George Andreopoulos *Editor*

Policing Across Borders

Law Enforcement Networks and the Challenges of Crime Control

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New York City, NY, USA George J. Andreopoulos

Contents

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Chapter 1
Policing Across Borders: Transnational Threats and Law Enforcement Responses

George Andreopoulos

This volume seeks to explore some of the main challenges confronting the law enforcement community in the Balkan region in dealing with two critical transnational threats and the prospects for effective cross-border collaboration in addressing such threats. One of the key arguments advanced here is that, in order to be effective and sustainable, such collaboration must adhere to international rules and standards and, in particular, international human rights norms.

Over the last 60 years, the threats facing the international community have drastically evolved. While traditional threats resulting from interstate aggression remain a matter of concern, the universe of challenges to human welfare has expanded. A 2004 report issued by the United Nations Secretary-General's High-Level Panel on Threats, Challenges and Change (HLPTCC) entitled *A More Secure World: Our Shared Responsibility* suggests that "any event that leads to large-scale death or lessening of life chances and undermines States as the basic unit of the international system" may be understood as a threat to international peace and security. In this context, the report identified six clusters of threats which are of global concern: economic and social threats; interstate conflict; internal conflict, including genocide, civil war, and other large-scale atrocities; nuclear, radiological, chemical, and biological weapons; terrorism; and transnational organized crime (TOC) (A more secure world 2004). Several of these clusters are also identified in domestic laws: in US law, for example, transnational threats are defined as "any transnational activity (including international terrorism, narcotics trafficking, the proliferation of weapons of mass destruction and the delivery systems for such weapons, and organized crime) that threatens the national security of the United States" and "any individual or group" that engages in any of these activities.[1]

[1] 50 USCS ξ402 (Title 50. War and National Defense; Chapter 15. National Security, Coordination for National Security).

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Such understandings of threats to international peace take as their premise a paradigmatic shift from an exclusive preoccupation with state security to a more nuanced interplay between state security and human security considerations within the framework of collective security. This shift in its turn rests on two basic pillars: the interconnectedness of various types of threats and, as a concomitant, the need for these threats to be addressed at the national, regional, and global levels.

TOC represents a telling example of such a threat. Corruption, money laundering, and human and drug trafficking not only contribute to state weakness, adversely affect economic growth, and undermine democratic institutions but, as indicated in the HLPTCC report, also undermine peace-building efforts through illicit trade in small arms and conflict commodities. In addition, state weakness/failure constitutes an inviting terrain for the proliferation of other transnational threats, including terrorism; such developments invariably have spillover effects into neighboring countries, as Zoran Pajic notes in his contribution. In order to eliminate such threats, the international community needs a varied and more effective use of the tools at its disposal.

Law enforcement constitutes a vital component of any credible response to the challenges posed by the aforementioned transnational threats. In particular, law enforcement efforts can play an important role in the suppression and punishment of activities resulting from these threats, as well as in the prevention of threat-enabling situations. As a result, several recent developments at the international, regional, and national levels have attempted to strengthen the contribution of law enforcement on the suppression/punishment and prevention fronts and enhance its overall role in global governance.[2]

To be sure, international crime control efforts manifested, in particular, through cross-border law enforcement collaboration do not constitute a novel feature in international relations. As several analysts have noted, such efforts have a long history (Andreas and Nadelmann 2006, p. 4; Deflem 2002, 2009). What has changed is the intensity and geographic reach of these efforts which have transformed the landscape of crime control and have raised the profile of policing issues in the international security discourse (Andreas and Nadelmann 2006, pp. 4–5).

The potential contribution of law enforcement is also part of a broader argument concerning the need for new conceptual lenses to understand global governance. According to this argument, the traditional notion of the state, i.e., as that of a unitary entity like a billiard ball, needs to be revised. Instead, states should be viewed as disaggregated entities and cross-border interactions should be understood as relations among subunits, including regulatory, law enforcement, judicial, and legislative channels (Slaughter 2004, p. 5). These transgovernmental networks are involved in a variety of activities that include the development of common standards and agreements

[2]At the international level, reference should be made to the work of the United Nations Security Council Counterterrorism Committee, to the implementation of the United Nations Convention against Transnational Organized Crime, and to several initiatives launched by the United Nations Office on Drugs and Crime (UNODC), in cooperation with the United Nations Office of Legal Affairs (UNOLA), and, at the regional level, to initiatives derived from the Organization for Security and Cooperation in Europe (OSCE) Charter on Preventing and Combating Terrorism and from the Organization of American States (OAS) Convention against Terrorism, among others.

to advance interstate cooperation, implementation issues such as intelligence sharing, and technical assistance and training. An important function of these networks is to facilitate the professional socialization of their counterparts from less developed nations through various capacity building initiatives (Slaughter 2004, p. 4).

The increasing density of such cross-border interactions does not unfold in a normative vacuum. In fact, the density of exchanges, manifested primarily through the sharing of growing amounts of information and the ability to coordinate activities among a vast array of entities, has only reinforced the critical nature of the normative context. More specifically, these activities need to adhere to well-recognized standards of legitimacy. This is particularly important in the context of law enforcement activities, given the perennial tension between effective law enforcement and law enforcement that becomes an instrument of repression, as Aaron Fichtelberg notes in his contribution.

There is wide consensus in the international community that human rights constitute important sources of legitimacy (Grant and Keohane 2005, p. 35). This statement does not mean that human rights remain uncontested: in fact, and at the risk of overgeneralization, it would be fair to say that the more widespread the moral appeal of human rights, the more intense the debate as to the content and reach of the relevant norms. The reference to standards of legitimacy indicates (1) that conformity to human rights norms constitutes an important indicator of the appropriateness of a particular course of action and (2) that any deviations from appropriate conduct place a considerable onus on the actors undertaking them to explain such deviations. Failure to do so would entail reputational costs and, in many cases, also material ones.

Actions and practices to which the stigma of illegitimacy is attached are not necessarily discontinued, but they are invariably concealed. A very good example here is torture. In an earlier period in European history, torture constituted a reliable means of obtaining a confession, which was considered as the "queen of proofs" in the criminal justice system (Peters 1999; Rejali 2007). To be sure, the role of torture as a source of obtaining evidence has drastically changed, but the practice has not been eliminated. The periodic reports issued by reputable human rights organizations, as well as the work of treaty organs and of the Special Procedures of the Human Rights Council, provide ample evidence as to the continuity of this practice.[3] What has changed is that, nowadays, states and other entities engaging in torture and related practices do not openly admit to doing so.[4] The abusive conduct in "secret prison sites" run by the CIA with the collaboration of other intelligence agencies, as discussed in Henry Carey's chapter, is an adequate testimony to that effect. Those engaged in such conduct go to great lengths to conceal it, an implicit admission of its inappropriate nature and of the reputational costs involved in its exposure.[5]

[3] I am referring, in particular, to the work of the UN Committee against Torture and of the UN Special Rapporteur on Torture.

[4] This statement has to be somewhat qualified in light of post-9/11 developments and the US-led efforts to normalize "enhanced interrogation techniques."

[5] The fear of exposure, due to more effective monitoring, has also contributed to a greater emphasis on what Rejali calls *stealth torture*, and explains why clean forms of torture "tend to cluster in democratic contexts" (Rejali 2007, p. 410).

These standards of legitimacy are drawn from hard as well as soft law instruments. These instruments include the core international human rights treaties,[6] and in the context of the Balkan region, which is the focus of this volume, the relevant European instruments and directives drawn from such instruments. For example, all Balkan countries are members of the Council of Europe and therefore bound, in addition to the core human rights treaties, by the provisions of the European Convention on Human Rights and Fundamental Freedoms and its protocols,[7] by the rulings of the Convention's European Court of Human Rights (ECtHR), and by other regional treaties, such as the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and its protocols.[8] Moreover, law enforcement activities are expected to be guided by soft law instruments, such as the Code of Conduct for Law Enforcement Officials,[9] the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials,[10] the Standard Minimum Rules for the Treatment of Prisoners,[11] and the Basic Principles for the Treatment of Prisoners,[12] among others.

While the Balkan region confronts numerous transnational challenges, our book project has focused on two of them: terrorism and human trafficking. There are several reasons for this selection. In recent years, both issue areas have risen into prominence within the regional security discourse and have featured in efforts to build effective cross-border cooperative structures. For example, both issue areas constitute key programmatic concerns in the Justice and Home Affairs Field of the Regional Cooperation Council (RCC), the regional organization which succeeded

[6] These are the International Convention on the Elimination of All Forms of Racial Discrimination; the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the Convention on the Elimination of All Forms of Discrimination against Women; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and the Convention on the Rights of the Child; http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx

[7] http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/CONVENTION_ENG_WEB.pdf

[8] http://conventions.coe.int/Treaty/en/Treaties/Html/126.htm.

[9] Adopted by General Assembly resolution 34/169 of 17 December 1979; http://www2.ohchr.org/english/law/pdf/codeofconduct.pdf.

[10] Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990; http://www2.ohchr.org/english/law/pdf/firearms.pdf.

[11] Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977; http://www2.ohchr.org/english/law/pdf/treatmentprisoners.pdf.

[12] Adopted and proclaimed by General Assembly resolution 45/111 of 14 December 1990; http://www2.ohchr.org/english/law/pdf/basicprinciples.pdf.

the Stability Pact for South Eastern Europe (SPSEE).[13] Likewise, in the recently established South East European Law Enforcement Center (SELEC), which replaced the South East European Cooperative Initiative (SECI),[14] two of the key task forces are on human trafficking and migrant smuggling[15] and on antiterrorism.[16] This density of interactions signals the enormity of the challenges confronting national and regional stability and a recognition of the potential benefits of intelligence sharing, of the creation of joint task forces for cross-border action, as well as of other forms of cooperation.

In addition, both threats, though transformed, constitute long-standing challenges for the international community. The current war on terror is part of a historical process that can be traced back to at least the nineteenth century, when "European police and intelligence agencies collaborated to keep track of political offenders" (Andreas and Nadelmann 2006, p. vi). In a similar vein, the most recent precedent to human trafficking can be traced back to the white slavery that existed among the United States, Western Europe, and South America between the 1880s and 1930s (Shelley 2010, p. 295).

Last, but not least, human rights play a very important role in confronting these challenges: in the context of terrorism, it is vitally important to protect human beings from both terrorism and from the excesses of policies and practices aimed at combating terrorism (Andreopoulos 2011; Flynn 2012); in the context of human trafficking, it is vitally important to address both the supply and the demand side of the equation, without criminalizing the victims (Fowke 2008; Danziger et al. 2009).

While the relevance of human rights norms is often acknowledged, the development of human rights-sensitive crime control initiatives remains, at best, a work in progress.

This volume is based on papers, presentations, and a series of discussions that took place in the context of four workshops organized by the Center for International Human Rights (CIHR) at the John Jay College of Criminal Justice, City University of New York, in collaboration with the Center for Security Studies (KEMEA) of the Greek Ministry of Public Order and Citizen Protection.[17] In preparing this volume,

[13] For more on RCC's Justice and Home Affairs field, see Annual Report of the Secretary General of the Regional Cooperation Council on regional co-operation in South East Europe in 2010–2011; http://www.rcc.int/pubs/0/15/annual-report-of-the-secretary-general-of-the-regional-cooperation-council-on-regional-co-operation-in-south-east-europe-in-2010-2011; and Annual Report of the Secretary General of the Regional Cooperation Council on regional co-operation in South East Europe 2011–2012. Sarajevo, 15 May 2012; http://www.rcc.int/admin/files/docs/reports/RCC-Annual-Report-2011-2012-text.pdf

[14] SELEC replaced SECI in October 2011, with the entering into force of the Convention of the South East European Law Enforcement Center; Convention of the South East European Law Enforcement Center, http://www.selec.org/docs/PDF/SELEC%20Convention%20%5bsigned%20on%2009.12.2009%5d.pdf.

[15] For more info on this task force, see http://www.secicenter.org/p280/Task_Force_on_Human_Trafficking_and_Migrant_Smuggling.

[16] For more info on this task force, see http://www.secicenter.org/p263/Anti_Terrorism_Task_Force.

[17] For more information on the workshops and the participants, see the acknowledgments section in this volume.

we asked contributors to address one or more of the following themes, which were considered central to our enquiry:

1. *Transgovernmental enforcement networks and the future of international police cooperation*. There is little doubt that the increasing collaboration of law enforcement agencies across borders has led to the emergence of an international law enforcement community. To be sure, police cooperation is not new; its modern variant unquestionably possesses some characteristics from earlier eras. However, the ever growing transnational organized crime challenges have added another layer of complexity and have transformed in some fundamental ways the nature and density of cross-border interaction. What are the key continuities with the past and what are the main transformations in this era of globalization? How does this development impact criminalization and crime control in international relations in general and in relations among states in the Balkan region in particular?
2. *The convergence of national security and criminal justice considerations*. The 2004 United Nations Report *A more secure world: our shared responsibility* identified terrorism and transnational organized crime as among the "six clusters of threats with which the world must be concerned now and in the decades ahead." Evolving definitions of security have contributed, as several analysts have noted, to the securitization, desecuritization, and resecuritization of "a … wide range of international policing issues … over time" (Andreas and Nadelmann 2006, p. 236). How has this convergence and in particular the growing interaction between law enforcement and national security institutions affected the identity and structure of these institutions as well as the instruments and tactics at their disposal to achieve their missions? What is the effect of this convergence on regional (i.e., Balkan) cooperation and stability?
3. *State capacity*. State capacity is a critical variable in the implementation of law enforcement policies, in particular if expectations of adherence to international rules and standards are to be met, as well as in ensuring more effective and legitimate cross-border cooperation. The Balkan region is seriously challenged on this front. While several regional international and regional organizations/agencies have training programs aimed at capacity building in the area of law enforcement and judicial institutions, more needs to be done. How can such entities contribute to this effort?
4. *Accountability issues in the internationalization of law enforcement*. The growing trend toward internationalization has raised, as several analysts have noted, a host of accountability-related issues, including, among others, the "democratic deficit" caused by activities that are not or not adequately supervised by elective bodies, and the human rights implications of the securitization of law enforcement, especially after the terrorist attacks of 9/11. What have been the main manifestations of this problem in the Balkan region? How can this trend be contained and eventually reversed? What can regional organizations and civil society actors contribute to this endeavor?

Aaron Fichtelberg's contribution sets the stage on the importance of democratic policing by analyzing and assessing the interconnection between three forces: the

demands of a democratic police force, state capacity building as a way to achieve democratic policing, and the ability of international institutions to help create and sustain the fine balance between the competing aims of modern policing in a democratic society. The author argues that while crime control in general and policing in particular are amenable to democratization and that democratic policing is a necessary condition for a democratic society, the democratization of policing is not an easy task. What is needed to achieve the desired fine balance is a combination of restraining bureaucratic structures, the cultivation of a professional ethic and carefully crafted legislation. This is an ongoing challenge for all societies addressing the difficult task of ensuring transparency and accountability in policing practices.

Turning our attention to the interconnectedness between national and international security, Zoran Pajic addresses the issue of security in relation to the criminal justice system and the latter's capacity to address some of the main contemporary security threats at the national as well as the regional and global levels. According to Pajic, any serious examination of this issue must begin with a common understanding about the meaning and responsibilities of collective security. Drawing on the case of Bosnia-Herzegovina, the author highlights the challenges posed by state failure and its implications for domestic as well as regional stability. Given the growing interconnectedness among local, regional, and global developments, addressing some of these challenges will necessitate the adoption, by the international community, of a more holistic approach toward the state-building process. It is in the context of "mutual dependence," the author argues, that credible incentives can be generated to ensure that failed states become reliable stakeholders in this process.

State capacity is a critical variable in advancing effective cross-border collaboration. Dimitar Markov, in his contribution, examines the role of international organizations in building the capacity of law enforcement institutions in Bulgaria. He analyzes the different types of international assistance and capacity building initiatives in the area of law enforcement and assesses their respective strengths and weaknesses. He concludes that, while the majority of capacity building efforts have produced satisfactory results, thus enhancing the ability of law enforcement to deal with crime and cross-border offenses, effective coordination remains an elusive goal. Very often international assistance provided by the different organizations leads, due to the lack of such coordination, to overlapping or incompatible results. This is a critical challenge for both national governments and international institutions.

Law enforcement collaboration in dealing with the threat of transnational terrorism has intensified since 9/11, but it has also led to many abuses. Henry Carey's contribution examines law enforcement misconduct, in particular misconduct associated with extraordinary renditions and secret prisons. One of the most troubling responses to the terrorist threat, on the part of the US government, was the creation of a CIA network of secret detention facilities, in which detainees were subjected to systematic torture and other forms of abusive conduct. This worldwide network included three European countries, Poland, Romania, and Lithuania. Going beyond the Balkan region, he analyzes and assesses the extent of this development and the efforts of regional entities, such as the Council of Europe and the European Union, to discourage collaboration in unlawful activities and ensure greater transparency

and accountability in the work of intelligence agencies. This case highlights two key issues: (1) the various ways in which the density of cross-border interactions can enable transgovernmental network misconduct and (2) the monitoring role of regional organizations as well as the limitations inherent in their operations, even in "high normativity" areas such as Europe.

Human trafficking is another major public order and human security issue for the region. In examining this issue, Roza Pati employs the theoretical lenses of the New Haven School of Jurisprudence. Thematically, the study focuses on substantive and procedural issues of international cooperation in addressing the crime of trafficking in human beings, and the geographic focus on such cooperation is in the region of South East Europe. Her contribution identifies the conflicting claims involved, and critically examines past trends in decision making, actual agreements, and instances of cooperation, and offers insights on future trends. Though some progress has been registered, Pati concludes that the pace at which cooperation to combat human trafficking has developed has not kept pace with the internal infrastructure which has been set up for this purpose. She concludes by offering a set of recommendations to states to improve anti-trafficking cooperative efforts, so as to ensure policy outcomes consistent with "a world public order of human dignity."

The next two pieces are contributions from seasoned practitioners. Nikos Petropoulos' essay examines the challenges that terrorism poses for law enforcement. His contribution surveys the main legislative measures adopted at the international, regional (European), and national (Greek) levels to combat it. The author argues in favor of a common international definition of terrorism and for the strengthening of existing agencies, such as Europol, and of entities promoting regional cooperation, such as SECI and its successor, SELEC, whose policies and practices must be consistent with fundamental rights and liberties, as enshrined in international and European treaties and related documents. In addition, the author briefly examines the impact of counter-terrorist legislation on human rights and argues that the correct approach entails finding a balance between national security and human rights.

Vassilis Grizis' essay offers insights into the complexities and challenges involved in addressing the crime of trafficking in human beings. His essay examines key developments at the international, regional (European), and national (Greek) levels to combat human trafficking. While the anti-trafficking efforts have registered some successes over the last few years, the author argues that significant progress can only be achieved by focusing on policies seeking to address the root causes of the problem. In this context, he argues that improved coordination among countries of origin, transit, and destination, as well as systematic efforts to protect the victims of trafficking, constitutes indispensable components of a more holistic and proactive approach to the problem.

The volume concludes with a focused study on the quest for accountability, a critical component of any effort aimed at ensuring legitimate law enforcement policies and practices. Selma Zekovic's contribution examines current trends in advancing the accountability of the law enforcement sector in Bosnia and Herzegovina

through an examination of the political situation in the country, the role of state institutions and civil society, and the media. Her essay provides an assessment of key accountability-related cases which have been highly prominent in the public arena, as well as of their potential consequences for the democratic process in that country. She concludes that a lot of work still needs to be done to ensure the establishment of sustainable accountability mechanisms and argues that a necessary step in that direction would be the adoption of policies that would advance democratization, policies that would go hand in hand with the implementation of international and EU standards in this regard.

The creation of a growing array of law enforcement networks at the international, regional, and national levels is emerging as a vital response to the interconnectedness of transnational threats. Bearing in mind the challenges posed by these threats to world order, the imperatives of suppression/punishment and prevention necessitate an in-depth study of these threats as well as of law enforcement's prospects for effectively addressing them. As the essays in this volume make clear, adherence to international norms constitutes a sine qua non for legitimate collective action. We trust that this volume will make a contribution to the ongoing quest for effective and legitimate law enforcement responses, responses which will advance protection premised on a commitment to human dignity.

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Chapter 2
Democratic Policing and State Capacity in an Integrated World

Aaron Fichtelberg

Introduction

In this chapter, I want to examine the interconnection between three forces: the demands of a democratic police force,[1] the construction of a state's capacities as a way to achieve democratic policing, and the ability of international institutions to help create and cultivate the fine balance between the competing aims of modern policing in a democratic society. These forces are fundamentally paradoxical for two significant reasons: first, democratic societies are essentially organized around the principle of governance by consent, and many aspects of policing are anathema to this political order. Second, democratic societies are self-determining societies, meaning that foreign intervention, particularly in a field as important as policing, is fraught with political danger. Influencing another state's policing involves transforming the core of their governance and affecting how the state fulfills what is undoubtedly one of its most serious functions: the use of force against its own citizenry. This means that those involved in foreign interventions into a state's policing system, be it from regional or international institutions, must be aware of the delicate position it is in and prickly matters of state sovereignty.

Nonetheless, it is both possible and necessary that international institutions play a role in constructing democratic police forces around the world. While "nation building" as a political project has come into disrepute in recent years, it is clear that many newly emerging democracies, particularly in Eastern Europe and in the Islamic World, need international assistance in developing the crucial institutions of democratic governance. While societies cannot be made democratic simply by

[1] For an analysis of the notion of democratic policing, see the OSCE's Guidebook for Democratic Policing (2008).

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waving a magic wand and the transition from despotism to democracy is a perilous, arduous process, basic institutions of most societies are capable of democratization, if for no other reason than that people demand a certain level of democracy from these institutions. Crime control in general and policing in particular are clearly amenable to democratization, and it is probably not an exaggeration to say that democratic policing is a necessary condition for a democratic society. However, like all aspects of democratic society, there is a tension between the normative demands of democracy as such and the need for law and order (Habermas 1998).

Police and "the Democratic Dilemma"

In democratic societies, the police stand in a strange, even contradictory position. The police embody the "sharp point" of the state's monopoly on the use of force, deploying physical violence (guns, batons, handcuffs, etc.) to enforce laws, maintain public order, and advance government policy. While this is taken for granted, it is important to understand the dramatic nature of this power: at their core, democracies are not societies based upon coercive imposition and the use of force, but rather are organized around the freely given consent of the governed. Moreover, because of their resources, training, and social structure, police as an independent governmental institution consists in individuals that are in some ways separate from and sometimes even hostile to the public at large. Each of these features of democratic police mean that, while they clearly are a necessity for almost all modern, industrialized societies, they are also in many ways a threat to these same democratic states. When police officers use force on their fellow citizens, they are denying their right to dissent from the prevailing order or freely determine their own actions.

There are two horns to this dilemma: a police force that is too powerful and even too effective could easily stifle the robust civil society as well as the personal privacy that are central to a democracy. On the other hand, a police force that is too ineffective or incompetent leaves the citizenry vulnerable to the ills of social disorder, which itself can impede democracy.

Thus, the "democratic dilemma" of policing refers to the need to create institutions for effective law enforcement and for the maintenance of social order while simultaneously preventing these institutions from becoming tools of oppression, either through their deployment by a would-be dictator or simply by overaggressive law enforcement. (I am leaving aside the issue of corruption for this discussion, but it too is a continuing threat to democratic policing.) Police officers who, in an earnest zeal to fight crime, violate individual liberties by invading an individual's private space or who become pawns of power-seeking politicians are a continuous problem in democratic societies, and such challenges require constant efforts to address.[2] Unlike, say, ordinary, profit-driven corruption, this dilemma is not a

[2] In nondemocratic societies, we might add, there is a corresponding dilemma—how to prevent an individual from using his control over the police force as a means for seizing power from those who presently hold it.

product of "bad cops" or rotten institutions—serious problems—but problems which are separate from the core functions of policing. Rather this dilemma is inherent to the logic of policing: law enforcement and the maintenance of order are often at odds with essential features of a democratic society such as privacy and dissent. Earnest cops out to stop crime and protect innocent civilians are more likely to infringe on individual liberties than are corrupt cops using their position for profit. This dilemma is so acute that in many democratic societies, police who violate individual liberties are valorized as tough enforcers by the very public they abuse (Klockars 1993, p. 89).[3]

In most Western liberal states, police are controlled by a complex web of legal, cultural, and political controls. These, along with policing practices that seek to prevent the abuse of coercive power on the part of the police, serve to keep them within democratic norms. Legal regulations on policing, be it in the form of civil or criminal liability for misbehaving officers, administrative oversight of police, or criminal procedural law (such as the exclusion of improperly obtained evidence from criminal trials), can help prevent police officers and institutions from stepping beyond their proper grounds. Cultural practices among officers such as the cultivation of a professional ethic for police officers (such as "policing by consent" in the UK), training and educational requirements for officers, and other symbolic aspects of police officers' self-identity can likewise be valuable in preventing police deviance.

