (OECD) and the World Bank.

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[78] Financial Action Taskforce, <http://www.fatf-gafi.org/pages10,2987.en_32250379_32235720_1_1_1_1_1.00.HTML> accessed 21 February 2023.

[79] R Golobinek, 'Financial Investigations and Confiscation of Proceeds from Crime' (Training Manual for Law Enforcement and Judiciary, Cedex 2006) 202, 28-33.

[80] Palermo Convention, art 12, para 7; see also United Nations Convention 1998, art 5, para 4.

VIII. CONCLUSION

Basically, the global transnational criminal justice system has gone through a period of intense efforts to understand transnational crimes and evolve methods to diminish their corruptive powers and influences. The progresses recorded so far are reflective in the establishment of discrete prosecution and investigative units, the passage of legislations, provision of financial and logistical support to local agencies as well as a continuous process of self-analysis and evaluation. It is however possible that by redefining strategic implementation approaches, the transnational crime justice system may ultimately achieve a significant level of success beyond that which is on ground.[81] Legal and political obstacles as well as opportunities presented by the multi-jurisdictional and multi-agency structures of international, state and local law enforcement ought to be analysed and understood. Thereafter, the formulation and execution of a coherent strategy should follow.

To have significant results in transnational crimes law enforcement, investigations must be part of a general strategy designed to extend beyond individual to criminal enterprises and networks. Spectacular investigations that produce headlines, leaving foundations untouched do little or nothing to eradicate the menace of transnational crimes. Investigations which yield fundamental results are based on an informed understanding of a particular crime and the environment involved, with due considerations of long range implications of both the strategy adopted to fight the crime and the daily operational tactics employed to carry out the strategy. Varying types of analyses, that is, economic, historical and structural, of several aspects of transnational crime activities and their implications on the development and implementation of strategies for long term control are fundamental.

[81] JS Albanese, 'Countering Transnational Crime and Corruption: The Urge to Action versus the Patience to Evaluate' (2018) *Justice Evaluation Journal* 82-95.

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