On the street, there are many ways that democratic policing may be inculcated into police forces. Practices like community policing and problem-oriented policing seek to make the police more responsive to the demands of the public in ways that are democratic in character. By structuring police practices such that officers are forced to be responsive to the community means that they are not only more likely to be effective but they are more likely to be responsive to a democratic society and not seen as alien from it. As "Skolnik and Bayley" describe it:

> Neither the police nor the criminal justice system can bear the responsibility alone. In an apt phrase, the public should be seen along with the police as "co-producers" of safety and order. Community policing thus imposes a new responsibility on the police to devise appropriate ways for associating the public with law enforcement and the maintenance of order. (Skolnik and Bayley 1988, p. 5)

Thus, policing practices themselves, strategies developed by police forces to fight crime, can help to structure the relationship between the public and the police.

Finally, the organization of policing bureaucracies themselves can work to regulate policing: decentralized systems such as in the United States or England diffuse authority among states, cities, counties, and other political entities. Similarly, this organization spreads oversight among different civilian and police units (police oversight committees, departments of justice, internal affairs divisions, etc.) in such ways as to allow for effective governance of officers and police units, keeping them effectively under civilian control or at a minimum preventing forces from having

[3] "There is considerable support among the public for an aggressive, kick-ass style of policing" (Skolnik and Fyfe 1993, p. 189).

too much autonomy. Decentralizing power by carefully structuring the organizational chart of a nation's police force hinders the ability of armed organizations, be they military or civilian, to threaten a democratic polity.

Thus, most states that are considered to be established democracies, that is, states where there is little likelihood that the government will sink into a police state (here I am thinking primarily of North America, Western Europe, and Japan), have developed a number of ways to restrict, regulate, and control those groups of people owning the most guns and possessing the authority to use them. These different tools permeate police forces culturally, organizationally, and actively, making the forces sensitive to the needs of the people and able to respond to their complaints and demands. While this is not to say that the police in these states are always functioning in a democratic fashion, as the testimony of many disempowered groups in these societies will bear witness to, they have developed and continue to refine tools to maintain and enhance their forces' democratic character. I will rely on some of these features of democratic police forces when I examine ways that regional and international actors can improve a state's capacity to fight crime democratically.

Of course the irony in this is that many of these developments have the effect of limiting the ability of officers to do precisely what we want them to do: fight crime and prevent public disorder. These restrictions on policing serve as road blocks to the police officer's ability to investigate crimes that occur, arrest and interrogate suspects, handle large-scale social disorder, and perform many other essential functions of policing. Procedural roadblocks hinder the ability of officers to get evidence; a police ethic can make officers reluctant to abuse their position to force suspects to confess or give up other criminals. Similarly, a failure of police officers to effectively share information on account of bureaucratic barriers can hinder investigations and lead to competing efforts to capture a suspect. Officers' "integrity" can prevent them from doing the dirty work that may be necessary when confronting unsavory characters who are not cowed by the Marquees of Queensbury style rules that sometimes constrain modern police forces. As Colleen Lewis puts it, "Police in democratic societies often defend their illegal behaviour by asserting that adherence to principles such as due process and the rule of law hinders rather than enhances their effectiveness as law enforcers" (Lewis 2000, p. 21). While almost everyone agrees that many of these constraints on policing are valuable, officers often face political and public pressure to fight crime in ways that these barriers are meant to preclude, particularly when crime appears or novel threats such as international terrorism arise.

Each democratic society has developed its own relations with its police forces. In each case these relations are the product of long, fractured histories and often reflect the peculiarities of their respective pedigrees. Unarmed officers in the UK, the *Garde à Vue* in France, and the exclusionary rule in the US are unique products of the development of their police forces and of their experience of governance more generally. Moreover, these institutions and the regulation of police officers are under constant negotiation in their respective societies. Unforeseen developments, such as new criminal threats (the September 11, 2001, attacks in the USA), ambitious politicians (Nicholas Sarkozy in France), or pubic scandal (the Guildford Four and Maguire Seven cases in England), can shift the balance one way or another.

It may be an overstatement, but perhaps we can say that democratic societies and their police exist in a state of "punctuated equilibrium"—new events rapidly force sweeping changes, disrupting the status quo until a new, complex balance emerges (True et al. 2007). Regardless of whether the metaphor from evolutionary biology is correct, it is clear that the relation between a society and its police is contradictory and dynamic: force and consent are in some ways inherently opposed; the democratic dilemma of policing cannot be finally and definitively resolved.

Capacity, Policing, and Democracy

Of course, the delicate balance that democratic policing seeks to maintain requires a great deal of resources and capacities from the state as well as a willingness on the part of government officials to restrain the powers of the state, even when it is to their own disadvantage to do so. The politics of constructing criminal justice institutions is a delicate matter: elected officials put themselves at risk if they hinder the abilities of police forces. Preserving law and order is frequently placed high on the public's agenda in any campaign season, and one high-profile crime can ruin a public official's electoral chances. To use one small example, one of the significant factors leading to Michael Dukakis' loss in the 1988 US presidential election was his alleged link to a felon, Willie Horton, who attacked innocent people while out on furlough. On the other hand, the public may equally disapprove of an overly aggressive police force linked to intrusive or abusive tactics, particularly if voters recognize themselves as potential targets of abuse and not, say, a feared or distrusted minority. A democratic government must both be willing to develop state institutions that allow them to effectively fight crime and social disorder while at the same limiting the ability of the police to do this very thing. The democratic public often demands no less.

For democratic policing to exist, it must be shepherded by government institutions and maintained by a vigilant civil society. The development of a democratic police force does not happen because of a spiritual transformation on the part of a people that is spontaneous, free-formed, and (most importantly) inexpensive. Rather it is a product of hard work and the commitment of extensive resources from a number of different groups inside and outside of government. In this sense, "state capacity," that is, the ability of state to meet the basic needs of its citizens and maintain stability, is an essential ingredient of police development and police reform. As the research of Kappeler et al. (1998) suggests, if a government lacks the resources to effectively train, equip, pay, and monitor police officers, these officers are much less likely to meet the complex demands of democratic policing. Similarly, if officers lack appropriate pay, are recruited without proper screening, not given support in the field, and not observed and supported by a watchful civil society, there is a good chance that, whatever the attitudes of the public or the perspectives of the officers themselves, they will neither be an effective nor will they be a democratic police force. Thus, there is a close link between a democratic police force and the development of state capacities to fight crime and regulate this force.

Foreign Intervention and Democratic Policing

One of the central questions in the field of foreign aid and development is, "How can we make governments more effective at providing goods and services to their people?" Of course, policing is a part of the answer to this question, but with this part of the answer comes the important follow up, "How can the police do their jobs while simultaneously respecting the restrictions imposed by democratic governance?" Arming and training law enforcement in developing societies is only going to be useful if officers clearly understand their limits and are placed in institutions that recognize these limits. This sensitivity and responsiveness to the public creates unique challenges for foreign and international organizations interested in aiding a state's capacity to maintain an effective police force. On one hand, they must aid a police force in being effective against crime but on the other accept that there are important political limitations on this capacity. In this section I will briefly outline some of the most significant ways that I believe such international and foreign organizations can help a government's capacity to have a democratic police force.

One important thing to keep in mind as a caveat is that in a globalized society, regulating domestic police forces need not be an entirely national affair and monitoring need not happen "on site," that is, within the borders of the state in question. Rather, a great deal of intervention can take place through cross-border exchanges and transnational monitoring. The technology available to a globalized society enhances the capacity of "outsiders," be they expatriates or foreigners, to monitor the behavior of actors within a state. With the creation of international nongovernmental organizations like Human Rights Watch, which often employ nationals of affected countries, the distinction between "internal" and "external" police monitoring is increasingly blurry. The relative ease of international transportation allows these organizations to transport monitors abroad to observe police behavior and make their findings available to a wide audience. The actions of police in China's Xinxiang and Tibet provinces were reported and monitored extensively outside of China as were abusive police tactics in Burma, Iran, and in the United States. A network of websites going under the moniker "Copwatch" have set out the task of cataloging and reporting abusive police tactics.[4] The organization "Global Roots" has similarly promoted transnational monitoring of police actions, particularly in Sweden (Wahlstrom and Oskarsson 2006). An internet video search under the title "Police Abuse" has pulled up over 1,200 videos of different sorts of police brutality from all over the world and is difficult for governments to effectively control (Wines 2010). While these videos are often ripped out of a meaningful context and presented purely for shock value, they nonetheless show that in many ways policing and police monitoring have become globalized.

Another thing to keep in mind is that enhancing a state's capacity to fulfill its functions does not exclusively require increasing or improving the state's government or its bureaucracy. In a healthy democracy, government institutions and civil

[4] http://www.copwatch.com/, http://www.berkeleycopwatch.org/

society stand in a reciprocal relationship with each other and neither can fully function without the other. Governments require the input and oversight of individuals and groups outside of the state's bureaucratic sphere and at the same time civil society requires government to focus its concerns and forge them into enforceable laws and policies. This means that civic organizations, nongovernmental organizations, and other activist groups can influence policing in many ways from outside of the bureaucratic sphere. These activities can both enhance and limit the ability of the police to maintain order in ways that are appropriate for a democracy. Sometimes, organizations like civilian review boards can work alongside police bureaucracies, in other situations, such as with *Copwatch*, they are diametrically opposed to it. While their relationship between these civil society groups and police organizations mean that such groups often go unappreciated by officers, they often serve an important role as watchdogs, limiting the ability of the police to abuse others free of consequences. There has yet to be a serious study of organizations like Copwatch, but studies of civilian review boards have suggested that civilian oversight can play an important role in democratic policing (Goldsmith and Lewis 2000).

Organizations like the ACORN, the ACLU, the Southern Poverty Law Center in the United States, and similar activist groups operating abroad such as France Libertés in France, Civil Rights and Livelihood Watch in China, and the Council for the Defence of Human Rights and Freedom (CDHRF) in Albania can keep the police democratic by having a voice in police procedures and policies. This can either take the form of cooperation, providing the police with intelligence about crime problems or helping them better understand the communities that they handle, or open confrontation, exposing aggressive policing or defending its victims. Similarly, as reported by the international NGO *Reporters Without Borders* (http://en.rsf.org/), courageous journalists monitor police abuse around the world, often at great risk to life and limb in order to make their findings available to a public who may then demand better oversight from their leaders. Thus, it is useful to think about "state capacity" more broadly than simply the political and bureaucratic institutions that are associated with the government and understand the democratic interconnections with the public at large. Just as there is no democratic government without a democratic civil society, there is no democratic policing without a robust public sphere overseeing it and this should be taken into consideration in any account of state capacity.

At the international level, groups such as Human Rights Watch and the Open Society Institute work in different ways to assist in the monitoring of police without being formally linked to a state's governmental institutions. By empowering the actors of a civil society, these groups can work with people who are often motivated, driven, and not subject to the competing demands of a bureaucracy as are more official police monitoring institutions. That is to say that police officers and administrators are bureaucratic actors who are beholden to their superiors and to public expectation that they maintain law and order. Moreover, as Skolnick's profile of the police officer's "working personality," officers often show with "their own" over the demands of the public (1975, pp. 52–53). On the other hand, civil society groups, particularly those who are critical of the government, are not so constrained. This means that they are able to monitor the police from a more "purely" critical

vantage point. While there certainly are nongovernmental civil society groups that are either corrupt or wasteful, these groups often are stocked with idealistic individuals who are willing to make stands, including stands against police forces, when they believe that they violate the public trust.

Focusing in the remainder of this section on the construction and staffing of police bureaucracies (and not on the public at large), I will examine three places where the state capacity to construct and maintain a democratic policing can be influenced by the deft intervention of international and regional actors. These are *organization, professionalization,* and *legalization.* These three, I believe, are particularly important because they do not rely on the "good will" of government actors to reform themselves or on the direct forceful intervention of outsiders, but instead are simple structural formations that can help make a police force more democratic. Given that democratic governance is self-governance, the lighter the touch that international actors can place upon domestic police forces, the better.

Organization—One place where regional and international institutions can influence policing is through helping structure the police force's bureaucracy so that they are inclined to be sensitive to democratic imperatives. While Bayley is correct in saying that "there is no necessary connection between democracy and any particular mode of organization or control over the police" (Bayley 2006, p. 62), the structure of police has direct consequences for their capacities as well as their role in a society. History has pointed to this fact: too centralized police force can be easily turned into a pawn of the political forces that may seek to use it for their political ends and may likewise make it too easy to cover up police misconduct. Scholars point to the centralization of German policing under the Nazi regime or the *Guardia Civil* in Franco's Spain as examples (Berkley 1970). Oddly enough, a streamlined, effective police force can hinder a democracy by posing a tempting base of power for an individual or group seeking an outsized measure of influence or outright control over the levers of power. As one scholar points out, "Many criticisms of the arrangements for police governance have identified the concentration of power in some sense as the problem" (Jones et al. 1996, p. 192). After achieving its independence from the Soviet Union, Lithuania decentralized its police force in a (failed) attempt to democratize its policing (Uildriks and Van Reenen 2003, pp. 50–51). A centralized power structure or a system with few opportunities for individuals to complain about police practices or police misconduct make it easy for unscrupulous officers or politicians to abuse their authority.

Similarly, a force that is too decentralized can either be ineffective or subject to low-level corruption as officials are able to operate more or less autonomously with little supervision from outsiders. The sheriff in a small American town who, lacking any serious accountability, runs his force as his own personal militia is one such example of this. On the other hand, too *much* democratic accountability can tempt police officials to pander to public whims against the demands of justice (by, among other things, targeting scapegoats or the latest moral panic in lieu of more serious threats to public order) when they sense that it is to their advantage to do so, while too little democracy has obvious threats of its own. As Bob Jones, the Chair of the Association of Police Authorities in the UK, testified, directly electing police

officials introduces an element of "political theater" into criminal justice (Home Affairs Committee 2008). Criminal justice officials have succumbed to the temptation of demagoguery by attacking the Roma population of Eastern Europe (Brearly 2001), the immigrant population in the United States (Males and Macallair 2010), and the Muslims in Western Europe (Fekete 2004). Thus, at the level of administration and bureaucratic organization, democratic policing has a lot of challenges to confront and need not be considered an unambiguous good. While "changing the organization tables does not change attitudes and mindsets" (Bayley 2006, p. 63), history has shown repeatedly that a poorly organized police force can be ineffective and undemocratic.

Foreign and international groups linked with police forces can be helpful in organizing democratic police institutions because they have come from their own bureaucratic formations, which though a direct result of their own history, have lessons for other societies. As David Bayley describes it, "Differences in national structures of policing depend on political settlements achieved at the time countries were formed" (1992, p. 509). For example, the massively decentralized policing in the United States reflects the history of federalism, the devolution of sovereignty to the states, and the diffusion of political authority to local communities out of fear of a centralized power structure. On the other hand, the French system reflects the preference for a centralized hierarchy, with only two different police forces, and is a product of the unique developments in post-French Revolution policing.[5] Similarly, democratic forces have experimented with various forms of organization modeled on the private sphere, where "their performance, and that of the organizations they led, were subjected to a growing array of accountability mechanisms including enhanced public complaint processes, more open budget processes, community-based and interest group consultative committees of various kinds, and increasingly demanding reporting requirements, all in the context of a general trend towards 'freedom of information'" (Stenning and Shearing 2005, p. 170). Nonetheless, these different structures reflect learning experiences, part of which involves efforts to keep police forces within the bounds of democratic policing. To use one example, the 1965 assassination of Algerian activist Ben Barka, widely believed to be the work of the Parisian police force, led to the centralization of the *Police Nationale* (Roach and Thomaneck 1985, p. 115). Reconstructing the Northern Irish police after the Good Friday Agreement led to a dramatic flattening out of their police structure and other organizational innovations in order to make officers more accountable (Ellison 2007, p. 249). There is good reason to believe that international and regional organizations can work to help local forces find the appropriate structure, including lines of command and oversight along with geographic and subject matter jurisdictions and other

[5] To cite Pakes, the French system has two merits: "First, the state can employ a 'divide and rule' strategy, when the quality or loyalty of one of the forces is in question. Second, there is the possibility of transferring investigations from one force to the other, for instance in cases of procedural errors or for the investigation of complaints. When both forces police each other, there is a better chance of guaranteeing civil liberties" (2004, p. 42).

bureaucratic structures, such that they can effectively maintain social order without being a threat to the democratic peace.

Professionalization—The second place where international and regional organizations can influence policing in emerging democracies is through the creation and cultivation of a professional ethos among police officers. Thus, accompanying the technical support that international and regional intergovernmental organizations provide to police forces around the world (i.e., forensic training, facilitating the exchange of police intelligence, and other features of everyday policing), these organizations can provide much-needed professional support for officers in emerging democracies. This can include inculcating officers with a sense of duty and public service as well as a tolerance for the messiness and procedural frustrations that are in many ways the spiritual core of democratic policing. This can be done through selective admission into police forces, along with educational requirements, long training periods, and taking steps toward a sense of professional pride in officers (Niederhoffer 1967).[6] Enhancing the capacity of police forces to develop and maintain a professional ethos among officers, particularly through exchanges and other "cross-fertilization" efforts, can help a great deal to make officers understand that their role as officers is as much dependent upon the use of restraint when dealing with criminal (and noncriminals) as it is upon their zeal.

While their conclusion on this subject is somewhat speculative, one study on transnational police training concludes that such exposure can have a positive impact on officers. "It is not difficult to imagine that international exposure by police officers to other systems will have an impact on how they think about policing, at least as individuals.… [P]ersonal exposure validates such often used phrases as 'we are all police,' or 'there exist an international fraternity (still so) of the police,' or 'we know how to talk to each other since we are police'" (Akgul and Marenin 2007, p. 91). Symbols and narratives that help create a sense of professional pride in a force cannot be created ex nihilo, but exposure to the professional police forces around the world can surely help foster such an attitude.

However, it is important to keep in mind that the ability of international and regional organizations to cultivate an ethos of democratic policing can run into many counterforces. Because of the tension inherent in democratic policing discussed above (i.e., police forces are expected to fight crime and disorder, but not do it without adhering to constitutionally mandated constraints), many officers in full-fledged democracies are ambivalent about their role in a society, and even ethical officers report being frustrated by the procedural safeguards that are essential to a democracy.[7] Thus, facilitating cross-border police interactions may have many benefits in exposing officers to different professional attitudes of other officers, but

[6] See also Brogden and Shearing (1997).

[7] For a nuanced analysis of US higher-ranked police officers' attitude toward *Miranda* practices which, while finding general positive attitudes toward the procedure, concludes that "support for violations is sufficient to be of concern for a legal system that, espouses the rule of law," see Zalman and Smith (2007, p. 874).

it can also undermine some of these practices. Police have an unusually high level of professional solidarity and often have an oppositional attitude toward the public, and there is good reason to believe that this can spill over borders with cross-national police exchanges (Skolnik 1994, pp. 50–56). Officer exchanges can easily lead to the development of an adversarial attitude of officers toward the public they ostensibly serve, a sort of support for police deviance. Official exchanges can even lead to the sharing of "tricks of the trade" used by officers to evade regulatory procedures or disciplinary oversight. Similarly, foreign officers, regardless of how well intentioned, are likely to be tone deaf to the intricate and nuanced cultural dynamics of a foreign society and its police officers. Police officers, in order to be effective, have to know more about the society in question. However, these interactions tend to be short, and there is a need to consider engaging more seriously and long term in the society in question.

Cultivating a culture of professionalism among police officers is a complex and difficult process and one that requires a great deal of resources, or state capacity, to implement.[8] As was already mentioned, selective admissions, increased training, and the creation of a professional ethic have been suggested strategies, but often states "in transition" lack the resources to provide these very things, which makes it ideal space for international and regional organizations to intervene. Anecdotal evidence suggests that police officers report a strong bond with fellow officers from other countries regardless of the relations among figures higher up in government.[9] Moreover, it's not too farfetched to think that the cultural caché of foreign officers (particularly American officers who are constantly valorized in popular films and television shown around the world) can inspire and influence others in a way that domestic sources could not. By fostering exchanges with foreign police officers and by assisting local police forces in developing their training capacities, international and regional organizations can go a long way toward creating a sense of professionalism among local police forces that could both allow them to effectively fight crime and at the same time respect democratic principles.

Legalization—The final, and probably least significant, region of government where foreign intervention can have an impact on the construction of a democratic police force is in the development of laws constraining the ability of officers to function in an undemocratic fashion. This is to say that foreign organizations can consult with lawmakers in countries in such a way that they can effectively control police forces. This could include administrative regulations spelling out the nature of and limits to police interventions into society along with the disciplinary sanctions for violating them. This would presumably also involve setting out the nature and scope of the "right to privacy" held by citizens, prescribing the limits of pretrial interrogation and incarceration, and the disciplining of deviant officers. While no other state has adopted an exclusionary rule akin to the one in the United States, many states have been influenced by American principles

[8] For a critical discussion of the concept of "police culture," see Chan (1996).

[9] See Fichtelberg (2008) and Nadelman (1993).

regarding the legal regulation of police operations (Liptak 2008). International organizations with armies of lawyers experienced with police matters would be of great benefit to a state that wants to draw clear, meaningful lines between the police and the citizenry. As Dixon points out, "clear and effective legal regulation can benefit all participants in the justice process" (Dixon 1999, p. 67). A clear, well-defined set of norms and sanctions for police misbehavior would create a clear set of guidelines for officers to comport to.

However, legal reform is apt to be the least-effective way to control police simply because, while clearly delineated rules can guide officers through ambiguous encounters, in and of themselves, they are powerless. Again, to cite Dixon, "Effective procedures require a positive approach from the police themselves which can only be the product of wider organizational and cultural change" (Dixon 1999, p. 67). There is a need for a deeper investigation and commitment which depends on the cultural exchanges among officers and organizational changes set out above. Many failed states such as Pakistan or Haiti, with criminal justice systems in tatters or with widespread corruption, have elaborate legal codes and police regulations that are routinely and cheerfully ignored. There is likely to be any serious effect of law alone without other tools for making officers care about regulations. Mary Cheh, a law professor at George Washington University, among others, has reported that in the United States, "Criminal prosecutions and other kinds of lawsuits have not played a major role in addressing the problem of excessive force by the police" (Cheh 1996, p. 247). Certainly, clearly articulated and carefully crafted laws have an important place in democratic policing, but they must be part of a larger political and cultural matrix bent on curbing police misconduct.

However, the weaknesses of legal reform for developing democratic policing is different from helping develop a respect for the rule of law among officers. The recognition of the symbolic architecture of democratic society on the part of officers is difficult to develop and maintain, requiring all of the structures (organization and training) described above. Only if this is established would legal regulation be of any value. Legal regulation is only valuable after a "a legal blueprint that provides for those features of policing bearing most directly on adherence to the rule of law and human rights," has been entrenched into a police force (Bayley 2006, p. 51). For an example of this in the African context, see Ntanda Nsereko (1993).

One thing to keep in mind when thinking about the intervention of foreign and international organizations into domestic policing is the significant role that police play in the state and the connection that the people feel toward that state. States can only operate effectively if they are perceived as legitimate, and in modern societies, this legitimacy comes from their claim to represent the people who live under the state's dominion. While the citizens of many states transitioning into democracy may welcome the input of foreign and international organizations, were these interventions ham-handed or culturally tone deaf, there is a genuine possibility that citizens will feel alienated from the forces that ostensibly represent them. A police force seen to be doing the bidding of a foreign or international power could be seen as a hostile occupying force, not a domestic law enforcement institution. This is especially true given, as observed by Bayley, foreign governments' assistance in the

realm of police reform has often been driven by imperatives of national interest (Bayley 2005). Given that the police are the state's most visible and forceful face, this could potentially have devastating effects on a state trying to establish its legitimacy among its people.

Finally, something should be said about the role of women in police forces. If a society's development can be measured by its treatment of women, then a police force's development can probably be measured by its treatment of women, both as citizens and as officers. This is true in *all* societies, whether democratic or not. Female police officers in countries as developed as the United States and Great Britain report being victims of discrimination. Increasing the number of female officers is apt to make police officers more democratic or at least better representative of a country's populace. While one need not buy into any essentialist gender ontology, the data cross-nationally is clear, women are less likely to be aggressive and female officers are far more likely to be democratic in their approach to policing (Otwin 2000, p. 321, National Center for Women & Policing 2003, p. 2). India, for example, has experimented with all-female police organizations and has found them to be an important addition to their police services (Natarajan 2008, pp. 49–58). Because many societies are hostile to women (in general) and female law enforcement officers (in particular), there are many opportunities for international and regional organizations to increase the number of female officers as well as the support that these officers receive while serving in uniform.

The Democratic Dilemma and Transnational Crime

Of course, when states who are seeking to develop democratic police forces work to combat transnational crime, the problems only multiply. Smaller and less-developed states are often massively out-financed and even outgunned by powerful international criminal organizations. Moreover, of the nature of transnational crime, officers must work with foreign law enforcement agencies, a complex, expensive, and time-consuming process. Finally, crime that involves foreigners brings up policing functions that are subject to conflicting demands such as controlling immigration and monitoring international commerce. Foreigners and minority groups are often seen by the public as "others" who do not necessarily deserve the regard that "we" deserve.

It is for these reasons that the democratic policing of transnational crime becomes even more important than it is in relation to more conventional sorts of crime and social disorder. Whether it is in confronting terrorists, drug traffickers, human traffickers, or cigarette smugglers, the first temptation of a society is to come down hard on "foreign threats" in a way that would not be considered acceptable in response to more conventional, domestic sorts of crime. Procedural norms are waived, punishments are more severe, and policing is apt to be more aggressive when foreigners are involved, particularly when the crimes are heinous or perceived as a serious threat to public security. Moreover, in some societies, foreigners do not

possess the same rights as others, and even if they do possess legal rights on paper, they often lack the economic and cultural resources (or even the linguistic resources) to defend themselves when confronted by aggressive policing. Finally, those individuals involved in transnational crime do not necessarily engender the same feelings as domestic criminals may garner, and as they are "not one of us," they are likely to fall outside of a society's circle of concern and gather little public sympathy. Thus, along with facing a highly organized, well-financed enemy, the police have a unique set of challenges and a unique set of temptations when fighting transnational crime.

For these reasons, and on account of these temptations, a state's capacity to create and control policing in a democratic fashion becomes even more important in the context of fighting transnational crime. States such as the USA have been willing to violate their cherished constitutional protections to handle terrorists with little consequence (so far), and other countries have followed in their footsteps. Smaller states and states without a strong tradition of democratic policing are apt to be even more aggressive and even less democratic when dealing with transnational threats. However, because many of the international organizations that assist a state to develop their policing capacities are firm supporters of democratic values and the principles of international human rights, there is reason to think that they could help counteract the pressure to violate democratic principles to fight transnational crime. Organizations like the UN and Europol are engaged with helping nations fight transnational crimes like human trafficking while simultaneously committed to promoting and defending human rights.[10] Interpol's constitution requires that they operate "within the limits of the laws existing in the different countries and in the spirit of the 'Universal Declaration of Human Rights'" (Interpol 1956, Article 2). Like all forms of policing, fighting transnational crime and adhering to the basic principles of democratic society are inherently in tension (the "democratic dilemma" I discussed at the outset of this chapter), but with the appropriate intervention from the state and the assistance for international and regional actors, this tension can be handled if not resolved.

Conclusions

There is a close analogy between police forces in a democracy and militaries in a similar government. In both cases, there are few material limitations on the ability of these groups and their leaders to dictate to the rest of the population because to put it simply, they have guns and the rest of us don't. (The belief, prevalent among the rights in the United States, that an armed private militia could somehow prevent an organized and determined military force from seizing power is an absurd and dangerous fantasy.) Similarly, both are organized around values and ideologies that are in some ways antithetical to the democratic ethos of equality and continuous,

[10] For an example, see UN (1997).

nonviolent (though spirited) disagreement. In both cases, they must be allowed to do the absolutely necessary tasks that have been given to them. So the only way to control the antidemocratic impulses that are inherent to policing is through democratic practices, cultivating a policing organization that is deftly restrained by the use of bureaucratic structures, the cultivation of a professional ethic, and carefully crafted legislation. Only through these mechanisms can the proper balance of order and democracy be established, even if, as argued above, the democratic dilemma of policing can never be finally resolved.

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Chapter 3
Legal Reform and Institution Building (in the Context of National and International Security)

Zoran Pajic

Introduction

The aim of this chapter is to discuss the issue of security in relation to the criminal justice system and its capacity to address main contemporary security threats at national as well as European and global levels. Such a wide approach emerged from the initial findings of the research problem. It became obvious that a holistic approach had to be taken into account first and foremost. Although this chapter deals with the national aspect in the second part of the text, namely, with regard to legal reform in Bosnia and Herzegovina, it will argue that any serious national security issue will, more often than not, spill over the state border and may ignite global or regional tensions and reactions. And vice versa, a broader global or regional interest may affect a national security crisis in many ways. The current political instability in Bosnia and Herzegovina or security crisis in the Kyrgyz Republic is not exclusively a national issue, but presents a serious problem for the EU, the USA and NATO, as well as for neighbouring countries. And vice versa, prevailing global interests may determine the fate and scope of a national security issue: in some cases a national security crisis may be left in isolation and ignored or in some other cases be brought from its micro framework to international attention. For example, the security situation in Myanmar can be left forgotten for decades, but the same level of crisis in Cyprus or Lebanon could become a regional issue or a global problem almost overnight.

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Global Aspects

It was on these premises that in 2004 the UN General Assembly adopted a document entitled "A more secure world: our shared responsibility."[1]

The starting point of the document is making the case for collective security: "The case for collective security today rests on three basic pillars. Today's threats recognize no national boundaries, are connected, and must be addressed at the global and regional as well as the national levels. No State, no matter how powerful, can by its own efforts alone make itself invulnerable to today's threats. And it cannot be assumed that every State will always be able, or willing, to meet its responsibility to protect its own peoples and not to harm its neighbours."[2]

Arguing for a "new security consensus," the report does not depart from the central principle of the UN Charter, according to which the sovereign equality of member states[3] is fully recognised and respected. It acknowledges that if there is to be a new security consensus, it must start with the understanding that the front-line actors in dealing with all the threats we face, new and old, continue to be individual sovereign States.

However, it can be argued that the awareness of monumental contemporary threats and their potential global impact on security and stability in the world gave rise to moving from "international" to "collective" security thinking. Collective security, as a goal, can be interpreted as a step forward in bringing the notion of security to a higher level than it is foreseen by the spirit of Chapter VII of the UN Charter. The vocabulary of the Charter does not speak about "collective security" in its often repeated mantra on "international peace and security." Though collective measures are mentioned in Article 1, the same (collective) meaning is not attached to the measures elaborated in Chapter VII. The above difference has not been discussed in the literature on the UN Charter and is open to interpretation. In international law, the word "international" may include any situation or act that is not national or unilateral. However, to apply the notion of "global" would require a higher level of threat, strategy, agreement, etc.

According to some authors, collective security is seen as a compromise between the concept of world government and a nation-state-based balance of power system, where the latter is seen as destructive or not a good enough safeguard for peace and the former is deemed yet unaccomplishable at the present time.[4]

While Kelsen, writing in 1957, seems not to distinguish between collective and international security,[5] it appears that contemporary terminology tends to

[1] Report "A More Secure World: Our Shared Responsibility" submitted to the UN Secretary-General in 2004, by the High-Level Panel on Threats, Challenges and Change. UN Doc. A/59/565, 2 December 2004.

[2] Ibid., p. 11.

[3] UN Charter, Art. 2 (1).

[4] Inis Claude: Collective Security as an Approach to Peace, in *Classic Readings and Contemporary Debates in International Relations*, ed. by Goldstein, Williams and Shafritz. Belmont CA: Thomson Wadsworth (2006), pp. 289–302.

[5] Hans Kelsen: Collective Security under International Law. The Law Book Exchange Ltd. (2001), p. 1.

explain the problem of security in terms of a *collective* strategy rather than an international one. This may be an attempt to break from the legacy of the Cold War when "international" implied the consensus between the two superpowers that has affected and emanated from UN resolutions.

In the twenty-first century, more than ever before, no state can stand wholly alone. Collective strategies, collective institutions and a sense of collective responsibility are indispensable. But before anything else, we need to be acutely aware and concerned about security threats and the risk they impose on the global world. It is important for any debate on these issues to agree on the substance of the meaning of security. It may mean many things to many actors in different situations. For an international organisation, security will involve all aspects of international peace and stability. For a state, security issues arise from the day-to-day fighting of organised crime and threats against individuals and state institutions. It can be said that peace and security have a much broader meaning than was understood in the years following World War II, namely, preventing international armed conflicts. Today, peace and security are closely associated with human rights and fundamental freedoms. On one hand, a secure and peaceful environment, free of any threat or terror, is condition sine qua non for the implementation of international human rights instruments and relevant national legislation.

On the other, security threats around the world, including terrorist alerts in particular, have had a serious impact on civil and political rights of individuals. Many governments are no strangers to hastily restricting civil liberties and fair trial guarantees while addressing serious security risks. Ill prepared to find the balance between the real threats to peace and security on one hand and full respect for civil liberties and fundamental freedoms on the other, some governments pushed constitutional limits to the extreme by trivialising the rule of law requirements and human rights guarantees. This trend can be illustrated by a number of cases of torture of detainees, either by the practice of rendition or by blunt use of force or inhumane treatment in police stations, as well as by tightening the laws which regulate the length of detention in a pre-trial period. Finally, the security sector, as a rule, jumped on the opportunity to create an atmosphere of fear and suspicion and to question certain democratic standards that our generation has taken for granted. These are also peace and security issues, but these are often pushed aside by the emergency of an immediate threat. The tension between the two concepts, i.e., human rights in the context of peace and security versus immediate terrorist threat and emergency measures, has been quite palpable and become the new "way of life" in all democracies since September 11.

In Europe in particular, large-scale aggression against a sovereign state seemed rather improbable following the fall of the Berlin Wall. But then the outbreak of conflict in the Balkans was a reminder that war has not disappeared from the continent. Over the last decade or so, no region of the world has been untouched by armed conflict. Although, speaking in general terms, our generation has enjoyed 65 years of global peace, numerous internal conflicts have been spilling over the national borders and keep challenging international peace and security. The fact that most of these conflicts have been within rather than between states and most of the victims have been civilians should not make the international community any more complacent.

Instead, the world faces new threats which are more diverse, less visible and less predictable. Once labelled an "iron curtain," the big divide between Western and Eastern Europe has gradually become blurred, and state borders have increasingly opened, departing from the Cold War faster than some had predicted.[6] Modern technology and new communication techniques have been overcoming even the most rigorously controlled societies, making state borders across the world more porous than ever.[7] However, this trend is making internal and external aspects of security indissolubly linked and interactive.[8]

With the globalisation of world politics, post-Cold War awareness of indivisible security and the collapse of the sphere-of-interest-driven bipolar international affairs, it became clear that transnational organised crime is a menace to states and societies, eroding human security and the fundamental obligation of states to provide for law and order. In identifying global threats, the UN resolution emphasised that combating organised crime "serves the double purpose of reducing this direct threat to State and human security, and also constitutes a necessary step in the effort to prevent and resolve internal conflicts, combat the spread of weapons and prevent terrorism."[9] The awareness of global security issues is a big step forward towards a comprehensive and coordinated approach to strategising preventive policies and measures. It can be argued that the world interaction amongst states, including other stakeholders in global politics, has reached the level where any event or process that leads to large-scale death or lessening of life chances and undermines states as the basic unit of the international system is a threat to international security.[10]

Turning to the problem of prevention, Resolution A/59/565 defined six clusters of threats with which "the world must be concerned now and in the decades ahead:

- Economic and social threats, including poverty, infectious diseases and environmental degradation
- Interstate conflict
- Internal conflict, including civil war, genocide and other large-scale atrocities
- Nuclear, radiological, chemical and biological weapons
- Terrorism
- Transnational organized crime"[11]

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[6] "In the last few decades, many countries in different regions would have moved from dictatorship to democracy… All are now wrestling with their repressive pasts… It is still too soon to say with certainty what works (200 years from now, it will still be too soon)," in: The Haunted Land: Facing Europe's Ghosts After Communism—by Tina Rosenberg. Vintage Books 1996, pp. 397–398.

See also: The World After Communism—by Robert Skidelsky. Macmillan 1995, pp. 160–172.

[7] See Chapter 9—by David P. Forsythe, in: Human Rights in the New Europe—by Forsythe (ed.). University of Nebraska Press 1994, p. 174.

[8] See The External Dimension of EU Justice and Home Affairs: Governance, Neighbours, Security—by Thierry Balzacq. Palgrave Macmillan 2009.

[9] Para. 165.

[10] As repeatedly noted in the UN Document A/59/565, referred to above (Note 1).

[11] Para. 166.

Drug trafficking has also been identified as a major security threat, having devastating effects for the state economy and public health. In some regions, the huge profits generated through this activity even rival some countries' GDP, thus threatening state authority, economic development and the rule of law.[12]

Following a high level of collective awareness and the definition of global security threats opens the way to a new consensus about the meaning and responsibilities of collective security.

There is a need to argue for consensus on the meaning of "security" in the collective context. On the face of it, the prevention of armed conflict between states would seem an easier objective—at least conceptually—than collective confrontation against transnational organised crime where it benefits at least some of the states where it occurs. Multinational action against piracy in the Indian Ocean presents fewer definitional problems than stopping environmental degradation in a poor country that is economically dependent on mining and deforestation. Addressing poverty as a matter of collective security would require not only responding to regional needs but also understanding and adapting to domestic and even local practices of service delivery.[13]

According to a Department for International Development (DFID)[14] study, "(I) nsecurity, lawlessness, crime and violent conflict" are amongst the biggest obstacles to achievement of the Millennium Development Goals; they also destroy development. Poor people cite safety and security as a major concern; they say it is as important as hunger, unemployment and lack of safe drinking water.

They talk about fear of attack, injury or physical abuse, often at the hands of precisely those institutions that are meant to protect them, or as a result of violent conflict or lawlessness. They explicitly link security to personal security. Given its importance to the well-being of the poor, we believe that supporting poor people's physical security is a vital part of reducing poverty."[15]

In the context of the above findings, it is crucial to adopt a holistic approach in addressing poverty and helping communities in desperate situations. Although the report by the High-Level Panel (UN Doc. A/59/565) found that international institutions and States have not organised themselves to address the problems of development in a coherent, integrated way and instead continue to treat poverty, infectious disease and environmental degradation as stand-alone threats. The fragmented sectoral approaches of international institutions mirror the fragmented sectoral approaches of governments: for example, finance ministries tend to work only with

[12] Ibid. "… It is estimated that criminal organizations gain $300–$500 billion annually from narcotics trafficking, their single largest source of income. Drug trafficking has fuelled an increase in intravenous heroin use, which has contributed in some parts of the world to an alarming spread of the HIV/AIDS virus. There is growing evidence of a nexus between terrorist groups' financing and opium profits, most visibly in Afghanistan."

[13] I am grateful to Professor D. Gordon (CUNY) for her thoughts and examples referred to in this paragraph.

[14] DFID is a department of British government.

[15] DFID document on "Fighting poverty to build a safer world: A strategy for security and development. British Government," March 2005. Chapter 1, Paragraphs 1–4.

the international financial institutions, development ministers only with development programmes, ministers of agriculture only with food programmes and environment ministers only with environmental agencies.[16]

The above approach invites for a major overhaul of donors' practices as well as strengthening the adaptive capacity of governments in the most poverty stricken countries.

Instead of "ticking the boxes" of aid programmes, lender governments and international financial institutions should provide poor countries with greater debt relief, longer rescheduling and improved access to global markets. But even this major change will not yield substantial results unless a major new global initiative to rebuild local and national recipient mechanisms throughout the developing world was undertaken.

Furthermore, the resolution stresses the three basic impediments which stand in the way of more effective international responses: insufficient cooperation amongst States, weak coordination amongst international agencies and inadequate compliance by many states.[17] In an ideal world, the often predictable devastating consequences of serious threats would make all actors agree on a harmonised, effective and coordinated preventive strategy. But we are still rather far from a wider consensus on the effectiveness of threats management as such, as can be drawn from the frustration implicitly expressed by the UN resolution: "Effectiveness in tackling specific incarnations of organized crime varies. Anticorruption efforts suffer from a lack of commitment and understanding about the types, levels, location and cost of corruption. In the effort to curb the supply of narcotics, successes in some countries are often offset by failures in others. National demand-reduction initiatives in the industrialized world have been similarly ineffective, and the total number of opium and heroin users has remained relatively stable over the last decade."[18]

The roots and socio-economic background of corruption may be different in different societies and circumstances. But one of the main reasons for pandemic corruption in post-communist countries and post-war societies lies in fragile state institutions and the legacy of informal practices in doing business and seeking ways of avoiding due process of law.[19]

The impediments, mentioned above, often rest on sociocultural differences in understanding the nature of threat or seriousness of its consequences. Not everyone will regard one or more of the threats identified by the UN resolution as truly being a threat to international peace and security. For example, it is well known that the global threat of HIV/AIDS took almost a generation to be recognised as a major human disease affecting millions. Some still believe that it is a horrible disease, but not a security threat, or that terrorism is a threat to some states, but not all, or that civil wars in Africa are a humanitarian tragedy, but surely not a problem for

[16] Para. 55.

[17] Para. 167.

[18] Para. 168.

[19] See D. Galligan and M. Kurkchiyan: Law and Informal Practices—The Post-Communist Experience. Oxford University Press, 2003.

international security, or that poverty is a problem of development, but not of security at the same time.[20]

Before turning to the regional (European) level and national criminal justice capacities, it is important to identify elements of a credible collective security system. It is widely considered that such a system could provide a framework for developing a credible response to security threats through the interaction between law enforcement and national security institutions. The UN has identified three principles of a credible and sustainable collective security: effectiveness, efficiency and equitability.[21]

In order to be *effective*, any national security system has to confront all forms of organised crime at the same time and with the same vigour. Concentrating on one (e.g. drug trafficking) and ignoring the other (e.g. illegal arms trade) would allow perpetrators to move resources and capacities across their field of operation, to switch priorities and to achieve the same results in destabilising state institutions. Often organised in fluid networks and less formal hierarchies, criminal organisations are more flexible and adaptable than cumbersome systems of interstate and intra-institution cooperation in sharing information and staging an effective security campaign in criminal investigations and prosecutions on the part of states. For that reason, a consistent and well-balanced approach to all forms of security threat is crucial.

Many countries that have emerged from decades-long communist rule found themselves ill prepared to deal *efficiently* with the new forms of criminal activity which often lead to security nightmares. Criminal laws were not prepared to tackle the "new" crimes like money laundering, trafficking of human beings, corruption and terrorism. Criminal procedure codes were still entrenched in the Napoleonic penal laws legacy, allowing for endless delays and adjournments of trials and inefficient techniques. Most of these countries have embarked on a substantial process of legal reform and had made impressive progress[22] but are still struggling with the "old-guard approach" in practice and an enormous backlog of cases.

It was pointed above that security in the globalised world has to be seen as collective and, as such, indivisible. In that context, the states have no choice but to share the burden of responsibilities in addressing security threats. This brings us to the third principle of collective security—an *equitable* way of meeting the challenge of prevention. The UN resolution interprets this in the following terms: "Combating organized crime … requires better international regulatory frameworks and extended efforts in building State capacity in the area of the rule of law."[23]

"Inadequate compliance" in implementing state commitments undertaken by accessing international treaties is a matter of general concern in international relations, as it is expressed by the UN resolution. It may come from both inability and

[20] See Note 15 above.

[21] UN Resolution A/59/565, Para. 31.

[22] Z. Pajic: On Judiciary and Public Perception (will be published on "Transitions Online," by the end of 2011).

[23] UN Resolution A/59/565, Para. 171.

unwillingness to knuckle under to Western notions of what will make communities and nations safer in the long term. Defensive postures that resist the central authority to accomplish the kind of collaboration, we might all support, are likely in many parts of the world.[24]

The international regulatory framework consists of a half a dozen of treaties, starting with the United Nations addressing organised crime and corruption.[25] These mechanisms and adequate institutions are designed to monitor member states' compliance with their commitments and to identify and remedy legislative and institutional deficiencies. However, more than half of the UN members have not yet signed or ratified or adequately resourced the monitoring provisions of these conventions and protocols (i.e. UN Office on Drugs and Crime). In order to share the responsibility, as well as the benefits, of collective security, it is crucial for such a system to have a central authority to facilitate the exchange of evidence amongst national judicial authorities, mutual legal assistance amongst prosecutorial authorities and the implementation of extradition requests. However, in the real world, one has to be sceptical about the prospect of arriving at agreements on many aspects of collective security without undue pressure from rich and powerful countries.

Regional (European) Aspect

Long before the European Security Strategy was published in 2003,[26] the first European strategic document agreed by the member states of the EU "acknowledged that their security is indivisible. That a comprehensive approach should underline the concept of security and that cooperative mechanisms should be applied in order to promote security and stability in the whole of the continent."[27]

The document stressed Europe's new responsibilities, highlighting the importance of the maintenance of international peace and "of democratic institutions, respect for human rights and fundamental freedoms and the rule of law."[28] It also stressed the need to "prevent economic imbalances from becoming a threat to our continent." This approach was crucial in confirming the international (regional in this case) awareness of interaction between human rights and economic development on one hand with peace and security on the other.

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[24] As in Note 9. See Communiqué of the 207th Meeting of the African Union Peace and Security Council, 29 October 2009. Doc. PSC/AHG/COMM. I (CCVII).

[25] The United Nations Convention against Transnational Organized Crime, GA Res. 55/25, 15 November 2000, and the United Nations Convention against Corruption (UNCAC), GA Res. 58/4, 31 October 2003.

[26] *A Secure Europe in a Better World—The European Security Strategy.* European Council, Brussels, 12 December 2003.

[27] *European Security: a Common Concept of the 27 WEU Countries.* Extraordinary Council of Ministers, Madrid, 14 November 1995.

[28] Para. 20.

The crucial novelty of the ESS (European Security Strategy) lies in the identification of threats. It identifies five major threats: international terrorism, WMD (weapon of mass destruction) proliferation, regional conflicts, failed states and organised crime. There is a strong message from the document that the distinction between internal and external security is increasingly blurred.

As it was asserted in a research document commissioned by the European Commission, "These threats are multi-faceted and interrelated, combining, for example, bad governance, weak states, poverty, human trafficking, organized crime, drug smuggling and terrorism. Their transnational nature has led nations to internationalise their security policies, intensifying cooperation and coordination in numerous areas and recognising that each of these threats requires a specific combination of means in order to be tackled successfully. Military instruments can and do play a role, but in most cases intelligence, police, judicial, economic, financial, scientific and diplomatic means will be at least as important."[29]

In contrast to the massive visible threat in the Cold War, none of the new threats is purely military, nor can any be tackled by purely military means. Each requires a diversified approach and use of a wide spectrum of instruments. Proliferation may be contained through export controls and attacked through political, economic and other pressures while the underlying political causes are also tackled. Dealing with terrorism may require a mixture of intelligence, police, judicial, military and other means. In failed states, military instruments may be needed to restore order and prevent sectarian violence, coupled by urgent humanitarian means to tackle the immediate crisis. Regional conflicts need political solutions, but military assets and effective policing may be needed in the post-conflict phase. Economic instruments serve reconstruction, and civilian crisis management helps restore civil government, establish law and order and consolidate state institutions.

The "security argument" was used by the EU leaders in order to gain support for the advancement of the process of EU enlargement eastwards. This may be best explained by using the constructivist approach. Thus, security is not simply a matter of survival in the face of a threat. More importantly, this approach argues that "the sense of threat, vulnerability and (in) security is socially constructed rather than objectively present or absent."[30] The first consequence of the constructivist definition of security is that it extends the area of security threats to sectors other than military ones providing the ground for the process of "securitisation."

The securitisation process assumes a conventional response to unconventional threats. The latter can be identified in a large area of sectors and can correspond to aspects such as conflict in third countries, migration, human rights abuses and natural disasters. These issues have emerged with the fall of communism and climaxed with the war in the former Yugoslavia (1991–1995) and the conflict in Kosovo (1999).

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[29] *Research for a Secure Europe, Report of the Group of Personalities in the field of Security Research*. European Commission 2004, p. 10.

[30] Atsuko Higashino, For the Sake of "Peace and Security"? The Role of Security in the EU Enlargement Eastwards. *Cooperation and Conflict*, Vol. 39, No. 4, 347–368 (2004).

The process of transition from communism to democracy and from authoritarian rule to rule of law exposed one of the main security threats in modern times, state failure. In common terms, this phenomenon gave rise to corruption, abuse of power, lack of accountability, organised crime, porous borders, etc. In spite of remarkable achievement in integrating the countries that aspire to EU accession, it is obvious that the EU security strategy rests upon the states and their ability to address the main threats. The overall goals, in reality, can be achieved through a regional strategy and coordination which presupposes the process of harmonising relevant legislation and institutions for law enforcement and implementation on the national level.

The characteristics of failed states should come before the discussion on the national aspect. What is the literature of state failure and what are the ramifications? How do these general aspects relate to B&H?

Failed State as a Security Risk

As it is stressed in both strategic documents,[31] collective security institutions are rarely effective in isolation. Multilateral institutions normally operate alongside national, regional and sometimes civil society actors and are most effective when these efforts are aligned to common goals. This is as true of mediation as it is of post-conflict reconstruction, poverty-reduction strategies and non-proliferation measures.

States are still the front-line responders to today's threats. Successful international actions to battle poverty, fight infectious disease, stop transnational crime, rebuild after civil war, reduce terrorism and halt the spread of dangerous materials all require capable, responsible states as partners. It follows that greater effort must be made to enhance the capacity of states to exercise their sovereignty responsibly.

Since the end of the Cold War, weak or failing states have arguably become the single most important problem for international order.[32] Weak or failing states commit human rights abuses, provoke humanitarian disasters, drive massive waves of immigration and attack their neighbours. Since September 11, it also has been clear that they shelter international terrorists.[33]

The collapse of communism has brought about the phenomenon of failed states to the European political map. Here they are still wrestling with the communist legacy, and some of them are painstakingly going through the post-war reconstruction at the same time. The latter category is especially vulnerable to exploits by former belligerents' criminal connections and their "know-how" developed during the war, thus undermining international peace-building efforts. Entrenched corruption, the use of violence to protect criminal activities and close ties between

[31] Notes 1 and 26.

[32] Chester Crocker: "Engaging Failing States," in *Foreign Affairs* 82 (5) 2003, pp. 32–45.

[33] More in Fukuyama, op. cit., pp. 125–127.

criminal enterprises and political elites hinder establishing the rule of law and effective state institutions. International efforts in curbing illegal trafficking have been insufficient or insufficiently enforced. Ethnic tensions and ongoing political conflicts not only destroy infrastructure, including social infrastructure but also encourage criminality, deter investment and make normal economic activity impossible. It can be argued in this context that economic development is the basic precondition for peace and security. Or the other way around, the lack of development, or development falling hostage to national criminality, and its continuous paralysis are, *per definitionem*, security threats. The interaction between the two resulted in the Balkan region having been caught in a cycle of conflict, insecurity and poverty at the turn of the century.

In the European political terminology, "failed or failing" is preferred to "rogue" state, partly to differentiate itself from the US "axis of evil" rhetoric, partly to underline a comprehensive approach and the civilian component favoured by the EU. State failure is thus an aggravating environment; it empowers non-state actors and increases security risks and threats, domestically as well as externally.[34]

But to what extent does a failed state represent a threat to European security? The basic idea behind state failure as a security risk is relatively straightforward when put in perspective. It refers to the notion that interstate conflict, local rivalry between neighbours or global competition of great powers does not represent the most serious security risks. What is happening inside a state matters more in the current context of peaceful, or even uneasy, relationships between world powers in an increasingly globalised world. Globalisation unites people, but it also creates tensions and conflicts. Economic crises, failed governance, ethnic violence and religious antagonisms are amplified by the gap between haves and have-nots. These dividing lines cross the old geopolitical system based on territories and sovereignties.

The main dimension of a failing state is an issue of human rights or human security. It refers to situations in which the domestic population is the first direct or indirect causality of state collapse or abuse. The lessons from the Balkan wars can be summarised in a few words: human values need to be defended at home and protected abroad!

However, this has to be seen in the broader context of governance. In this framework, the failed state has lost its ability to provide positive political goods to its citizens, such as the provision of an independent judicial system to adjudicate disputes, to enforce the rule of law and to protect the most fundamental civil and political rights. Such unstable situations can rapidly spill over to neighbouring countries. Collapsed or corrupt state authority can rapidly lead to chaotic situations of civil unrest, economic crises and international crime.

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[34] Jean-Yves Haine, The European Security Strategy: Coping With Threats, p. 21 (The EU and the European Security Strategy: Forging a Global Europe). Ed. by Sven Biscop and Joel Andersson. Routledge, 2008.

National Aspect: The Case of Bosnia and Herzegovina

The process of transition from communism to democracy in Southeastern Europe has reached the point at which the countries of the region are embarking on a much longer journey—the transformation process. While the transition so far included dismantling of communist political structures and getting rid of one-party authoritarian rule, the transformation proves to be much more complex. It involves state building and good governance based on the rule of law principle, human rights and civil liberties, free market economy, plural democracy and, above all, sociocultural changes and acceptance of new values and responsibilities across the board.

The lesson the international community (IC) and democratic governments are still to learn is that the holistic approach to reconstruction and development is the only way to guarantee stability and peace in the region. A holistic approach simply means realising that civil liberties, safety and security, independent judiciary and good governance go hand in hand with market economies and private and entrepreneurial initiative—eventually creating conditions for a good society. Efforts and measures aimed at improving these policy areas should not be given priority over one another. Wherever the IC or local authorities tried a sector-driven approach in transitional countries, it failed or slowed down the process of transformation. This is discussed in detail below, highlighting the case of the international administration in Bosnia and Herzegovina. All these areas have to be addressed and confronted simultaneously from day one, in particular when dealing with communities struggling with post-war reconstruction as well.[35]

This can be illustrated by the international administration failure in Bosnia and Herzegovina to approach the reconstruction of the country by implementing the holistic method in the state-building process. Instead, the international community (IC), following the Dayton Agreement (1996), wasted precious time, effort and resources in trying to achieve political settlement in the country at any cost. At the same time, crucial areas of the reconstruction process had been neglected, including reviving the economy and creating jobs, reforming the judiciary, public administration and policing and establishing the rule of law. Instead, the IC rushed towards organising the first "free and fair" elections less than a year after the war was stopped. The election project stalled the process of reforms for at least a couple of years. It became obvious soon after the elections that this genuine democratic mean, without the rule of law to speak of, simply allowed the warlords to be legitimised by being elected to the offices of power all over the country. What this lead to in September 1996 was not the launching of a democratic future for Bosnia, but the permission of criminals and war profiteers to highjack the institutions of the state. It can be argued that the IC has made the same mistake in Kosovo.

[35] This aspect is discussed widely by Francis Fukuyama in his book *State Building—Governance and World Order in the Twenty-First Century*. Profile Books, 2004.

The remaining part of this chapter will assess the institutional capacity of the Western Balkan countries to cope with the issues of security, with emphasis on criminal justice reform in Bosnia and Herzegovina.

The ex-Yugoslav countries have gone through three consecutive phases of their legal transitions and law enforcement institutions in the past half century. The first one was the system of *law and order* which goes hand in hand with a totalitarian regime. Its legislation is usually well structured and coherent, and judicial bodies are well organised professionally and institutionally. But if this surface is scratched just a bit, the true meaning of law and order will show itself as an effective mechanism in protecting the interests of the governing ideology and durability of the ruling power. This phase was prevailing from 1945 until the fall of communism and the break-up of the Yugoslav federation.

The second phase was the "system" of *lawlessness* which brought about the high degree of arbitrariness in resolving legal disputes, disregard for human rights and, consequently, the total lack of trust in judicial institutions. Lawlessness is found in a state of war, including social chaos or failure of state institutions to offer a decent level of legal protection or access to justice to individuals and juridical persons. Consequently, state institutions become paralysed and make room for corruption and informal practices. The lawless state of affairs, in its extreme form, may encourage people to bypass judicial institutions—including police—and to take justice in their own hands.

Finally, the *rule of law* stage has been the current trend and ultimate goal in the post-communist world since 1991 or more precisely since the end of wars in the region of the former Yugoslavia. The rule of law, in its basic meaning, reflects the principle that no one is above the law. Perhaps the most important application of the rule of law is achieved when a governmental authority is legitimately exercised only in accordance with written, publicly disclosed laws adopted and enforced in accordance with established procedural steps that are referred to as due process. The principle is intended to be a safeguard against any arbitrary power exercised whether by a totalitarian leader or by mob rule. Thus, the rule of law is hostile both to dictatorship and to anarchy, or rather the other way around.

The end of war in Bosnia brought about an unprecedented power of the international administration in a sovereign country.[36] This resulted in the legal and judicial reform led by the UN, OHR and OSCE. The trial monitoring was introduced by OCSE, the ECHR was incorporated in the domestic legal system, the Human Rights Chamber was established as an international human rights court in situ and an OSCE ombudsman office was opened and started receiving petitions by individuals. However, the post-Dayton judiciary, including judges and prosecutors, still worked under heavy pressure by political establishment, organised crime groups as well as by the international community (IC). It was only in 2002 that the IC had fully concentrated on justice reform, providing for a comprehensive court restructuring.

[36] See Z. Pajic: Witnessing Transition and State-Building in Western Balkans, in *Conflict and Renewal-Europe Transformed.* Ed. By H. Swoboda and C. Solioz, Nomos Verlagsgeselschaft, Baden-Baden 2007.

This was followed by the process of vetting and reappointing judges and prosecutors, which was completed in 2004 by establishing the State Court of B&H (2003) and enacting the new legislation in criminal and civil matters (respective codes, 2003–2004).

As far as new Bosnian legislation is concerned, its task was to provide for a more efficient system in addressing the criminal culture which used to prevail in the country following the war and its legacy in all walks of life. The leading principles of the law reform were expected to secure the predictability and probability of a trial, respecting and implementing international human rights standards, and rights and freedoms from the European Convention of Human Rights. Finally, it was crucial to take into account the practice of other countries in fighting crime, which domestic legal tradition had little experience of. Those were, primarily, organised crime, corruption, money laundering, tax evasion, terrorism, war crimes, etc.

In order to achieve these aims, the reform had to look into more efficient solutions than those offered by the present legislation, while preserving the main assets of the European continental legal tradition. It was agreed by national and international experts that the common law system (often referred to as "American" or "Anglo-Saxon") provided for more efficient and rational judicial procedure. As a result, the new Criminal Procedure Code of Bosnia and Herzegovina was enacted in 2003. It successfully intertwines the two prevailing legal traditions in the world ("Continental European" and "American"), and it has proved to be an optimal mechanism for transcending between the old and the new in the country's struggle with all forms of criminality.

In conclusion, the ground has been laid down for criminal justice to complement the work of other state institutions responsible for fighting major threats to security in the country and implicitly in the Balkan region. However, achieving consistent implementation of laws, full independence of judges and professional conduct of law enforcement officers is a slow-moving process which frustrates public expectations and prevents confidence building in state institutions in general. Also, inconsistencies in regional effectiveness in cooperation in criminal matters are a serious drawback for a unified strategy in addressing security threats.

The conclusion needs to be more comprehensive—it only focuses on legal reform at the moment.

Concluding Remarks

If the issues referred to in this chapter were brought into the context of transgovernmental enforcement networks and international police cooperation, state functionality and capacity of its institutions would emerge as the main problem. It can be argued that the growth of transnational organised crime has been a continuous phenomenon, while dramatic transformations in the global community of states took place since the end of the Cold War. Consistent response to terrorism is challenged today by at least two post-outcomes.

First, many countries, post-communist ones in particular, regained their sovereignty or political independence and rejected their respective leaders of the bipolar world. Many of them have fallen into the category of failed states for different reasons and cannot be treated as reliable partners in trans-governmental enforcement networks who could play a credible role in international intelligence and police cooperation.

Second, it is exactly this category of (failed) states that represents an important link in the chain of international efforts in preventing acts of terrorism. It has become obvious since 9/11 that countries with questionable rule of law agenda and without credible and democratic state institutions are crucial as potentially resourceful partners in sharing security data and developing antiterrorist strategies. Today, states like Afghanistan, Bosnia, Kosovo, Pakistan and Yemen, to name just a few, have to be treated as partners in sharing information through international networks and police cooperation. This seems to be condition sine qua non for developing a meaningful and consistent security policy at the global level. It is exactly at this point that their domestic law enforcement policies and practices may prove to be incompatible with international law enforcement mechanisms. Failed state institution network is hardly consistent with international standards of rule of law, democratic principles of governance and requirements of a professional civil service. In some cases, police force, prosecution and judiciary are influenced by ethnic or religious rivalries in the country; in others, they are controlled by political parties, tribal interests or criminal organisations. As a result, such countries are unable or unwilling to work with other national and international democratic institutions and follow the procedures that are normally required in fighting organised crime.

Is there a remedy for such unbalance in the security or, more specifically, "antiterrorist partnership" and building networks? What more can be done beyond technical assistance and training programmes offered to countries in transition?

Networks have been with us for centuries, and the world of the twenty-first century is one of increasing connections. It is often pointed out that networks have become "webs of mutual dependence." The interaction amongst states and nations has opened the new horizons for our prosperity, but also made us aware of the new threats and significant dangers to it.[37]

It is in the context of "mutual dependence" that seeing and understanding the benefits of national and international security is the crucial incentive for any society to comply with the requirements of the strategy to achieve and protect it. The contribution of failed states should be encouraged and appreciated by the leading states and international agencies in trans-governmental enforcement networks. Failed states, in spite of everything, want to be treated as equals and to feel as co-owners of the process of international police collaboration. If this prospect was clearly opened to them, they might get more serious, responsible and determined to reach certain standards that are required in "joining the club."

[37] A. Ghani and C. Lockhart: Fixing Failed States. Oxford University Press 2008, p. 221.

Writing in a different context, a few authors argue that a key to success in the strategy development is "to identify the types of capabilities that exist among different groups and organisations in a particular place and then to create partnerships and organisational designs that can network them into collective assets."[38] This sounds like a logical proposition, but it will take a consistent political will and shared responsibility in the day-to-day process of international collaboration towards a more secure world.

[38] Helper, MacDuffie and Sabel: "Pragmatic Collaborations," in Industrial and Corporate Change, Volume 9, No. 3. Oxford University Press, 2000, p. 443.

Chapter 4
The Role of International Assistance for Building the Capacity of National Law Enforcement Institutions: Lessons Learned from the Bulgarian Experience

Dimitar Markov

Abbreviations

CCC	Command and Coordination Center
DG	Directorate General
EEW	European evidence warrant
EJN	European Judicial Network
EU	European Union
GRECO	Group of States against Corruption
INTERPOL	International Criminal Police Organization
NATO	North Atlantic Treaty Organization
NCB	National Central Bureau
NGO	Nongovernmental organization
OECD	Organization for Economic Cooperation and Development
RTA	Resident Twinning Advisors
TA	Technical assistance
TAIEX	Technical Assistance and Information Exchange Instrument
UN	United Nations
UNDP	United Nations Development Programme
UNODC	United Nations Office on Drugs and Crime

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Introduction

A number of global and regional international institutions and organizations are providing various forms of assistance for building the capacity of national law enforcement institutions. The type of assistance provided varies from training and qualification of staff to harmonization of legal rules and procedures. In all cases, the main goal of these capacity building efforts is to achieve better results in the prevention of and fight against transnational crime.

In the last 20 years, Bulgaria underwent a period of transition from a former socialist country to a democratic state, becoming member of NATO and the EU in the process. During this period, the country implemented fundamental reforms in all areas of public life, including in the areas of security and law enforcement. Many institutions, including the police, the public prosecution service, and the courts, were completely reorganized. A number of new agencies like the State Agency for National Security and the Assets Forfeiture Commission were created. Numerous legislative changes were made to align domestic laws with international standards and to comply with the requirements for EU membership, including the adoption of a new constitution, a new Criminal Procedure Code, Ministry of the Interior Act, and Judiciary Act.

Significant changes occurred in the field of international cooperation as well. The old cooperation mechanisms used by the former socialist countries were no longer existing, and the country joined new international cooperation networks, such as Europol and Eurojust, which in turn required further reforms. In addition, Bulgaria's membership in the EU and other international organizations placed the country under various types of evaluation and monitoring, implemented either incidentally or on a regular basis.

Overall, the main objective of the reforms was to create a modern law enforcement system, possessing the necessary capacity not only to respond to the new challenges in the area of fight against crime but also to effectively cooperate in the new international environment.

Such large-scale reforms, however, required considerable resources both in terms of funding and expertise. As most countries in Southeastern Europe at that time, Bulgaria was not in a position to face such a challenge by itself and had to rely on assistance from abroad. Thus, in order to effectively implement all the necessary reforms, the country soon became a major beneficiary of most of the available international assistance instruments.

Undoubtedly, international assistance played a significant role in building the capacity of the Bulgarian law enforcement system and allowing the country to successfully join NATO and the EU. In the same time, some of the shortcomings of the existing assistance instruments became visible as well. Although considerable results were achieved in some areas, there were also cases where international assistance failed to produce the expected results.

Against this background, the aim of this chapter is to provide an overview of the various types of capacity building activities in the area of law enforcement and, based on the Bulgarian experience, to outline the major problems and opportunities for improvement.

Definition

According to a definition provided by the United Nations for the purpose of the organization's peacekeeping operations, "capacity" of law enforcement agencies is the ability of law enforcement officers and agencies to perform their mandated tasks effectively and legally. Capacity has both an individual dimension (knowledge/skills of the police officer) and an organizational dimension (human resources, organizational structure, etc.). Based on this definition, the UN defines the term "capacity building" as developing the individual's ability to perform a law enforcement task effectively and the ability of the institution to be a legal and effective instrument of state authority according to international standards and democratic principles.[1]

There are numerous definitions of the term "capacity building," which are either more general or refer to other areas of public life. Nevertheless, some of these definitions can be used to clarify the meaning of capacity building in general and to outline what types of activities fall under the scope of this term.

According to a more general definition, provided by the United Nations Development Programme (UNDP), capacity means the skills, knowledge, and resources needed to perform a function, while capacity development is the process by which individuals, groups, organizations, institutions, and countries develop their abilities, individually and collectively, to perform functions, solve problems, and achieve objectives. Capacity building differs from capacity development in that the latter builds on a preexisting capacity base.[2]

The World Bank defines capacity building as a "coordinated process of deliberate interventions to (1) upgrade skills, (2) improve procedures, and (3) strengthen organizations." Capacity building refers to the investment in people, institutions, and practices that will enable countries to achieve their development objectives.[3]

All definitions of capacity building include two major components: the development of the individual skills of the persons working for the respective agency and the improvement of the operation of the agency as an entity. In the field of law enforcement, the development of the individual skills of the persons working for the respective agency can be done primarily through training but also through exchange of experience, improved access to information, etc. The improvement of the operation of the law enforcement agencies as entities can involve introduction of better rules and procedures, provision of equipment, development of new channels for cross-border cooperation, etc.

For the purpose of this chapter, capacity building of law enforcement institutions can be defined as any activity aimed at increasing the effectiveness of the operation of the law enforcement agencies and/or their personnel.

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[1] *Reform, Restructuring and Rebuilding of Police and Law Enforcement Agencies*, United Nations, New York, 2009, p. 8.

[2] *Governance for Sustainable Human Development: A UNDP Policy Document*, United Nations Development Programme, New York, 1997.

[3] *Glossary of Poverty and Social Impact Analysis (PSIA) Terms*, World Bank, New York, 2010.

Setting International Standards

The differences between the domestic legislations of individual countries are often hampering the effective international cooperation in the field of law enforcement, in particular as regards the fight against transnational crime. Differences exist both in substantive and procedural law. In the field of substantive law, for example, the same unlawful behavior may be regarded as a criminal offense in one country and as a less serious administrative violation in another country. In terms of procedural law, there are differences in the procedures for collection of evidence, the execution of sentences, the recognition of judicial decisions, etc. The differences between national legislations may affect international cooperation in a different way: from slowing down the collaboration between the relevant authorities to completely blocking any interaction.

To overcome this problem, several major international organizations have been trying to set common legislative standards, usually through the signing of multilateral international treaties such as conventions and protocols. The primary objective of such instruments is to help countries align their domestic legal frameworks in a specific area and thus overcome some problems arising from the differences between national legal provisions.

In the area of security and prevention of and fight against crime, most of these multilateral treaties are aimed at harmonizing the countries' criminal legislation. Usually such harmonization seeks to ensure that in all countries bound by the respective treaty, certain forms of illegal or dangerous behavior are regarded as criminal offenses and are subject to investigation and prosecution through the criminal justice system.

The major actors introducing such standards in the area of security and fight against crime on global level are the United Nations (UN) and the Organization for Economic Cooperation and Development (OECD), while on European level, this is done mainly by the Council of Europe and, for the member states of the European Union, by the Union's institutions.

Globally, the United Nations is the most active international organization in this area. The UN has adopted a number of conventions dealing with specific types of transnational criminality such as taking of hostages,[4] terrorism[5] and financing of terrorism,[6] organized crime,[7] and corruption.[8] Having been signed and ratified by a

[4] *International Convention against the Taking of Hostages (UNTS Volume 1316, I-21931)*, United Nations, New York, 1991.

[5] *International Convention for the Suppression of Terrorist Bombings (UNTS Volume 2149, I-37517)*, United Nations, New York, 2003.

[6] *International Convention for the Suppression of the Financing of Terrorism (UNTS Volume 2178, I-38349)*, United Nations, New York, 2004.

[7] *United Nations Convention against Transnational Organized Crime (UNTS Volume 2225, I-39574)*, United Nations, New York, 2007.

[8] *United Nations Convention against Corruption (UNTS Volume 2349, I-42146)*, United Nations, New York, 2007.

huge number of countries worldwide, most of these conventions have a very broad geographical scope of application.[9]

OECD also plays a certain role in this field, although limited to the area of anti-corruption.[10] Despite its relatively narrow subject, covering only bribery of foreign officials in international business transactions, the OECD anti-bribery convention has a considerable geographic coverage, having been ratified by with 38 countries from all continents. All parties to the OECD convention also report that they have adopted the necessary domestic legislation implementing the convention.

In Europe, the major international organization active in the field of introducing common standards in the area of security and fight against crime is the Council of Europe. The Council of Europe has adopted a number of conventions, protocols, and other legal instruments aimed at harmonizing national legal systems in areas such as prevention and suppression of terrorism,[11] corruption,[12] cybercrime,[13] and trafficking in human beings.[14] The majority of European countries have already ratified most of these instruments. Incidentally, several countries outside Europe have also acceded some of these treaties.[15]

The main goal of these tools is to encourage countries to harmonize their national legal provisions and thus overcome some obstacles hampering international cooperation because of country-specific variations. The capacity building impact of these instruments, although not being their primary objective, is also significant. The setting of international standards is usually based on best practices, and by complying with these standards, each country provides its law enforcement bodies with an improved legal basis for their operation.

Setting international standards contributes to the building of the capacity of national law enforcement institutions in different ways. On the one hand, the adoption of an international convention or other legal instrument encourages national governments to revise and amend domestic legislation in order to bring it in line with the respective convention's provisions. Oftentimes, such changes substantially enhance national legal frameworks by either improving existing provisions or introducing completely

[9] For example, as of beginning of March 2010, the Convention against Transnational Organized Crime has 154 parties out of 301 signatories, while 143 parties out of 283 signatories have ratified the Convention against Corruption.

[10] *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and Related Documents*, Organization for Economic Cooperation and Development, Paris, 2010.

[11] *European Convention on the Suppression of Terrorism (CETS No.: 090)*, Council of Europe, Strasbourg, 1977, and *Council of Europe Convention on the Prevention of Terrorism (CETS No.: 196)*, Council of Europe, Warsaw, 2005.

[12] *Criminal Law Convention on Corruption (CETS No.: 173)*, Council of Europe, Strasbourg, 1999.

[13] *Convention on Cybercrime (CETS No.: 185)*, Council of Europe, Budapest, 2001.

[14] *Council of Europe Convention on Action against Trafficking in Human Beings (CETS No.: 197)*, Council of Europe, Warsaw, 2005.

[15] For example, the Convention on Cybercrime has been signed by Canada, Japan, South Africa, and the United States, and the Criminal Law Convention on Corruption has been signed by Mexico and the United States.

new ones. Thus, for instance, before the adoption of the Council of Europe Convention on Cybercrime, computer-related offenses were not criminalized in Bulgaria at all, and law enforcement bodies were unable to investigate and prosecute such behavior. However, as a consequence of the signing and ratification of the convention, Bulgarian parliament adopted amendments to the Criminal Code and the Criminal Procedure Code introducing a comprehensive legal framework governing the investigation and prosecution of computer crime in the country.

The harmonization of domestic legislation as a result of the signing and ratification of an international convention also increases the capacity of judicial and law enforcement bodies by overcoming the problem of the so-called dual criminality, which is an obligatory prerequisite for the application of most instruments for international cooperation in criminal matters. Dual criminality means that a certain offense is considered a crime in both countries using the respective cooperation tool, i.e., if a certain offense was not criminalized in one of the cooperating countries, the respective tool would not be applicable. Thus, by aligning domestic criminal legislation of different countries, international conventions actually help overcome this problem and facilitate the operation of national law enforcement authorities when such cooperation is needed.[16]

Furthermore, the majority of the international legal instruments in the area of security and fight against crime significantly streamline international cooperation by introducing institutional mechanisms for interaction. Some conventions impose obligations on their parties to reorganize their law enforcement authorities or create new ones so that they could effectively cooperate with their counterparts. Such reforms help enhance the overall capacity of the domestic law enforcement systems and are a vital prerequisite for increasing their effectiveness when dealing with transnational cases. Referring again to the Convention on Cybercrime, to comply with its requirements, Bulgaria was obliged to establish a point of contact available on a 24 h, 7-day-a-week basis, in order to ensure the provision of immediate assistance for the purpose of investigations or proceedings concerning criminal offenses related to computer systems and data or for the collection of evidence in electronic form of a criminal offense (Article 35 of the Convention on Cybercrime). To implement this provision, the Bulgarian Ministry of the Interior created a special unit within its Directorate General for Combating Organized Crime, which is now responsible for the provision of assistance on all transnational cases of computer-related crime.

The setting of common standards through multilateral international conventions has significant impact on building the capacity of national judicial and law enforcement bodies, but they also reveal certain weaknesses. The major shortcoming of these efforts as a capacity building tool is that they are usually limited to the formal introduction of certain provisions within the national legislation of individual countries and often have little impact on the practical enforcement of these provi-

[16] For example, the problem of dual criminality was mentioned as one of the obstacles hampering the effective implementation of the UN Convention against Transnational Organized Crime as regards mutual legal assistance and extradition. For more information, see *Report of the Conference of the Parties to the United Nations Convention against Transnational Organized Crime on its fourth session, held in Vienna from 8 to 17 October 2008 (CTOC/COP/2008/19)*, United Nations, Vienna, 2008.

sions. Thus, for instance, a 2009 report by Transparency International on the enforcement of the OECD Convention admits that the convention is still far from achieving its goals mainly because of unsatisfactory enforcement. The principal cause of lagging enforcement, according to the report, is the lack of political will, and in the absence of political will, even repeated monitoring reviews have little effect. The report also warns that "the present situation is dangerously unstable" and "unless enforcement is sharply increased, existing support will erode and the Convention will fail."[17]

Bulgarian experience reveals a similar situation. Although the country has introduced all necessary amendments to its domestic criminal law in line with the anti-corruption instruments of the UN, OECD, and the Council of Europe, these amendments have had limited, if any, impact on the prevention and countering of corruption in the country. This situation was best described by the Bulgarian non-governmental organization Center for the Study of Democracy in its annual corruption assessment report for 2006: "The legislative amendments enacted in relation to the punishment of corruption crime have propelled the harmonization of Bulgaria's domestic legislation with the current international instruments designed to combat corruption. None of those amendments, however, has impelled the increase in the number of cases and convictions aspired at."[18]

Monitoring and Evaluation

Another approach often used by some international organizations to enhance the capacity of domestic law enforcement systems is the implementation of various monitoring and evaluation schemes. In most cases, monitoring and evaluation mechanisms are not designed as separate tools but are linked with a certain international treaty and are specifically aimed to monitor and assess compliance with the standards and provisions introduced by that particular treaty. The major objective of such monitoring tools is to provide the respective international organization, which has adopted the treaty, with reliable feedback on the progress with its implementation. Based on the findings and results of this evaluation, the international organization can then address specific recommendations to the individual countries to encourage them to more effectively implement and enforce the convention's provisions.

In addition to its major objective to provide feedback on implementation, monitoring and evaluation mechanisms also have certain capacity building effects on domestic judicial and law enforcement institutions. The capacity building potential of these mechanisms comes from the fact that the evaluation of countries' progress against the provisions of a respective international instrument is usually combined

[17] Fritz Heimann and Gillian Dell, *Progress Report 2009: Enforcement of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, Transparency International, Berlin, 2009, pp. 8–9.

[18] *Anti-corruption Reforms in Bulgaria: Key Results and Risks*, Center for the Study of Democracy, Sofia, 2007, p. 98.

with recommendations for measures that need to be undertaken to meet the relevant requirements and the effective implementation of these recommendations directly or indirectly improves the capacity of national authorities.

The capacity building potential of the monitoring and evaluation done by international organizations could be best illustrated by a couple of examples from Bulgaria, both in the field of anticorruption. Bulgaria has faced serious problems in the prevention of and fight against corruption and was often criticized for the lack of progress by the international organizations active in this field. As a result, the country was placed under various monitoring schemes, the two most important of which were the monitoring done by OECD on the implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the monitoring exercised by the Council of Europe Group of States against Corruption (GRECO) on compliance with anticorruption standards.

The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions established an open-ended, peer-driven monitoring mechanism to ensure the thorough implementation of the international obligations that countries have taken on under the convention. The monitoring is carried out by the OECD Working Group on Bribery, which is composed of members of all State Parties. The country monitoring reports contain recommendations formed from rigorous examinations of each country. The examinations are performed in two phases: phase 1 evaluates the adequacy of a country's legislation to implement the convention, while phase 2 assesses whether a country is applying this legislation effectively.

In the framework of phase 2, in November 2002, a team of examiners carried out an on-site visit to Bulgaria, and based on their findings, the OECD published its country report on Bulgaria. One of the recommendations formulated in the report advised the Bulgarian government to "provide all officials having a role in the detection, reporting and enforcement of the foreign bribery offence with detailed and regularly updated training about the content of the offence, and guidance, in the form of guidelines or typologies where appropriate, on the circumstances in which it occurs and how to recognize it."[19]

In response to this recommendation, the Bulgarian government undertook a series of measures to improve the capacity of the relevant institutions to detect, investigate, and prosecute the bribery of foreign public officials. Some of these measures included the introduction of obligatory anticorruption training for civil servants, including the detection of bribery offenses (seminars and online training), provision of specialized training to police officers on detection and counteraction of bribery, and extensive anticorruption training of judges, prosecutors, and investigative magistrates.[20]

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[19] *Bulgaria—Phase 2: Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions*, Organization for Economic Cooperation and Development, Paris, 2003, p. 42.

[20] *Follow-up Report on the Implementation by Bulgaria of the Phase 2 Recommendations on the Application of the OECD Convention and the 1997 Recommendation on Combating Bribery of Foreign Public Officials in International Business Transactions*, Organization for Economic Cooperation and Development, Paris, 2006, pp. 12–13.

Up until 2009, the OECD did not have any mechanisms to monitor and evaluate the progress of individual countries beyond these two phases of examination. Thus, the organization was not able to oversee and assess the measures undertaken by the parties in response to its recommendations. The situation changed in December 2009, when the Working Group on Bribery adopted a post-phase 2 assessment mechanism, which, unlike the first two phases, is intended to act as a permanent cycle of peer review with the purpose to maintain an up-to-date assessment of progress. The aim of the new mechanism will be "to improve the capacity of parties to fight bribery in international business transactions by examining their undertakings in this field through a dynamic process of mutual evaluation and peer pressure." The first cycle of reviews under the new mechanism (known as phase 3) will evaluate, among other things, the progress made on weaknesses identified in phase 2 as well as enforcement efforts and results.[21]

The new mechanism will consist of replies to an evaluation questionnaire and on-site visits, and for each country under evaluation, two other countries will be appointed as lead examiners. The output of the evaluation will be a report on performance including findings and recommendations. The evaluated country will be asked to provide a follow-up report on the implementation of the recommendations within 24 months of the adoption of the evaluation report. In addition, the Working Group on Bribery may require the evaluated country to give a further oral report within a further 12 months on key outstanding recommendations. For Bulgaria, the evaluation report is expected in March 2011 with Poland and Chile acting as lead examiners.

Another example of a monitoring mechanism is the Council of Europe Group of States against Corruption (GRECO). GRECO was established in 1999 and currently comprises 48 member states (47 European states and the United States of America). GRECO's objective is to improve the capacity of its members to fight corruption by monitoring their compliance with the established anticorruption standards "through a dynamic process of mutual evaluation and peer pressure."[22] It helps to identify deficiencies in national anticorruption policies, prompting the necessary legislative, institutional, and practical reforms. GRECO also provides a platform for the sharing of best practice in the prevention and detection of corruption.

GRECO evaluation procedures involve the collection of information through questionnaires, on-site country visits enabling evaluation teams to solicit further information during high-level discussions with domestic key players, and the drafting of evaluation reports. These reports, which are examined and adopted by GRECO, contain recommendations to the evaluated countries in order to improve their level of compliance with the provisions under consideration. Each evaluated country is obliged to address to GRECO a situation report indicating the measures taken to follow the recommendations.

Subsequently, GRECO assesses under a separate compliance procedure the measures taken to implement recommendations. The carrying out of the compliance procedure is assigned to two member states selected on the basis of specific

[21] *OECD Anti-Bribery Convention Phase 3 Monitoring: Information Resources*, Organization for Economic Cooperation and Development, Paris, 2009, p. 10.

[22] *Statute of the Group of States against Corruption (GRECO)*, Council of Europe, Strasbourg, 1999.

criteria such as involvement in the first evaluation, similarity of legal systems, and geographical proximity with the evaluated country. The compliance procedure concludes with a compliance report, which indicates the degree to which each individual recommendation has been implemented. For each recommendation, the compliance report should indicate one of three possible options: implemented satisfactorily, partly implemented, or not implemented. For recommendations that have been partly implemented or not implemented, the compliance report may specify a period of time within which the evaluated country is required to submit additional information regarding the implementation of the recommendations in question.[23]

In case the overall conclusion of the compliance report is that "the response to the recommendations is globally unsatisfactory," GRECO may apply a special "procedure for dealing with noncomplying members." This procedure consists of the sending of letters and notifications to the relevant national institutions and bodies of the noncomplying country drawing their attention to the noncompliance or, if need be, the arrangement of a high-level mission to this country "to reinforce this message."[24]

The second evaluation report on Bulgaria concluded that "even if it was legally possible to use forfeiture with regard to property held by third parties, the Bulgarian authorities did not have any practical experience in doing so and that there is a need for specialized training of prosecutors and judges on this matter." Based on these findings, the report recommended the provision of "appropriate training to prosecutors and judges on the forfeiture of proceeds of crime held by third parties."[25]

In response to this recommendation, Bulgarian authorities included the topic of forfeiture of proceeds of crime held by third parties in a number of training activities. After the publication of the report, the National Institute of Justice organized a series of seminars for judges, prosecutors, and investigators covering different aspects of asset forfeiture. As a result of these measures, the capacity of Bulgarian authorities to apply asset forfeiture was significantly improved which provided sufficient grounds for GRECO to conclude that the recommendation has been dealt with "in a satisfactory manner."[26]

The measures, implemented in response to the GRECO recommendations, improved the performance of the authorities dealing with asset forfeiture, which is evidenced by the increased number of forfeiture proceedings. In 2009, the number of proceedings for identifying criminal assets increased by 19% compared to the previous year due to the "increased administrative capacity of the Commission for Establishing of Property Acquired from Criminal Activity and its territorial directorates" and the "improved interaction" with the other institutions involved in

[23] *Rules of Procedure*, Council of Europe—Group of States against Corruption, Strasbourg, 1999, pp. 13–15.

[24] *Rules of Procedure*, Council of Europe—Group of States against Corruption, Strasbourg, 1999, p. 15.

[25] *Second Evaluation Round: Evaluation Report on Bulgaria*, Council of Europe—Group of States against Corruption, Strasbourg, 2005, pp. 8 and 21.

[26] *Second Evaluation Round: Compliance Report on Bulgaria*, Council of Europe—Group of States against Corruption, Strasbourg, 2007, pp. 3–4.

the asset forfeiture procedures.[27] The improved results were also acknowledged by the European Commission, which, in its regular reports on Bulgaria's progress in the fight against organized crime and corruption, noted the "continuous positive track record regarding freezing and forfeiture of criminal assets."[28]

The main advantage of international monitoring is that it is usually assigned to independent external evaluators and there are sufficient guarantees for the objectiveness and impartiality of the conclusions and recommendations. In the same time, the experts doing the monitoring do not rely only on information and documents provided by the national government. Most monitoring schemes include on-site visits and meetings with domestic actors, including nongovernmental organizations, which allow the evaluators to make informed conclusions and concrete recommendations. As a consequence, as evidenced from the examples described above, if implemented, the recommendations usually produce visible results.

Implementation, however, significantly depends on the will of the national authorities, and this is the major weakness of international monitoring. In fact, it is often the case that international institutions conducting such monitoring do not have appropriate enforcement or sanctioning powers at their disposal to motivate states to comply with the formulated recommendations. The best thing the monitoring organization could do in cases of noncompliance is to simply acknowledge the lack of progress, repeat the recommendations, and insist on their implementation through additional reports, letters, or other written communication. In practice, there is no possibility of imposing heavier sanctions (e.g., fines, suspension of membership), which weakens the obligatory effect of the recommendations.

Thus, for example, the independent evaluation of the enforcement of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, made by Transparency International, concluded that in "countries where there is committed political leadership, the OECD's outstanding monitoring program has helped improve laws and enforcement programs," while "in the absence of political will, even repeated monitoring reviews have little effect." The evaluation report also admits that the "OECD Working Group can do little to compel action by governments that fail to respond to critical monitoring reports" and recommends that this "problem must be addressed at a higher level" with the "active involvement by the OECD Ministerial Council and the Secretary-General, as well as bilateral pressure on the laggards from governments committed to enforcement."[29]

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[27] *Report on the Activities of the Commission for Establishing of Property Acquired from Criminal Activity for the Period January 2009—December 2009*, Commission for Establishing of Property Acquired from Criminal Activity, Sofia, 2010, pp. 17–18.

[28] *Report from the Commission to the European Parliament and the Council on Progress in Bulgaria under the Co-operation and Verification Mechanism*, European Commission, Brussels, 2010, p. 5.

[29] Fritz Heimann and Gillian Dell, *Progress Report 2009: Enforcement of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, Transparency International, Berlin, 2009, p. 9.

Streamlining International Cooperation

Many international organizations have adopted legal instruments that not only encourage international cooperation but also introduce specific rules and procedures to facilitate the communication and interaction between law enforcement bodies from different countries. The introduction of such rules and procedures is aimed at facilitating the cooperation between national law enforcement authorities in practice by introducing uniform and less complicated procedures for interaction. Very often, however, the introduction of such rules and procedures has considerable capacity building impact as it allows domestic law enforcement bodies to better coordinate their efforts with their counterparts in other countries and provides them with broader opportunities for fast and effective communication and exchange of information.

Thus, for example, in 1959, the Council of Europe adopted the *European Convention on Mutual Assistance in Criminal Matters*. The convention has been in force since 12 June 1962 and has been ratified by 48 countries (all member states of the Council of Europe plus Israel). Under this convention, parties have agreed to afford each other the widest measure of mutual assistance with a view to gathering evidence and hearing witnesses, experts, and prosecuted persons. The convention sets out rules for the enforcement of the so-called letter rogatory. A letter rogatory is a mandate given by a judicial authority of one country (requesting party) to the judicial authority of another country (requested party) to perform in its place one or more specified actions. The letter rogatory can have as a subject the procurement of evidence (audition of witnesses, experts, and prosecuted persons; service of writs; and records of judicial verdicts) or the communication of the evidence (records or documents). The convention also specifies the requirements that requests for mutual assistance and letter rogatory have to meet (transmitting authorities, languages, refusal of mutual assistance).[30]

After its enforcement, the convention was supplemented with two additional protocols. The first one, adopted in 1978 and in force since 12 April 1982, completes provisions contained in the convention; withdraws the possibility to refuse assistance solely on the ground that the request concerns an offense which the requested party considers a fiscal offense; extends international cooperation to the service of documents concerning the enforcement of a sentence and similar measures (suspension of pronouncement of a sentence, conditional release, deferment of commencement of enforcement of a sentence, or interruption of such enforcement); and adds provisions relating to the exchange of information on judicial records.[31]

The second additional protocol, adopted in 2001 and in force since 1 February 2004, was intended to improve states' ability to react to cross-border crime in the light of political and social developments in Europe and technological developments throughout the world. This is to be achieved by broadening the range of situations

[30] *European Convention on Mutual Assistance in Criminal Matters (CETS No.: 030)*, Council of Europe, Strasbourg, 1959.

[31] *Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (CETS No.: 099)*, Council of Europe, Strasbourg, 1978.

in which mutual assistance may be requested and making the provision of assistance easier, quicker, and more flexible. It also takes account of the need to protect individual rights in the processing of personal data.[32]

The European Union has introduced even more detailed rules on mutual legal assistance in criminal matters, applicable to member states. On 29 May 2000, the EU Council of Ministers adopted the *Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union* (in force since 25 August 2005),[33] followed by a protocol on 16 October 2001 concerning mutual cooperation on banking information, aimed at fighting money laundering and financial crime.[34] The convention aims to encourage and modernize cooperation between judicial, police, and customs authorities within the Union as well as with Norway and Iceland by supplementing provisions in existing legal instruments and facilitating their application. The state receiving a request must in principle comply with the formalities and procedures indicated by the requesting state. However, when a punishment falls within the competence of the receiving authority, a spontaneous exchange of information (i.e., without prior request) may take place between member states regarding criminal offenses and administrative infringements. The convention also provides that the requesting state can ask the receiving state to comply with some formalities or procedural requirements which are essential under its national legislation. Under the convention, requests for mutual assistance and communications are to be made directly to the judicial authorities with territorial competence. However, in some cases, documents may be sent or returned via a central authority. Urgent requests may be made via INTERPOL or any other competent body and mechanisms involving modern communication methods like videoconference and teleconference have been introduced to facilitate cooperation between judicial authorities. The convention also provided for the opportunity for two or more EU member states to set up a joint investigation team for a specific purpose and for a limited period of time.

An even further step toward enhancing mutual assistance in criminal matters within the EU was the adoption of *Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters*.[35] The European evidence warrant (EEW) is a judicial decision, whereby objects,

[32] *Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (CETS No.: 182)*, Council of Europe, Strasbourg, 2001.

[33] *Convention established by the Council in accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the Member States of the European Union*, EU Council of Ministers, Brussels, 2000.

[34] *Council Act of 16 October 2001 establishing, in accordance with Article 34 of the Treaty on European Union, the Protocol to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union*, EU Council of Ministers, Brussels, 2001.

[35] *Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters*, EU Council of Ministers, Brussels, 2008.

documents, and data may be obtained from other member states. The EEW shall be issued, recognized, and executed by competent authorities designated by the member states (a judge, court, investigating magistrate, public prosecutor, or other judicial authority). The EEW is to be recognized by the executing authority without any further formality and should be executed within 60 days from its receipt, unless there are grounds for postponement.

Beside the area of mutual legal assistance in criminal matters, the Council of Europe and the European Union have adopted similar instruments also in the area of extradition,[36] transfer of criminal proceedings,[37] transfer of sentenced persons,[38] etc.

By introducing uniform and simplified rules and procedures, such instruments significantly facilitate international cooperation in the field of criminal justice. They have a certain capacity building effect as well since they improve the ability of domestic judicial and law enforcement institutions to handle cross-border criminal cases. This is evidenced by the constantly increasing number of requests for mutual legal assistance in criminal matters. In Bulgaria, for example, only within a period of five years between 2001 and 2005, the number of letter rogatory communicated (sent or received) by the public prosecution service increased more than eight times (from 140 in 2001 up to 1,153 in 2005). To improve the capacity of the public prosecution service to manage the increased workload in the field of international cooperation, the unit responsible for dealing with letter rogatory was upgraded in status from a section into a department, and much ampler activities both in terms of drawing up and sending abroad applications and in terms of executing similar applications sent by other countries were developed.[39]

However, these instruments reveal some shortcomings as well. One such shortcoming is that most of them have certain limitations. The instruments for mutual legal assistance, for example, are based on bilateral treaties or multilateral treaties with limited geographical scope of application. There is no uniform, globally applied mechanism, and national authorities have to use different instruments depending on the country from which they need to collect the evidence. There are

[36] *European Convention on Extradition (CETS No.: 024)*, Council of Europe, Strasbourg, 1960; *Additional Protocol to the European Convention on Extradition (CETS No.: 086)*, Council of Europe, Strasbourg, 1975; *Second Additional Protocol to the European Convention on Extradition (CETS No.: 098)*, Council of Europe, Strasbourg, 1978; *Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States*, Council of the European Union, Brussels, 2002.

[37] *European Convention on the Transfer of Proceedings in Criminal Matters (CETS No.: 073)*, Council of Europe, Strasbourg, 1972.

[38] *Convention on the Transfer of Sentenced Persons (CETS No.: 112)*, Council of Europe, Strasbourg, 1983; *Additional Protocol to the Convention on the Transfer of Sentenced Persons (CETS No.: 167)*, Council of Europe, Strasbourg, 1997.

[39] Maria Yordanova, Dimitar Markov, *Reinforcing Criminal Justice in Border Districts*, Center for the Study of Democracy, Sofia, 2007, pp. 89–90.

also procedural shortcomings since generally requests have to be sent through a central authority often following slow and bureaucratic procedures.[40]

A recent survey among the European Judicial Network contact points also revealed that translation of requests of assistance is often problematic, sometimes "making it impossible for the court seized to determine national legal equivalents for offences in foreign applications." Furthermore, some EU member states reported that the quality of translations was patchy and the time for obtaining translations was frequently too long.[41]

Operational Assistance

In addition to the introduction of uniform rules and procedures for cross-border cooperation, some international organizations also provide specific services to the benefit of national judicial and law enforcement bodies. Such services include development and maintenance of different databases, provision of communication channels, and publication and dissemination of guidelines and manuals.

The most important international organization providing operational assistance on the global level is INTERPOL. Within the European Union, there are several offering operation assistance institutions, including Europol, Eurojust, and the European Judicial Network (EJN).

The International Criminal Police Organization—INTERPOL—is the oldest and the world's largest international police organization, with 188 member countries. It was created in 1923 to facilitate cross-border police cooperation and to support and assist all organizations, authorities, and services preventing or combating international crime. One of the major competitive advantages of INTERPOL is that it aims to facilitate international police cooperation even where diplomatic relations do not exist between particular countries.

Each INTERPOL member country maintains a National Central Bureau staffed by national law enforcement officers and serving as a contact point when assistance is needed with overseas investigations or the location and apprehension of fugitives.

INTERPOL plays an important role in the capacity building of national law enforcement agencies through the variety of capacity building activities it provides to the National Central Bureaus (NCBs) such as operational police support services, operational data services and databases for police, police training and development, and development of I-24/7 secure communications.

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[40] Matti Joutsen, *The European Union and Cooperation in Criminal Matters: The Search for Balance*, The European Institute for Crime Prevention and Control, affiliated with the United Nations (HEUNI), Helsinki, 2006, p. 18.

[41] *Replies to the Questionnaire on the Evaluation of the Tools for Judicial Cooperation in Criminal Matters*, Council of the European Union, Brussels, 2009, p. 7.

Operational support is aimed at increasing the efficiency of NCBs in priority crime areas such as fugitives, public safety and terrorism, drugs and organized crime, trafficking in human beings, and financial and high-tech crime. Operational support is provided round the clock by the Command and Coordination Center (CCC). Part of the operational support services are also the INTERPOL Response Teams, the Disaster Victim Identification teams, the INTERPOL Major Event Support Teams, as well as the international alert system (a system of six color-coded notices) and the development of crime data analyses.

Operational data services include several databases managed by INTERPOL and accessible to all NCBs. Databases contain critical information on criminals and criminality. The main databases are suspected terrorists, nominal data on criminals (names, photos), fingerprints, DNA profiles, lost or stolen travel documents, child sexual abuse images, stolen works of art, stolen motor vehicles, etc.

The I-24/7 global police communications system connects the INTERPOL General Secretariat in Lyon, France, NCBs in member countries, and regional offices, creating a global network for the exchange of police information and providing law enforcement authorities in member countries with instant access to the organization's databases and other services. Member countries can also grant consultative access to authorized law enforcement entities outside of NCBs, such as border control units or customs officials.

Police training and development aims to help officials in INTERPOL's member countries to improve their operational effectiveness, enhance their skills, and build their capacity. In 2009, more than 140 operational training sessions were delivered, benefiting more than 4,500 participants. The majority of the sessions (some 84%) took place in the participants' own countries. Courses included topics such as trafficking in human beings, drugs and criminal organizations, financial and high-tech crime, public safety and terrorism, fugitives, and tools and databases.[42]

Several similar mechanisms exist in the European Union as well, the most important of which are Europol, Eurojust, and the European Judicial Network (EJN).

Europol is the law enforcement agency of the EU. Its aim is to support and strengthen action by the competent authorities of the EU member states and their mutual cooperation in preventing and combating organized crime, terrorism, and other forms of serious crime affecting two or more member states. The main task of Europol is to collect, process, and exchange information and intelligence. In addition to that, Europol has also some functions directly targeting the capacity of national law enforcement agencies. These functions include development of specialist knowledge of the investigative procedures of the competent authorities of the member states, provision of advice on investigations, and provision of strategic intelligence to assist and promote the efficient and effective use of the resources. Europol can also provide assistance to member states through support, advice, and research in the training of their competent authorities, the organization and equipment of those authorities (by facilitating the provision of technical support between

[42] *INTERPOL Annual Report 2009*, INTERPOL, Lyon, 2010, pp. 22–23.

the member states), crime prevention methods, technical and forensic methods and analysis, and investigative procedures.[43]

Europol staff may participate in supporting capacity in joint investigation teams operating in individual member states. Europol maintains a computerized system called the "Europol Information System," which contains data about persons suspected of having committed a criminal offense in respect of which Europol is competent or who has been convicted of such an offense. The data stored in the system is accessible to the domestic law enforcement agencies through Europol's national units (the liaison bodies between Europol and the competent authorities of the member states). Similarly to INTERPOL, Europol operates nonstop: 24 h a day, 7 days a week.

Based on the model of Europol, Eurojust is aimed at stimulating and improving the coordination of investigations and prosecutions between the competent authorities in EU member states when dealing with cross-border crime. Eurojust's responsibilities cover the same types of crime and offenses for which Europol has competence. The activities of Eurojust that have a capacity building impact are primarily in the field of logistical support, such as assistance in translation, interpretation, and the organization of coordination meetings.

The European Judicial Network (EJN), officially inaugurated on 25 September 1998, is a network of national contact points for the facilitation of judicial cooperation in criminal matters among EU member states.

Operational assistance has significant capacity building impact as it provides domestic law enforcement institutions with the opportunity to benefit from specific practical services and thus improve their own capacity to deal with cross-border crimes. The use of such services is often decisive for the successful investigation and prosecution of cross-border offenses.

Technical Assistance

Technical assistance is the most widely used instrument by international organizations to enhance the capacity of national law enforcement agencies. The major provider of technical assistance in Europe is the European Union. Technical assistance is also part of the activities of other international organizations such as the United Nations (mainly through the United Nations Office on Drugs and Crime).

Technical assistance (TA) support provided by the EU is available to the new member states (under a temporary instrument called the Transition Facility), the accession and candidate countries, the potential candidate countries of the Western Balkans, and the Turkish Cypriot Community in the northern part of Cyprus. Activities focus on the weaknesses identified at the central, regional, and local level.

[43] *Council Decision of 6 April 2009 establishing the European Police Office (Europol)*, Council of the European Union, Luxembourg, 2009.

TA has two specific areas of action: transfer of "know-how" and technical assistance involving investment.

Technical assistance involving transfer of "know-how" is defined as the process of helping the partner countries to develop the structures, strategies, human resources, and management skills needed to strengthen their economic, social, regulatory, and administrative capacity. Significant resources are allocated for this purpose and are mainly deployed and implemented with member states through the instruments of TAIEX, twinning, and SIGMA. This assistance is provided specifically to implement the *acquis communautaire* and to prepare for participation in EU policies as well as to fulfill the requirements of the Copenhagen political criterion: the stability of institutions guaranteeing democracy, the rule of law, human rights, and respect for and protection of minorities.

The Technical Assistance and Information Exchange Instrument (TAIEX) is an instrument of the European Commission's DG Enlargement. TAIEX helps countries with regard to the approximation, application, and enforcement of EU legislation. It is largely demand driven and channels requests for assistance and contributes to the delivery of appropriate tailor-made expertise to address problems at short notice. Nevertheless, TAIEX is also strategy driven in that requests are addressed in accordance with the priorities identified by the commission.

Services provided by TAIEX come in the form of seminars, workshops, expert and study visits, training, peer review and assessment-type assistance, and database and translation services. The beneficiaries of TAIEX assistance include those sectors which have a role to play in the beneficiary countries in the transposition, implementation, and enforcement of EU legislation.[44]

In Bulgaria, recent TAIEX activities in the area of building the capacity of law enforcement institutions included expert missions, workshops and seminars on border control, prevention and fight against corruption, VAT fraud, and asset recovery.[45]

Twinning projects involve the secondment of EU experts, known as Resident Twinning Advisors (RTA), to the acceding, candidate, and potential candidate countries on specific projects. The RTAs are made available for a period of at least one year to work on a project in the corresponding ministry in the beneficiary country.

[44] The TAIEX mandate to provide assistance covers the following beneficiary countries: Bulgaria, Romania, Croatia, former Yugoslav Republic of Macedonia, Turkey, Turkish Cypriot community in the northern part of Cyprus, Albania, Bosnia and Herzegovina, Montenegro, Serbia, Kosovo (as defined in UN Security Council Resolution 1244 of 10 June 1999), Algeria, Armenia, Azerbaijan, Belarus, Egypt, Georgia, Israel, Jordan, Lebanon, Libya, Moldova, Morocco, the Palestinian Authority, Syria, Tunisia, Ukraine, and Russia.

[45] Specific activities included Expert Mission on the Schengen Self-evaluation of Bulgaria's Air Borders (Sofia, Plovdiv, Burgas, Varna, 5–8 October 2009), Workshop on Risk Analysis as a Prerequisite for the Prevention and Fight against Corruption (Svilengrad, 8–10 September 2009), Expert Mission on the Schengen Self-Evaluation of the Bulgarian Black Sea Border (Burgas and Varna, 8–12 July 2009), Expert Mission on Schengen Self-Evaluation of Land Borders (Sofia, Svilengrad, Elhovo, 8–12 June 2009), Seminar on Counteraction to VAT Frauds in EU (Sofia, 27–29 May 2009), and Seminar on Asset Recovery (Sofia, 19–20 January 2009).

They are supported by a senior project leader in their member state home administration, who is responsible for ensuring project implementation and coordination of input from the member state. Different means are used to obtain a successful objective in addition to the RTA, including short-term expertise, training, translation and interpreting services, and specialized IT assistance.

In Bulgaria, for the period 1998–2007, 141 twinning projects for a total amount of 138 million Euro have been implemented, and the majority of them were in the area of justice and home affairs. The Ministry of Interior has been the beneficiary of several twining projects, including a project with the Spanish Ministry of Interior on building the capacity of the Bulgarian police to counter drug-related crime, a project with the German Federal Police on building the capacity of the Bulgarian border police, and a project with the UK Home Office and the London Metropolitan Police on prevention and countering of corruption. The Public Prosecution Service has also been involved in capacity building twinning projects with the Federal Ministry of Justice of Austria and the Ministry of Justice of the Netherlands.

Twinning projects are designed to deliver specific results on implementing areas of the acquis in the beneficiary countries based on the priority areas identified in the monitoring and regular reports prepared in view of enlargement. Twinning not only provides technical and administrative assistance but also helps to build long-term relationships between existing and future member states and brings all beneficiary countries into wider contact with the diversity of practice inside the EU.

From 2001, a further institution building support service was introduced to fill the gap between the short-term assistance provided by the TAIEX instrument and the longer-term secondments of member state experts provided through twinning. Twinning Light is a flexible tool for medium-term assignments, providing member state civil servants' expertise for assignments of up to 6 months, with possible but limited extensions. These civil servants do not need to be permanently located in the beneficiary country, unlike Resident Twinning Advisors. The procedures for these assignments are a simplified form of those currently used under twinning and similarly are aimed at addressing a specific action with regard to adopting the acquis.

SIGMA is a joint initiative of the OECD and the European Commission, principally financed by the European Community. SIGMA is a technical assistance instrument for assistance in horizontal areas of public management (public administrative reform, public procurement, public sector ethics and anticorruption initiatives, external and internal financial control). SIGMA's main roles are to assess the progress in reforms, to assist beneficiary administrations to establish good public sector practice and procedures, and to lend complementary support as required to other donor assistance actions. The instrument targets civil service and public administrations, aiming to bring beneficiary countries closer to meeting baseline conditions for a reliable, professional civil service operating in a complete and appropriate legal framework.

Technical assistance involving physical investment is concentrated on supporting alignment with EU norms and standards. There are three principle features: supports investment in key regulatory institutions whose equipment or infrastructure needs to be upgraded in order to monitor and enforce the acquis effectively; such investments

can be supported anywhere in a beneficiary country; and investment in the regulatory infrastructure is only made on the basis of a clear-cut government strategy on public administration reform, modernization, and governance, supported as necessary by technical assistance involving transfer of "know-how."

The United Nations Office on Drugs and Crime (UNODC) is also providing technical assistance services in the areas covered by the organization. These services have different forms depending on the specific area. In the area of criminal justice reform, the UNODC has developed several manuals, tools, and handbooks such as handbooks on alternatives to imprisonment and restorative justice and a toolkit and training material on HIV/AIDS prevention in prison settings. In terms of victim support, UNODC provides grants to NGOs working on victim support issues and develops training materials for law enforcement officials in the area of violence against women. Training materials and online training courses have been also developed on issues related to trafficking in human beings and terrorism. Technical assistance is also provided in the areas of prevention and fight against drug trafficking and drug distribution, organized crime, and corruption.

A typical technical assistance project illustrating both the advantages and the shortcomings of this type of assistance is the EU-funded project entitled "Strengthening the Capacity of the Anti-Corruption Commission to Counteract Corruption in Public Administration and Judiciary." The project was implemented in Bulgaria in the period 2004–2008, and according to the official project documentation, its total value was 4.7 million Euro.

The activities under the project included adoption and implementation of codes of ethics for the judges, prosecutors, investigators, and officials of the Ministry of the Interior; development of a corruption prevention program; provision of specialized training and equipment to the officials directly involved in countering corruption; development and implementation of anticorruption audits in selected ministries and agencies; and introduction of anticorruption education in high schools and universities.[46]

All of the activities under the project were duly implemented, and all the envisaged outputs were produced. However, the long-term impact of the project was not that satisfactory. A monitoring report by the European Commission, published in July 2009, acknowledged the achieved results, stating that "coordination, supervision, technical support for all regional anticorruption offices and a network of inspectorates at all ministries were provided."[47] In the same time, the commission also assessed the results as "confined to the technical level" and with "limited impact" and recommended further strengthening of the capacity of the general

[46] *Strengthening the Capacity of the Anti-Corruption Commission to Counteract Corruption in Public Administration and Judiciary*, European Commission, Brussels, 2006.

[47] *Report from the Commission to the European Parliament and the Council on Progress in Bulgaria under the Co-operation and Verification Mechanism (SEC(2009)1074)*, European Commission, Brussels, 2009, p. 5.

inspectorate and of inspectorates to ministries and agencies—a result that should have been already achieved through the EU-funded project.[48]

The major advantage of technical assistance as a capacity building technique is that it allows direct transfer of expertise from more experienced countries to countries that need to improve the capacity of their law enforcement institutions. Technical assistance offers a broad scope of services from supply of technical equipment to the provision of training and expertise.

The major criticism at technical assistance is that it is usually focused on the technical level and has limited or no policy impact. Technical assistance projects produce visible short-term results, but they often lack sustainability, and the impact gradually decreases once the projects are over. There are also concerns that technical assistance project relies too much on the transfer of best practices which are not always adjusted to the specific conditions of the beneficiary country. As a result, measures do not always produce the expected results, and their impact in the beneficiary country is smaller than the one they have had in the country they are transferred from.

Conclusion

The analysis above shows that currently there are a variety of capacity building instruments and tools provided by international organizations to domestic judicial and law enforcement institutions. Each of these instruments has its own advantages and shortcomings, but as a whole, the majority of capacity building efforts have produced satisfactory results enhancing the ability of national law enforcement system to investigate and prosecute serious crime, including cross-border offenses.

However, one thing that seems to be still missing is an effective for coordination among the various capacity building activities of different international organizations. Bulgarian experience shows that very often the international assistance provided by different organizations is not efficiently coordinated leading to overlapping or incompatibility of results. The lack of coordination significantly decreases the impact of the provided assistance and does not allow it to reveal its full potential.

On the one hand, the problem could be solved by increased cooperation and communication between the various international organizations providing capacity building assistance. Such a coordination of the efforts would help international organizations complement each other when offering assistance to individual countries and would increase the impact of different programs and measures. On the other hand, a more responsible attitude on the part of the beneficiary countries is also needed, and national governments should develop their own mechanisms for effectively coordinating the assistance provided to them by the international

[48] *Report from the Commission to the European Parliament and the Council on Progress in Bulgaria under the Co-operation and Verification Mechanism (SEC(2009)1074)*, European Commission, Brussels, 2009, p. 7.

community. Through better coordination of the already available capacity building tools, international organizations and national governments could substantially increase their impact and achieve better practical results.

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Chapter 5
European Supranational Monitoring of Intelligence Agency Collaboration in Counterterrorism in the Balkans and Eastern Europe

Henry F. Carey

Torture is legally banned worldwide but honored in the breach in a majority of countries, liberal democracies included. However, Europe's commitment to banning torture, as a region, initially through the Council of Europe (CoE) and more recently through the European Union (EU), has arguably been the most successful in the world—at least until 9/11. This chapter considers the efforts by these two international organizations to monitor the human rights compliance of intelligence agencies cooperating with each other and with the CIA. Legislative and judicial bodies of the CoE and the EU documented the unlawful collaboration of nearly every EU member state to render terrorism suspects to torture through European airspace to Guantánamo and about 50 prisons used to hold detainees in other secret locations in 28 countries, plus 20 prisons in Iraq and at least 25 in Afghanistan. The USA has also included about 17 ships as floating prisons as part of the CIA worldwide network of secret detention facilities, which human rights groups regard as unlawful. The most valued detainees, about 30 worldwide, in terms of threats to the USA, were held at three known East European states, Poland, Romania, and Lithuania, where the worst torture policy was implemented (Detainees in Afghanistan and Iraq also died from US torture.) Another 70 known detainees and about 100 "ghost detainees," in CoE Special Rapporteur Dick Marty's phrase, of perceived lesser value, were rendered by the CIA through Europe by intelligence agencies of nearly every EU candidate or member state to the Middle East and Asia, such as Morocco, Egypt, and Syria. The financial and administrative details of the CIA–intelligence agency collaboration in EU and CoE member states have not been revealed, despite repeated calls for investigations. Marty listed 14 participating European countries. Former EU Justice Commissioner Franco Frattini reiterated several times that any country that hosted CIA secret detention facilities would be suspended from voting, a threat that has not been seriously considered by the EU Council.

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Three-quarters of those "worst of the worst," in Secretary Donald Rumsfeld's words, who were brought to Guantánamo were probably not guilty of any crime (Ballen and Bergen 2008; Fletcher and Stover 2006; Seton Hall 2006). The Commanding Officer at Guantánamo in 2002 (Joint Task Force 170), Judge and Major General Michael E. Dunlavey, disagreed with an Arabic-speaking CIA agent who had concluded that one-third of the detainees were innocent. Dunlavey insisted that the correct figure was one-half (Sands 2008, p. 43; Mayer 2008). Only a few of the Guantánamo detainees were ever charged with a crime. Some were deported for further detention in their home countries, but the very large majority were released, about 700 of 850 detainees, to date.

Most of those imprisoned in these three of the most committed US allies and anti-Russia societies in Europe may have been active terrorists, though Abu Zubaydah was not even a member of al-Qaeda, even though the USA had asserted he was the number-three in that organization. Even if they were terrorists, there is no legal context, particularly in Europe's zone of human rights treaties, for aiding and abetting torture, cruelty, or inhuman or degrading treatment or punishment. By providing the CIA secret detention since 2002 for some of the approximate 100 high-value detainees (HVDs) controlled by the CIA worldwide, Europe proved that national security agencies were able to escape the post-War, EU civilian states' commitments to the rule of law, democracy, and human rights (other non-European black sites included Thailand, Afghanistan, Diego Garcia, and US Navy Brigs. The US Defense Dept. kept many more detainees in illegal secret detention, especially in Iraq and Afghanistan.) The legislative bodies of both the 47-member-state CoE and the 27 member-state EU passed repeated resolutions calling for each European country to investigate collaboration in extraordinary rendition. The European Court of Human Rights (ECHR), a judicial body of the former, has also accepted lawsuits against member states responsible for alleged torture, unlawful detention, and extraordinary rendition on their territory. This is reinforced by ECHR case-based, soft law holding that CoE member states have a positive obligation to investigate and punish all gross and systematic violation of human rights, as well as holding torture absolutely forbidden and whose violation requires not only prosecution, but also reparations and rehabilitation to victims—even if they are terrorists.

Council of Europe member states since 1991(Poland) and 1993 (Romania and Lithuania), all three countries had ratified and violated the CoE's European Convention on Human Rights and Fundamental Freedoms and are eligible for lawsuits before the CoE's European Court for Human Rights (ECtHR) for these violations. Lithuania eventually in 2011 became the first country in Europe to admit that it had allowed the CIA to establish two secret detention centers ("black sites"), though it never took legal action, supposedly on the grounds that there was no evidence that they were actually used. One HVD, Abu Zubaydah, has claimed that he was tortured in Lithuania in his lawsuit initiated in October 2011 in the ECtHR. In addition, el-Nasri has sued Macedonia in July 2009 for alleged torture, with a hearing before the ECtHR Grand Chamber occurring on May 16, 2012; Al-Nashiri sued Poland on May 6, 2011; and Babar Ahmad and others the UK in the ECHR. The latter case was decided in April 2012, holding that there would be no violation of the European Convention if the UK extradicted the appellants (defendants) to the

USA (which might not occur because of the prevalence of the US death penalty in federal law and in many states). Aside from their torture, the plaintiffs have also sued for the CoE member states' failure to conduct investigations, which are mandatory for any instance of likely torture. It is possible that future lawsuits might occur in the Court of Justice of the European Union, which enforces the Charter of Fundamental Rights, and possibly the CoE treaties on human rights, or more clearly the human rights principles on which both treaties are based. However, individual plaintiffs have much less access to this EU Luxembourg-based, Court than the ECtHR in Strasbourg.

In 2012, Poland reportedly became the first European country to charge a former intelligence agency official, after initiating formal investigative proceedings in January, following a classified prosecutorial review since 2008—an initiative for which it deserves credit, assuming the effort is not short-circuited. The other country named in CoE and EU parliamentary investigations, Romania, continues to deny any involvement, as Lithuania and Poland had done since 2006, when the prisons were closed following the allegations, especially by the first, 2006 CoE report. The initial PACE and EP parliamentary inquires of 2006–2007 also revealed a broad, secret collaboration in extraordinary rendition. Despite these investigations, much more relevant facts remain secret, including the full scope of collaboration with the CIA secret cooperation in the war on terror, along with all the extralegal acts of extrajudicial disappearances, torture, rendition to torture, and unauthorized use of airspace, as well as the extent of elected official cooperation in or ignorance of what occurred.

The first and most comprehensive effort came from the Special Rapporteur of the Law and Human Rights Committee of the Parliamentary Assembly of the Coe (PACE), Dick Marty, who documented the existence of these secret CIA prisons in Poland and Romania in 2006 and 2007—when few believed him. Following the November 2005 reports in *The Washington Post* and by Human Rights Watch (2005), the Council of Europe's Law and Human Rights Committee of the Parliamentary Assembly (PACE) appointed a Special Rapporteur, Senator Marty, who published two reports that were the basis of the two PACE resolutions calling for an investigation of the Polish Prison. The second, 2007 study led by Swiss and PACE legislator Dick Marty accused 14 European governments of permitting the CIA to run secret detention centers or carry out rendition flights over their territories between 2002 and 2005. He estimated that 1,245 CIA-operated flights had passed over the continent.

Similarly, on January 18, 2006, the EU's European Parliament (EP) established a Temporary Committee (Temporary commission on the alleged use of European countries by the CIA for the transport and illegal detention of prisoners (TDIP)). In February 2007, the TDIP's Report on detailed the complicity of most EU member states in collaboration with the CIA. It called for each state…antiterrorist legislation. The Report was approved in Plenary Session that same month. Subsequently, a 2010 Report by Manfred Nowak and Martin Scheinin, two UN Special Rapporteurs, another supranational institution, confirmed that Poland and Romania hosted a secret CIA prison, and added information on Lithuania secret prison (Cole 2009; United Nations 2010).

In February 2009, a second EP resolution was adopted to reaffirm the first Resolution's call for member states to follow 46 recommendations, especially to

investigate further, noting that there had not yet been any significant follow-up to the 2007 Report. A December 15, 2010, EP Resolution also regretted that other EU bodies also had not followed up on the TDIP Report, including not only the intergovernmental EU Council, but also the supranational EU Commission, and noted that the EP itself needed to take further action (EP Resolution 2010).

Kazimierz Marcinkiewicz, Poland's Prime Minister at the time, indignantly called the allegations "libel." In 2007, the EP also conducted investigations and passed resolutions which concluded that the CIA set up secret prisons in Romania and Italy and that 14 EU countries helped to set up these unlawful, secret detention centers. Those named by the EP were Austria, Belgium, Cyprus, Denmark, Germany, Ireland, Italy, Poland, Spain, Sweden, and the UK, and in the Balkans: Greece and Romania. It also concluded that European countries helped to send detainees to torture in countries like Egypt, where they were made to confess or reveal information, which often proved to be bogus, including the infamous accusation made by Colin Powell at the UN Security Council in February 2003 that erroneously linked Saddam's Iraq to al-Qaeda. On June 27, 2007, the PACE voted to approve Resolution 1562 and Recommendation 1801 endorsing the conclusions of the 2007 Final Marty report, specifically condemning the secret detention for torture of CIA HVDs in Poland and Romania.

The EP's February 14, 2007 report, following the interim Marty 2006 report, but preceding the final 2007 PACE report and legislative actions, also concluded that 1,245 CIA flights crossed the territory of Austria, Belgium, Cyprus, Denmark, Germany, Greece, Ireland, Italy, Poland, Portugal, Romania, Spain, Sweden, and the UK to travel to destinations where torture was likely and aided, abetted or turned a blind eye to this violation of the Convention on Human Rights and the European CPT. All these states cooperated with or tolerated secret CIA flights over their territory and also condemned them for not cooperating in the Investigation of the EP's TDIP. It also urged all EU member states to initiate investigations on the extent to which European sovereign airspace was offered, relinquished, or violated for CIA rendition flights.

As of July 2012, the European Parliament TDIP Committee was reconstituted by the EP's Civil Liberties, Justice and Home Affairs Committee on November 30, 2011 and held hearings on its most recent, March 15, 2012 report, "Alleged transportation and illegal detention of prisoners in European countries by the CIA: follow-up of the European Parliament TDIP Committee report." The report was written under the leadership of Hélène Flautre and approved by the TDIP on July 10, 2012. The EP was expected to take up the resolution later in the year.

Both the CoE and the EU are divided into intergovernmental units representing the individual constituent states and supranational units attempting to represent the interests of the entire organization and the European community. While some scholars insist that supranational organizations have no more autonomy than the member-states delegate, others suggest that states accept supranational autonomy on intractable problems (Hawkins et al. 2006, p. 20). For example, during the Romanian and Bulgarian accession process, the supranational European Commission was delegated authority to try to improve their compliance with the EU's Copenhagen

democratization criteria, given that both nations were less prepared than the earlier candidate countries; the Commission established new monitoring mechanisms, which earlier EU member states never had to face. Yet, economic and political considerations in the member-states often conflict with the desire to monitor human rights and democracy in transitional states. The European Commission, the chief monitor regarding established EU goals, still has difficulty achieving consensus. The Commission also makes strategic decisions about what the intergovernmental, Council of Ministers, representing all 27 member states individually, would accept regarding accession or new laws.

EU and CoE evaluations purport to be based on objective criteria and stated priorities, although in actuality, decisions reflect strategic calculations and political considerations. Much depends on whether the member states want the candidate country to join and then remain in good standing for reasons external to treaty compliance. For example, unready yet allied countries benefit from lower standards; countries with lower geopolitical value may face higher standards. Moreover, the prod of criticism is applied selectively, in part dependent on whether a country is likely to respond. Criticism can be official and public, or secret and confidential, or quiet and discreet as part of constructive diplomacy. Romania received much public criticism, especially when it was not admitted to the EU in 2004, but afterwards was privately assured that it would eventually join. However technocratic their formal evaluations, CoE and EU accession has been based more on intergovernmental politics, emphasizing rationalist goals of member-states more than supranational politics. For example, since 2002 Tony Blair, then UK Prime Minister, pushed for Romania's accession partly because of its support for Anglo-American foreign policy in Iraq and Afghanistan, as well as its geopolitical potential to withstand Russian hegemony.

Attention to human rights, democratization, and the rule of law, however, came primarily not from the intergovernmental institutions representing the collection of sovereign nations, such as the EU's European Council of Ministers and the Committee of Ministers of the CoE. Instead, to the extent that these issues mattered, the supranational units within the EU and the CoE have taken the lead. Both before and after their 2007 EU accession, conditions in Romania and Bulgaria received enormous international attention. Despite this, the effectiveness of the EU and CoE has been limited because of the ongoing importance of domestic politics and because of the intergovernmental units, who must agree to supranational recommendations within the CoE and the EU.

Romania

If Poland may be able to begin to bring officials to justice, Romania, by contrast, has followed the lead of the USA, and, among other things, provided a secret prison for CIA torture chambers. "No such activities took place on Romanian territory," according to a report of its Foreign Minister (as quoted in Marty 2011). This follows

a pattern of inadequate accountability in Romania that renders it one of the weakest EU member states in promoting the rule of law, with prosecutors taking as little interests in official torture as other forms of official criminality in that state. Romania has also been perhaps the East European state most obsequious of the USA, as well as the state most eager to become a NATO member.

Romania is one of three European countries (along with Lithuania and Poland) that secretly agreed to house terror suspects from 2002 until about 2006 in special detention without any public acknowledgment, though the Polish prisons were closed earlier. Some of its prisoners were brought from Poland to Romania, probably making Romania, probably making the Romanian site, whose code name was "Bright Light," the destination for the most feared detainees and perhaps the worst torture as well. The Associated Press reported how detainees were brought into Bucharest, after the CIA scrambled to find another site outside the USA and outside US law prohibiting torture on US territory:

> Shuttling detainees into the facility without being seen was relatively easy. After flying into Bucharest, the detainees were brought to the site in vans. CIA operatives then drove down a side road and entered the compound through a rear gate that led to the actual prison. The detainees could then be unloaded and whisked into the ground floor of the prison and into the basement. The basement consisted of six prefabricated cells, each with a clock and arrow pointing to Mecca, the officials said. The cells were on springs, keeping them slightly off balance and causing disorientation among some detainees. (Goldman and Apuzzo 2011)

The prison was opened after Poland closed its prison, and then Romania offered a site, among various that have been identified, in the basement of the National Registry for Classified Information (ORNISS) on 4 Mureş Street. This site, codenamed Bright Light, housed some who were later sent as some of the 14 "high-value detainees" to Guantánamo, while others were returned to their home countries. The building still has had a NATO flag flying in its front and is said to be one of the most secure in Romania, despite its urban location, according to the ORNISS Director Adrian Camarasan (Goldman and Apuzzo 2011; Wolverton 2011; Horton 2011). Unlike Lithuania and Poland's documented detention facilities in the countryside, Romania's secret facility was located in a nondescript building in the capital in the middle of a modest neighborhood.

Romania facilitated on its territory CIA torture, abuse, and extraordinary rendition from 2002 to 2006. This was condemned by the PACE and by the EP, yet is still denied by the Romanian government. Regarding Romania, EU discursive politics had, prior to 2004 and the election of Traian Băsescu as the country's second opposition president, already been centered on Romanian compliance with international norms. This pressure was legally consistent with the Romanian Constitution, which holds all ratified treaties as self-executing in domestic law.

At the time of B sescu's election, Romania was widely considered a consolidated democracy. Thicker definitions of democracy would indicate that Romania still had progress to make and that its achievements in some areas were in danger of decay. Romania had an acceptable record in protecting most civil and political rights, at least officially, in qualifying for member state accession, first to the Council of Europe and then to the European Union in 2007. Of course, in practice, its record on

respecting these rights probably did not really meet the EU's Copenhagen Criteria (Gallagher 2009). Improvements were clearly required, entailing institutional reforms providing public goods, preventing discrimination, and assuring accountability. As in other countries, international pressure for improved performance would have to be matched by domestic political will.

Romania after 9/11 offered the CIA several "black sites," secret prisons outside US territory, where activities that would be criminal on US territory could be perpetrated abroad (activities which, by the way, were criminal according to Romanian law). The relevant status of forces agreement between the USA and Romania was similar to those the USA established with other EU member-states. Yet, the decision to permit U.S. black sites—secret detention centers for interrogation, including the likely use of torture, and from which detainees were subject to extraordinary rendition to locations known to use torture—was undertaken in separate and secret protocols or communications that were probably not stated in the status of forces agreements, as confirmed in the recent finding of the ECHR on Poland's secret CIA prisons (Abd al Rahim Hussayn Muhammed al Nashiri v. Poland 2012).

Romania as a CoE member-state and the USA as an observer state of the CoE both have a legal obligation to obey the European Convention of Human Rights, as well as other relevant treaties banning torture and cruelty, and extraordinary rendition to torture. Romania legally should have insisted that no incommunicado detentions and torture occur on bases on its territory, as well as banning air flights to other countries practicing torture. As soon as Romania understood that the CIA was conducting these crimes on its territory, it could have refused to cooperate with the CIA. Despite a documented CoE investigation, Romanian security officials and their cabinet supervisors have never been held to account. Neither have the adamant, subsequent denials by President Băsescu and Members of Romania's Parliament, who conducted a whitewash investigation, resulted in any domestic political scrutiny or embarrassment, let alone prosecutions, have occurred in Poland and Lithunania for the same type of activities.

While the USA had largely ignored Romania in the early 1990s, the agencies of coercion for the two countries slowly developed extensive relationships, beginning in 1993 when Romania became the first country in NATO's Partnership for Peace. Prior to assuming office, President Băsescu presumably was unaware of the secret promises Romania had made to NATO and the USA in order to be considered for membership. Concerns for national security combined with a culture of impunity and a desire to please the USA induced Romania to support a cover-up, despite obvious human rights violations. The lack of domestic political will, in the face of Romanian military, intelligence, and security agency secrecy, prevented accountability. The case is important not only as a departure from explicit Romanian ethical and legal commitments, but also because it shows Romania's lack of democratic control over those agencies, even to the limited extent of a credible state or journalistic investigation and report. Instead, indignant denials from both camps have ensued.

Rapporteur Marty in 2006 named Romania and Poland as the two key countries providing black sites, aiding and abetting torture and extraordinary rendition and turning a willful blind eye to these crimes. Civilian planes had flown into clandestine

airstrips for refueling or holding detainees on their way to Guantanamo Bay Naval Base and other torture interrogation centers in CIA-controlled black sites and in other countries. Romania tried to contradict Marty's findings with fabrications. A subsequent report by Marty in June 2007 provided more extensive detail, naming 14 CoE countries that participated in extraordinary rendition to torture, listing the names for some of those individuals rendered to torture, including Khalid Shah Mohammed, the chief planner of 9/11. Twenty-two countries in Europe were also said to have used national security doctrines to prevent investigations, hearings, and prosecutions. He concluded that secret detention facilities in Romania and Poland housed the enforced disappearances and torture of 14 HVDs (Danner 2009a, b; ICRC 2007) who were later transferred to Guantanamo, as well as the extraordinary rendition to torture dozens of alleged lower-ranking terrorists rendered to countries like Egypt, Jordan, Syria, Uzbekistan, and Morocco for extreme interrogation (Marty 2007).

The majority of the detainees brought to Romania originated from Afghanistan and Iraq. They were held in a facility similar to the notorious Bagram Air Base in Afghanistan (Marty 2007, para. 133–135; *Taxi to the Dark Side* 2007). Other facilities included the Smardan Training Range, Babadag Training Area and Rail Head, Mihail Kogalniceanu Air Base, and the Cincu Training Range. Marty concluded that Romania agreed to the American demand that all operations be kept secret and that US personnel were to have exclusive access to the facilities. As a result, Romanian authorities felt that they could deny direct knowledge of what was going on. According to Marty's 2007 Report:

> Concerning the transfer of prisoners, from the first moment we said that Romania collaborated with the United States and with other members of NATO. Aircraft landed in Romania and transported persons. We did not and do not know who the persons are because, do not forget, the aircraft are under the authority of the countries where they are registered. The countries in which the airports are located do not have legal instruments to see what happens on board. (Marty 2007, para. 156)

After a brief period, when some officials felt the controversy had dissipated from the reports by the PACE Special Rapporteur and the EP Special Committee, further developments emerged. First, the EU demanded in 2009 that its member states conduct independent investigations; the EU Commission President José Manuel Barroso made such a demand in August 25, 2009, after hearing allegations that Lithunaia hosted CIA detention sites.

Journalist accounts in 2011, based on former intelligence officials, who described the location of the Romanian prison and identified pictures of the building, reported that the Bucharest prison was located in the basement of an archive that housed classified information on NATO and the EU. Khalid Sheik Mohammed and other Al-Qaeda operatives were kept there until 2006, when they were transferred to Guantánamo after President Bush admitted to the existence of these secret detention facilities. High-value detainees (HVDs) Khalid Shah Muhammed and Abu Zubaydah were kept for 3 years in Poland and the former was water-boarded over 180 times during the first few months (Jost 2010, p. 49). Romania housed other important HVDs, plus insurgency troops from Afghanistan and Iraq. Flight records show that a Boeing 737 used by CIA subcontractors flew from Poland to Bucharest in

September 2003, carrying Mohammad and Walid bin Attash, who were implicated in the USS Cole bombing. Other detainees there included Ramzi Binal-Shibh, publicly identified as the 20th highjacker who could not get a visa to the US before 9/11; Abd al-Rahim al-Nashiri, the mastermind of the USS Cole and other attacks; and Abu Faraj al-Libi held in Romania from 2003 to September 2006, the number three in command of al-Qaeda from 2003 until his capture in 2005. Detainees flown to Romania were often transported by the CIA contractor, Richmor Aviation, Inc. (Marty 2011a, b). The facility was probably closed just before or after President Bush publicly admitted on September 6, 2006, the existence of such secret sites, and some or all of the most dangerous and valued detainees were transferred to Cuba. There is some evidence that all such secret facilities were not closed by Bush, and President Obama retained exceptional authority, if national security is invoked, in his administrative regulations issued on his second day in office, which officially closed all such secret detention sites, which President Bush had said that had closed in 2006 (Mazzetti and Glaberson 2009).

Following hearings on Marty's first comprehensive report in January 2006 as Rapporteur to the Legal Affairs and Human Rights Committee, the PACE enacted Resolution 1754 (June 27) that called on the CoE's Committee of Ministers to take measures to assure that CoE member-states no longer violate fundamental human rights. Unfortunately, the intergovernmental Committee of Ministers, which represents state interests, has effectively ignored the PACE Resolution 1754 and done almost nothing, deferring action to the individual member-states, many of whom have an interest in not being investigated for alleged intelligence abuses.

The EP began in April 2006 its own investigation of the more than one thousand secret flights since 2001, as identified in the 2006 Marty report. On July 6, 2006, even before Marty had finished his full investigation, the EP endorsed the 2006 Marty Report to the CoE, along with several companion resolutions from the Swedish Ombudsman and Swedish Parliament (EP Resolution 2006). The Report was written under the leadership of Claudio Fava and adopted in plenary session on February 14, 2007 (382 MEPs in favor, 256 against, and 74 abstentions). It asserted that the CIA operated at least 1,245 flights on EU territory and had housed detainees in Romania and Poland (Their torture was revealed by a secret Red Cross report leaked to Mark Danner and published in 2009, despite the US euphemism, "enhanced interrogation techniques.") (Marty 2007; ICRC 2007). Marty's counterpart, as EP Rapporteur, was Giovanni Fava from Italy. The 2007 EP Resolution was not quite as systematic as that of the PACE, but it did name Romania as one of 14 countries tolerating CIA rendition flights over its territory.

Unfortunately, neither the supranational arm of the EU (the European Commission), nor its intergovernmental arm (the European Council) have taken any actions in response to the EP Resolution. Torture victims who have been released may try to sue for damages no longer held by the USA at Guantánamo Bay Naval Base or elsewhere may sue for damages in the ECtHR and in the Court of Justice of the EU (foreigners have standing in both courts). Specifically, the resolution criticized the incomplete investigations conducted by the Romanian Senate, which involved no interviews of NGOs, journalists, or Romanian employees at airports. Romania's report, conducted by a Senate committee, was kept secret, except for its conclusions,

which denied all involvement, as well as the existence of any secret detention facilities. The Resolution mentioned that Romania had permitted at least 21 CIA stopover flights, at least two of which were headed for Guantánamo and the rest to countries linked with torture. It noted that Romanian authorities appeared to exercise no control over CIA flights into Kogălniceanu Airport. Romania did provide an accident report on a flight from Bagram Air Base, Afghanistan, that crashed in Bucharest, after which its seven passengers disappeared.

While the Romanian authorities politely met the Members of the TDIP, Poland's authorities refused to meet with them. There were two meetings with Interior Ministers, but no investigations conducted by any independent authorities, such as the façade of independence from the legislative branch of Romania. The Resolution named 11 CIA stopover flights in Poland and 64 in Greece.

Romania's official parliamentary enquiry issued an emphatic denial, as originally did Poland's. Instead of searching for truth, the enquiry whitewashed government officials of any wrongdoing. Romanian government officials told military security staff to investigate within the limits of the law but, since officials already had determined that nothing ostensibly was illegal and all was in accord with the 2001 NATO treaty, there was nothing to report. Romanian parliamentarians, like the security officials collaborating with the CIA, could then effectively deny that they had turned a blind eye and allowed the CIA the full pleasure of its operations. The Marty report argued that the Romanian responses "were characterized by obfuscation, inconsistency and genuine confusion." The Chairperson told Marty that it is possible that the Romanian Senate had not completed its investigation, but no further action was ever taken. Marty concluded that the Romanian authorities ignored:

> far-reaching and unexplained inconsistencies in Romanian flight and airport data; the responsive and defensive posturing of the national parliamentary inquiry, which stopped short of genuine inquisitiveness; and the insistence of Romania on a position of sweeping, categorical denial of all the allegations, in the process overlooking extensive evidence to the contrary from valuable and credible sources. (Marty 2007, para. 228)

He continued:

> I was confounded by the clear *inconsistencies in the flight data* provided to my inquiry from multiple different Romanian sources… There presently exists *no truthful account of detainee transfer flights into Romania*, and the reason for this situation is that the Romanian authorities probably do not want the truth to come out…The (parliamentary) Committee does not appear to have engaged in a credible and comprehensive inquiry. The Romanian national delegation to PACE, in their carefully worded reply, ruled out the existence of unlawful CIA activity and ultimately reverted to their (sic.) initial position of complete denial. (Marty 2007, para. 228–231, emphasis in original)

Then EU Justice and Security Commissioner Frattini requested an explanation from the governments of Poland and Romania regarding the accusations made in the Marty reports. Doris Mircea, Romania's spokesperson in Brussels, replied in a November 2007 letter that a committee of enquiry set up by the government had concluded that the allegations were unfounded. She claimed, "No person was kept illegally as a prisoner within Romanian jails, and no illegal transfer of detainees passed through Romanian territory" (BBC 2007).

The most important lesson from this story is that there were minimal policy changes as a result of Marty's two reports and the PACE and EP Resolutions. Romania's participation in extraordinary rendition sparked almost no call for greater transparency or accountability, if only because few in the country have appeared to care Romania. Romania has not changed its legal and political procedures to prevent the recurrence of torture and extraordinary rendition on its territory, or to reduce the autonomy and impunity of its military and intelligence agencies for human rights abuses. Opposition political parties have been disinterested, given that Romania's military and intelligence agencies were involved at some point in CIA torture. Explicit accusations from Human Rights Watch, the PACE, and the EP, and in 2011–2012, explicit press reports of the precise prison used in Bucharest, have not inspired the human rights community or the media in Romania to make a serious investigation, thereby acquiescing to the government's denials. It is particularly surprising that its human rights NGOs, including the distinguished Romanian Helsinki Committee (APADOR) that specializes in police and prison issues, have conducted no credible study and made few statements regarding the protection of human rights in the war on terror. Neither has the EU or the CoE imposed any sanctions on Romania or on other countries as a consequence of the two parliamentary Resolutions adopted. Romania's parliamentarians at the PACE have not responded to the documented facts by demanding accountability in their domestic legislature, which is the duty of PACE members. The independently elected MEPs of all political persuasions, who are not implicated by the Romanian legislature's whitewashed investigation, have not responded either.

Kosovo

Since its February 17, 2008, Declaration of independence, Kosovo, recognized by the USA and the majority of EU countries, has not investigated these allegations. While the EU could use its incentives of visa liberalization and eventual Kosovo candidacy for EU membership to demand greater accountability, the EU has focused on its effort to negotiate normalization of relations with Serbia instead. The lack of EU pressure also reflects the fact that Prime Minister Thaçi, the former leader of the Kosovo Liberation Army, presides over a slim parliamentary majority whose opposition has been Euro-skeptic. Already, the party in power in the *de facto*, autonomous Serb zone in the north with the capital of Mitrovica is the ultra-nationalist Democratic Party of Serbia, whose presidential candidate ousted the pro-EU, incumbent President of Serbia, Boris Tadić, in the presidential elections of May 6, 2012.

The TDIP Resolution also pointed to the refusal of NATO to provide access to the EU, as well as the European Committee for the Prevention of Torture, to the KFOR Peacekeeping Mission's detention facility at Camp Bondsteel in Kosovo. It suspected that the CIA and/or NATO operated secret detention facilities at the latter and/or elsewhere in Kosovo. The TDIP heard testimony from the Kosovo

Ombudsman, Marek Antoni Nowicki, that from July 1999, detainees were routinely brought to Camp Bondsteel, with only the KFOR commander, usually a US officer, able to review that decision. The European Committee was only able to visit Kosovo's prisons and detention centers in July 2006. Subsequent CPT visits to the UN Mission in Kosovo, such as in 2010, have, as with other countries, shown no evidence of detainee mistreatment of terrorism suspects.

Bosnia and Herzegovina

The government of Bosnia and Herzegovina is the *only* European country to admit and accept responsibility for its participation in the arrest and rendition to the CIA of six Bosnians, all of Algerian ethnicity on January 17, 2002, according to the 2007 EP report. All international authorities were forewarned that Bosnian authorities were going to hand over the six suspected terrorists to the USA, and none apparently took any action to prevent it, according to the testimony by the OSCE High Representative for Bosnia, as well as the President of the Human Rights Chamber. The Bosnian troops then transferred the six to USA soldiers in NATO's SFOR peacekeeping mission in Bosnia, who then rendered them to Guantánamo. The NATO soldiers ignored or disobeyed an order by the Supreme Court of Bosnia to release the six. There was also an explicit, binding, temporary ruling by the Human Rights Chamber for Bosnia and Herzegovina, which was a hybrid court, with eight of the 14 judges appointed by the CoE's Committee of Ministers. One of the latter was Manfred Nowak, who became the UN Special Rapporteur on Torture and who verified this NATO violation in the TDIP. The EP Resolution reported that the USA threatened to close its Embassy and end diplomatic relations unless Bosnia arrested the six suspects on terrorism charges. (It is not clear why NATO did not arrest them itself.) In addition, the US commander of SFOR refused to answer any questions about his actions, since he claimed that as a USA military officer, he was not subject to their authority, even though he was leading the peacekeeping operation under the legal authority of the UN Security Council. Subsequent EP Resolutions called for further clarification of the role of the Bosnian government, as well as NATO's IFOR and SFOR missions' responsibility for "disappearing" suspected terrorists.

Lithuania

Since the 2007 TDIP report's publication, two more black sites were identified in Lithuania (and one in Romania). Elite LLC, Inc. purchased former riding stables/academy in Antaviliai, Lithuania. Incorporated in July 2003, Elite purchased the site and permitted Americans to build a warehouse there, until it was sold to the Lithuanian Security Services in January 2007. Secret rendition flights came to

Vilnius and Palanga from Bucharest and Morocco, without any border guard checking or landing flight reviews, on orders from the Lithuanian Security Services.

The *Seimas* parliament eventually undertook, in November 2009, an independent enquiry, some time after ABC News reported the CIA used a detention site outside Vilnius provided by the government, where "high-value detainees" were held up to the end of 2005. The Chair of the Committee on National Security and Defense, Arvydas Anusauskas, reached the conclusion that there was not enough evidence to justify opening a formal parliamentary enquiry. However, when CoE Commissioner for Human Rights Thomas Hammarberg visited in October 2009, the Commissioner and the Lithunian President Grybauskaite publicly expressed skepticism about the preliminary enquiry. Then, on November 5, 2009, the Lithuanian parliament's Committee on National Security and Defense investigated and reported 2 months later that Lithuanian agents assisted in at least five air flights between 2003 and 2005 after the CIA asked the Lithuanian Secret Service (SSD) to provide detention facilities for terrorist suspects. The first was reportedly not used, and the use of the second, in Antaviliai near Vilnius, could not be reliably established. The quick investigation also failed to determine the complicity of officials, including SSD chief Povilas Malakauskas and Foreign Affairs Minister Vygaudas Usackas. The main recommendation of the parliamentarians' report was to open a judicial investigation. The latter was started in the next month on January 2010, but was suspended a year later in January 2011 because of an "information shortage," which, if true, resulted from the refusal of the US and the Lithuanian government to cooperate by revealing relevant information. Many unanswered questions remain.

While parliamentarians toured the two sites, NGOs and journalists could not. The CPT also visited them on June 14 and 18, 2010. The CPT report, published with Lithuania's consent, as it is standard CPT procedure, concluded that "the premises did not contain anything that was highly suggestive of a context of detention; at the same time, both of the facilities could be adapted for detention purposes with relatively little effort" (CTP Report 2010). According to the UN, beginning in 2004, eight terrorist suspects were held in Lithuania for more than 1 year until late 2005. Two additional rendition fights occurred on 20 September 2004 and 28 July 2005 (UN Document A/HRC/13/42, para 120 et seq). However, the UN Rapporteur's Report did not provide additional details.

Macedonia/FYROM

A German citizen of Lebanese ethnicity, Khalid El-Masri, sued "the Former Yugoslav Republic of Macedonia" (FYROM) in the ECtHR in September 2009. This is the first case among many to come on complicity with secret detention and rendition to torture, since the ECtHR allows plaintiffs from anywhere in the world to sue CoE member states, provided that they are within their jurisdiction. The Court asked the government of Macedonia for its responses to an initial set of enquiries.

El-Masri had been arrested on vacation in Macedonia on December 31, 2003, by Macedonian police near the Serbian border and held by government agents for 23 days in a hotel without any consular access before being transferred to CIA agents in Skopje on January 23, 2004, despite knowing that he would be tortured or cruelly treated there and would be rendered by the CIA to torture and/or cruelty in Afghanistan. After his interrogation there, it became clear that El-Masri was not a terrorist, and his arrest was a mistake. At the time of these events, the EU's PROXIMA police mission was part of the FYROM's Ministry of Interior and appears to have collaborated with the Security and Counter-Espionage Service (DBK) which apparently blundered when it arrested El-Masri and later transferred him to the CIA. The EU Council or its staff has information on this case, which this intergovernmental arm of the EU has withheld from the supranational EP.

To this day, Macedonian authorities have denied that it rendered El-Masri to torture in Afgahnistan, first through its; first through its April 3, 2006, response to Terry Davis, the CoE Secretary General's Article 52 Inquiry and then in the conclusion of the May 2007 domestic parliamentary committee, conceding only that Macedonian authorities had not abused their power. El-Masri became the first rendition victim to sue a CoE member state, Macedonia/FYROM, in the ECtHR on July 20, 2009. The Court accepted the case, which only occurs in about one percent of cases filed, because El-Masri's complaint on October 6, 2008, to the public prosecutor in Skopje for illegal detention and abduction resulted in no investigation. No evidence was adduced or discovered that contradicted El-Masri's account of the events, as well as Germany's non-involvement, according to an investigation by the Munich Public Prosecutor, Martin Hoffman, who testified before the European Parliament on July 11, 2006. Hoffman noted, "isotope samples of his hair had indicated a 'significant change in living conditions' during the time he claims to have been imprisoned." Experts concluded that "the tests did not contradict the report of El Masri" (European Parliament Press Release 2006). The issue is likely to be discussed in the accession process to the EU of Macedonia/FYROM by both the Commission's review process and perhaps ultimately in the Council, where a final, unanimous vote is required for the FYROM's accession to EU membership.

The USA has merely refused to comment and denied access to the US courts, a decision upheld by the US Supreme Court on the basis of the national security secrets doctrine. Germany has denied any involvement, though a parliamentary enquiry was stalled by the executive's invocation of the state secrets doctrine to prevent any further enquiry into this or any other form of German collaboration with the CIA. Much testimony by NGOs, as well as from innocent victims, provided important evidence at the hearings. However, the German executive branch refused to provide important information or offered a heavily edited for "state secrecy" version, and civil servants were prevented from commenting extensively at *Budestag* hearings.

Subsequently, a group of *Bundestag* members appealed to the Federal Constitutional Court to recognize the parliamentary right to information to trump the state secrets doctrine (Marty 2011a, b). The Constitutional Court found in favor

of the parliamentarians, though its judgment came too late, on June 17, 2009, after the legislative committee had finished its investigation and the *Bundestag*'s term of office was near completion. The Court ruled that if there is a conflict of rights, the government's desire to protect internal decision-making processes versus parliament's and the public's right to know, specific reasons have to be given to justify withholding information. Moreover, parliaments do and should enforce their own rules to protect state secrets. The decision should reduce the executive's monopoly on national security information, especially where there are *prima facie* criminal acts involved. The Court would decide in the future whether or not the reasons provided by the executive branch merit continued nondisclosure, with embarrassment not constituting grounds for justification.

A TDIP delegation was told officially by the Macedonian/FYROM Republic that it denied arresting and holding el-Masri before handing him to CIA authorities in the country's capital. The Macedonian/FYROM parliament refused to investigate even after the German enquiries had determined these arrests and rendition to torture.

Conclusion

The efforts of the EU and CoE to discourage collaboration in extralegal human rights violations in counterterrorism have set a precedent of exposure and some embarrassment. In political cultures with strong civil liberties traditions and institutions, such as Germany and the UK, there have been relatively strong investigations, which nevertheless have been constrained by the invocation of national security privileges, as well as administrative foot-dragging. The EU and CoE parliamentary studies have led to the documentation of specific torture chambers in the three CoE/EU member states, with the acknowledgment in Poland, semi-acknowledgment in Lithuania, and continued denial in Romania. In newer democracies, with weaker civil liberties traditions, such as Poland and Lithuania, the truth emerged as a result of NGO, CoE, EU, and UN monitoring, which invoked enough domestic outrage to initiate investigations. In weaker democracies, where the rule of law is hardly established against law-breaking top officials in general, such as Romania and Macedonia/FYROM, blunt denial of any responsibility has stalled any investigations or outrage, even in the face of unequivocal evidence. These precedents have raised the costs of undertaking extralegal action. Most likely, following new national security threats, intelligence agencies will undertake counter-terrorism collaborations of marginal legality as opposed to outright illegality. The costs from the risks of exposure of violations are too high, because reputations and soft power are diminished. Liberal theories that suggest relativist, contextual opportunities to mitigate power politics better explain this pattern of likely soft violations than realism, which would predict harder violations with impunity. European institutions, in particular, reflect the human rights culture that has made inroads, due to interna-

tional institutions with reputational and discovery powers such as the CoE and the EU. The sustainability of counterterrorism based on international law is stronger in Europe than in USA because the CoE and the EU insist on the application of human rights law, as well as international humanitarian law, while the USA insists that only its particular interpretation of the latter applies, including its own definition of minimum standards. While the severity of violations will undoubtedly decrease in the future, impunity and secrecy will undoubtedly hide future violations in the USA, whose human rights compliance is not reviewed by a regional court, legislature, or human rights body, as occurs in Europe. The difference is that European democracies, assuming no institutional shocks from the economy or terrorism itself, will not likely partner with the USA again in the commission of systematic rights violations while conducting joint counter-terrorism operations.

Still, Europe has not imposed sanctions. The legal obligation to investigate, and where appropriate to prosecute torture and rendition is as unequivocal, based on Article 12 of the Convention against Torture among other treaty sources, as the obligation to refrain from torture in both human rights and war law. Following the publication of the ICRC report on the "high-value" detainees in 2009, there could no longer be any debate whatsoever as to whether detainees at the European black sites in Lithuania, Romania, and Poland were tortured, with only the latter proceeding with prosecution. Both the EU Both the EU and the CoE remain dependent on press leaks and domestic investigations to discover how the intelligence agency collaboration has occurred. Both European countries and the USA have refused to undertake any formal truth commissions. Congressional enquiries have spasmodically revealed much of what has transpired in the USA, as with the serious parliamentary enquiries in Lithuania and Germany. Italy and Poland have undertaken prosecutorial investigations. Kosovo admitted its complicity in extraordinary rendition, while FYROM still abjectly denies its documented involvement. Only in the UK has the executive branch undertaken a formal study. In January 2011, an influential Amnesty International Report concluded that the failure of the Council, the intergovernmental, ruling body of the EU, to respond to the 2007 Report and Resolution was a dereliction of duty, a position that was reiterated by the EP in its special hearing and resolution of June 2012.

The EU and the CoE have not imposed sanctions, in accordance with Article 7 of the Treaty of the EU for breaches of the principles on which the EU was founded, such as human rights, or even imposed any financial penalties in Commission funding. In Commission funding and the CoE's Committee of Ministers' Recommendation No. R(92). The EU Justice, Fundamental Rights and Citizenship Commissioner, Viviane Redding (now the Commission Vice President), has not even said a word about the failure of EU states to investigate rendition and torture on its soil. The only action taken by the Commission was to send three letters to the three EU states hosting black sites, but no follow-up action occurred. This surprising result from a supranational institution of the EU supports the realist thesis that security matters have only limited agency granted to international organizations by member states. In this case, the intergovernmental Council of the EU has, by its very absence, acted more like the intergovernmental UN Security Council or the Organization of American States,which do

reflect state power more than supranational commitments and institutions. The firewall to protect states from accountability and to reinforce impunity still exists to a significant degree. Despite the reforms of the 2009 Lisbon Treaty, which were supposed to empower the European Parliament, the latter remains powerless to enforce its will on EU member-states to investigate human rights violations in counter-terrorism.

The extent of dummy flight plans and other forms used to hide the logistics provided by many European countries suggests extensive collaboration and cover-up of these criminal activities, which could not have been achieved by the CIA alone. The country where the most extensive forms of torture were conducted, Romania, has conducted the least serious investigation, based on its culture of impunity and fear of domestic and foreign intelligence agency retaliation against the former communist elites that still largely control Romania.

The three countries confirmed as having hosted CIA sites demonstrate three models of accountability: Poland has moved toward transparency and possibly criminal prosecution. Lithuania acknowledged hosting a site, but halted its criminal investigation before it could follow the evidence. Romania has denied all the evidence of culpability. Its reaction is similar to its anti-imperial perspective on most foreign pressure: a game to be manipulated to its advantage, but without any commitments to human rights values that the CoE and the EU represent when national security interests conflict. For example, the new, Social Liberal Union (USL) government of Prime Minister Victor Ponta in July 2012 impeached President Băsescu and then decreed that the Constitutional Court could not review the action, as well as decreeing that the subsequent plebiscite would only require a majority of the electoral turnout, rather than what its Constitution requires, a majority of the registered electorate. When the German and US governments criticized these decrees as violating the rule of law, the government condemned foreign influence coming from states that had routinely broken international law in the previous decade. In the end, the second plebiscite to remove Băsescu from the presidency failed.

Responsibility to protect human rights requires a commitment of will from a range of both international and domestic actors. The overwhelming documentation unless no one in Romania, Poland, Lithuania, Kosovo, FYROM and Germany is interested in truth and justice on this issue. Until Romania, Kosovo, and FYROM strengthen democratic accountability in intelligence operations, Romania's law-free zones for intelligence agency collaboration with systematic human rights abuses will occur again, quite likely in the context of counterterrorism pressures.

The lack of human rights implementation shows the weakness of the European reform process. The EU and CoE send ambiguous signals reflecting intergovernmental divisions. Romania is not the only recent EU member-state country to experience erosion in democratic governance; Bulgaria and Hungary also constitute notable examples on this front. These negative developments elsewhere do not augur well for the future of human rights in Romania, Kosovo and FYROM. Reform requires synchronization and interaction within and between the international and domestic levels of politics. Since such coordination and political will are rare, Europe effectively signals that its countries are free to ignore or meet human rights laws at their discretion. International pressure from the PACE and EP have been

much stronger than what has been placed before in counter-terrorism and what the US has felt worldwide, but they remain insufficient, even in Europe and the Balkans. These two supranational branches of the CoE and the EU, along with future cases to be considered by the supranational ECtHR, have nevertheless produced a new agenda that has strengthened these laws, despite the lack of complete investigations and punishment. Now, explicit discourses and institutions check on compliance on the prohibitions on torture, extraordinary rendition through supranational and NGO monitoring and domestic investigations. However, deepening democracy, human rights protections, and the rule of law require a cooperative constellation of domestic forces and institutions based upon sustained political management and direction in both the accession and post-accession processes. So long as these international institutions and incentives remain in play, international pressure could still overcome the previous inability to effectuate domestic reforms. However, the current economic crisis threatens to undermine the focus of these supranational efforts at protecting human rights and accountability in counter-terrorism.

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Chapter 6
Combating Human Trafficking Through Transnational Law Enforcement Cooperation: The Case of South Eastern Europe

Roza Pati

Introduction

In the early 1990s, when human trafficking[1] was just surfacing in my homeland of Albania, I was finding it hard to believe that the figures and stories that were making headlines in Italian newspapers about Albanian girls exploited as prostitutes, were true. I found those figures to be exaggerated, and I considered them at the most a half-truth, sometimes sheer propaganda—fueled, I perceived, by the undesirability of illegal Albanian migration to Italy. Being a local politician and an elected government leader, and knowing the moral code that reigns in my district and my nation from times immemorial, I could not perceive, and neither could I accept, that Albanian girls or women would prostitute themselves on the streets of Europe. However, I was unconsciously closing my eyes. I was caught in the minor detail of national pride, and I was missing the critical point: those girls and women were not prostituting themselves voluntarily; they were cheated, lied to, promised a better life and an honest lucrative job, then trafficked, threatened, violated, and forced to prostitute themselves at gunpoint. They were coerced to live the earthly hell of slavery, the utmost human indignity. Their "bosses" were exploiting them for financial profits.

I was brought to my senses by a dedicated priest, Don Antonio Sharra, an Italian priest who had come to serve the Catholic community in my district. He first led me to

[1]Throughout this chapter, the terms "human trafficking," "trafficking in human beings," and "trafficking in persons" will be used interchangeably.

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his parish, where a symbolic graveyard carried crosses signifying the missing girls, then to the homes of missing girls in my own district, to experience the pain of listening to the broken hearts of their families, and then to the streets of Rome, Turin, and Milan to see the horror with my own eyes and to talk to the very Albanian girls who were scared to death of their pimps, who were wandering around like vultures ready to prey on their victims. These poor girls could not even tell me the truth of their infernal fate. I never forgot the petrified look in their faces nor the nervousness reflected in all of their being. In their silence, they were crying for help. I realized that we, the society, the government had abandoned them, and I made a resolution that I would try my best to do my share in bringing an end to this brutal and utter violation of human dignity. Almost two decades have passed since then, and I am happy to see the awareness that exists about this horrendous crime in the world today. But our job is not yet complete—far from it. The perpetrators have become ever more sophisticated in the routes and means they use, and they are ever more difficult to catch. In the meantime, as the victims rise in numbers, we hear of very few survivors rehabilitated and few cases of prosecution worldwide. That tells us that we are missing out on something important: proper coordination and cooperation across and within national borders. Whether we talk about prevention, victim protection and integration, retribution or deterrence, the present-day reality of one of the ugliest phenomena of our time requires finely tuned policing and prosecuting cross-nationally. Serious attempts at eradicating this odious scourge of humankind, the trafficking and commodification of beings of our own kind, beings with a human face, necessitates concerted efforts of all structures of our international world order: governmental, nongovernmental, and intergovernmental.

In order to effectively address this horrendous crime, the attack has to come from all angles, from the sharpening of our efforts to investigate and prosecute its perpetrators to devising policies aimed at all those who patronize, or in other ways foster the multibillion industry of trafficking in human beings. As this is a complicated crime involving countries of origin, transit, and destination, its policing, prosecuting, and adjudicating transcends national jurisdictions and requires strong networks of transgovernmental crime control. This article aims at exploring the framework and practice of such cooperation, *inter alia*, through the case study of some countries in the Balkan region.

Delimitation of a Transnational Problem: Trafficking in Human Beings

When talking about trafficking in human beings from a human rights perspective, one immediately associates this concept with the protection of the victim-survivor, efforts to rescue, restore and rehabilitate them back to normalcy, but also with the approach of addressing the root causes of human trafficking that would lead to effective prevention of the phenomenon. Another angle in the anti-trafficking approach, still within the realm of human rights, and deriving from

the duty of the state to protect human rights,[2] is the tool of criminal law and justice.[3] In many cases properly labeled as a transnational crime or transnational organized crime, it requires engagement of an international law enforcement community very much committed to requisite cross-border interaction.

Transnational crime is not a new phenomenon; however, it has been perceived to have spread exponentially because of more freedom in the movement of people, goods, and services with the development of globalization during the last few years.[4]

Human trafficking is no different. It most often involves cross-border circulation of criminals and their "merchandise"—human trafficking victims, as well as circulation of proceeds from this criminal activity.[5] Considered a conservative calculation, the annual profits from transnational organized crime are estimated to be between 500 and 1,500 billion dollars,[6] whereas the proceeds from trafficking in human beings range from Interpol's 2001 estimate of $19 billion[7] to a business group's finding of over $31 billion a year.[8] Transnational organized crime, including human trafficking, weapons, and drug trade, continue to pose a great threat to the territories and population of many countries, and has been described as the dark side of globalization.[9] It is one of the most serious security problems in our contemporary

[2] For a specific understanding of states' duties in the context of human trafficking see Roza Pati, *Beyond the Duty to Protect*: *Expanding Accountability and Responsibilities of the State in Combating Human Trafficking*, in The Diversity of International law: Essays in Honour of Professor Kalliopi K. Koufa 319 (Martinus Nijhoff Publishers 2009).

[3] International human rights bodies increasingly add positive state duties to criminalize and prosecute certain violations of human rights by private actors to the content of international human rights treaties. For an example in the field of human trafficking, see the European Court of Human Rights decision in the 2010 decision of *Rantsev v. Cyprus and Russia*. For a detailed analysis, see Roza Pati, *States' Positive Obligations with Respect to Human Trafficking*: *The European Court of Human Rights Breaks New Ground in* Rantsev v. Cyprus & Russia, 29 Boston University Journal of International Law 79 (2011).

[4] Peng Wang & Jingyi Wang, *Transnational Crime*: *Its Containment Through International Cooperation*, Asian Social Science 5, No. 11, November 2009, at 25.

[5] Council of the European Union, *Action-Oriented Paper on strengthening the EU external dimension on action against trafficking in human beings*; *Towards Global EU Action against Trafficking in Human Beings*, 6865/10, GS/ACA/tt, Brussels, 25 February 2010.

[6] Peng Wang & Jingyi Wang, *supra* note 4.

[7] Nico A. Gemmell, Human Traffic*king*. *The Effects of Modern-day Slavery on the Global Economy*, at http://www8.georgetown.edu/centers/cndls/applications/posterTool/index.cfm?fuseaction=poster.display&posterID=1752.

[8] SMWIPM, *The Business Community against Human Trafficking*, at http://www.endhumantraffickingnow.com/public/structure/2.html.

[9] Peng Wang & Jingyi Wang, *supra* note 4. *See also* Tom J. Farer, Transnational Crime in the Americas 195 (1999).

world,[10] one of the six kinds of national and international security threats permeating our world, as recognized by the United Nations in 2004.[11]

This reality leads to the conclusion that transnational criminal networks, which are far more complex and pervasive, are creating new challenges for national, local, and international authorities in their efforts to control them. Hence, the topic about transnational criminal containment through international cooperation has become an increasingly interesting issue for criminologists and governments alike.[12] Both are exploring new ways of cooperation in order to receive information, to analyze risks, to know trends, and to police effectively, through designing comprehensive anti-trafficking strategies. Such strategies cover global and regional issues and have proved to be of varying efficacy.

In the Balkan region, trafficking in human beings started in the early 1990s[13] and it remains a major concern. It was in 2001 that the International Organization for Migration (IOM) reported that the Balkans had by then emerged as a major route of trafficking into the Western Europe, but also within the region itself.[14] According to that report, Bosnia–Herzegovina and Kosovo were primary destination countries; Moldova, Romania, Ukraine, and Bulgaria were mostly countries of origin; Albania, mostly known as a transit country, was also a country of origin for victims trafficked mostly in Western Europe; Croatia and Slovenia were generally considered to be transit countries; whereas, Macedonia, Serbia, and Montenegro were not clearly classified.[15] Later in 2002, Helga Konrad, the OSCE Special Representative on Trafficking in Human Beings had stated that "the Balkan route is one of the best known routes used by organized crime and human traffickers, where victims are sold to brothels and on markets, and moved onto Albania, through Slovenia, Hungary and into the European Union."[16] It seemed that there was a sort of clear passage originating

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[10] Leo S.F. Lin, *Conceptualizing Transnational Organized Crime in East Asia in the Era of Globalization*: *Taiwan's Perspective*, Research Paper No. 146, October 2010, at 7.

[11] Those threats are (1) Economic and social threats, including poverty, infectious disease, and environmental degradation; (2) Inter-State conflict; (3) Internal conflict, including civil war, genocide, and other large-scale atrocities; (4) Nuclear, radiological, chemical, and biological weapons; (5) Terrorism; and (6) Transnational organized crime. *Ibid*.

[12] Peng Wang & Jingyi Wang, *supra* note 4.

[13] In 2002, Human Rights Watch (HRW) reported that study and evidence revealed that trafficking of women and girls for prostitution was extenuated in 1990s mostly due to the high military presence in the region. Report noted that girls from Moldova, Romania, and Ukraine were trafficked into the region, particularly into Bosnia–Herzegovina and Republika Srpska, through Serbia and other countries to end up severely exploited in brothels and night clubs. The report started with a gripping story of a 17-year-old Romanian girl who had 500 clients, was beaten and maltreated. *See* HRW, *Hopes Betrayed*: *Trafficking of Women and Girls to Post-Conflict Bosnia and Herzegovina for Forced Prostitution* 14, No. 9 (D) (November 2002).

[14] International Organization for Migration (IOM), *Victims of Trafficking in the Balkans*: *A Study of Trafficking of Women and Children for Sexual Exploitation to*, *through and from the Balkan Region* (Geneva: IOM, 2001).

[15] *Id*.

[16] Helga Konrad, *Trafficking in Human Beings—The Ugly Face of Europe*, Sept. 18–20, European Conference on Preventing and Combating Trafficking in Human Beings, 13 Helsinki Monitor 260 (2002).

from Eastern Europe and former Soviet republics, transiting into convenience countries like Albania, and then into Central European countries to end up at destination, mostly Western European countries, where the demand for unskilled or semi-skilled labor as well as commercial sex was high.[17] The targeted victims were women and children, but also men.[18] Later reports noted that in the following years, the routes kept changing, creating shifts and overlaps amongst countries of origin, transit, and destination. So countries like Kosovo and Bosnia—Herzegovina surfaced as destination countries, most likely fueled by large military presence of an after war situation and lawlessness, with countries like Albania, Romania, Bulgaria, Serbia, and Moldova identified more and more as countries of origin, and countries like Italy, Greece, Great Britain, and Holland, as well as Austria, Germany, and France—destination countries.[19] It became even more difficult to have clear-cut categorizations, as to origin, transit, or destination. The crime passed borders seemingly with ease, and survived due to the complexity of tracking the crime and its perpetrators, its victims and its proceeds across multiple jurisdictions. Almost two decades later, the reality of human trafficking in the Balkan region remains still tough to fully grasp and comprehend.

While there are numerous initiatives, organizations, institutions, and networks—like governmental, intergovernmental, and nongovernmental—, the fight against human trafficking has not been made much easier. For many years in a row the estimated number of human trafficking victims fluctuates between very wide ranges,[20] because of the difficulties of identifying victims of this hidden crime as well as because of lack of proper collection of data and establishment of meaningful statistics. *A fortiori*, venturing to obtain or collect data and figures on the cooperation amongst states and/or institutions in proceedings involving human trafficking, is almost an impossible task.

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[17] The demand for commercial sex increased also within the Balkans itself. In 2004, Amnesty International reported that the sex market in Kosovo alone had grown six times compared to the early 1990s. *See* Liz Kelly, *You can Find Anything You Want*: *A Critical Reflection on Research on Trafficking in Persons within Europe*, in Data and Research on Human Trafficking: A Global Survey 236, 242 (F. Laczko & E. Gozdziak eds., 2005).

[18] *See*, *generally*, Lynellyn D. Long, *Trafficking in Women and Children as a Security Challenge in Southeast Europe*, Journal of Southeast European and Black Sea Studies 2, Issue 2, 53–68 (2002).

[19] Jasna Vujin, *Human Trafficking in the Balkans*: *An Inside Report*, 4 Intercultural Human Rights Law Review 267, 279–280 (2009).

[20] The US State Department's 2007 report on human trafficking estimates that 800,000 people are being trafficked across borders each year, with 80% of the victims being women and children, and up to 50% minors. *See* US State Department, Trafficking in Persons Report, Released by the Office to Monitor and Combat Trafficking in Persons, June 12, 2007, *Introduction*, at http://www.state.gov/g/tip/rls/tiprpt/2007/82799.html. This number does not include people sold within national borders. If we include this category, according to Free the Slaves, the numbers add up to 27 million people living in slavery today. *See* Free the Slaves, *Slavery Today*, with reference to Kevin Bales' book Disposable People, at http://www.freetheslaves.net/NETCOMMUNITY/Page.aspx?pid=301&srcid=348. Additionally, a study by the International Labor Organization (ILO) reveals that at least 2.45 million persons across the globe are subject to trafficking. Out of this number, 1.2 million are children. *See* ILO, Trafficking in human beings, with a particular focus on children: new trends and responses, Turin, 18–22 September 2006, at http://training.itcilo.it/ils_trafficking/training_activities/2006/A900613/A900613_flyer.pdf.

The US Department of State Trafficking in Persons Report of 2011 evidences that most countries have ratified the Palermo Protocol, and in compliance with its requirement for the prohibition and punishment of human trafficking crimes, countries have enacted adequate legislation to criminalize human trafficking.[21] It further confirms a rise in prosecutions and convictions from 5,212 prosecutions and 2,983 convictions obtained globally in 2008, to 6,017 prosecutions and 3,619 convictions in 2010, observing however that the number of prosecutions is far outweighed by the number of arrests and investigations.[22] It is encouraging to know of slightly higher figures of successful police and justice work. Regrettably, there is no way to know about how many of these are result of cross-border activity of prosecutors, or joint investigations.

The following sections will focus on surveying and analyzing the theory and practice of transnational cooperation in combating trafficking in human beings, with a special focus on some countries in the Balkan region.

The Legal Framework and the Infrastructure for Global and Regional Investigations—Judicial and Police—Applicable to South Eastern European Countries

Definition of a Transnational Crime: Human Trafficking

Defining a "transnational crime" is a complex task.[23] A relatively new phenomenon, the term *transnational crime* is perceived to be about a quarter of a century old.[24] It was coined by the United Nations Crime and Criminal Justice Branch in 1974 describing certain criminal phenomena transcending international borders, transgressing the laws of several states or having an impact on another country.[25] Such characteristics of a transnational crime seem to be widely accepted.[26] Transnational crimes involve two

[21] US Department of State, *Trafficking in Persons Report* (*2011*), *available at* http://www.state.gov/g/tip/rls/tiprpt/2011/166772.html.

[22] *Id.*

[23] An interesting account of the history, explanations on the confusions and objections to different definitions of transnational crime, as well as kinds of organized crime can be found in Frank G. Madsen, Transnational Organized Crime (2009). The definitional difficulty of transnational organized crime is perceived to be based on the fact that the crime is a social phenomenon across the borders involving people, places, and institutions, which are also influenced by a variety of social, cultural, economic determinants, and hence it is difficult to generate a universal definition as the term may mean different things to different societies. *See*, *generally*, Mark Findly, The Globalization of Crime: Understanding Transnational Relationship in Context (2003).

[24] Combating Transnational Crime: Concepts, Activities and Responses 12 (Phil Williams & Dimitri Vlassis eds., 2001).

[25] *Id.* at 13.

[26] Lin, *supra* note 10, at 9. Also, in a supplemental survey to the *Fourth United Nations Survey of Crime Trends and Criminal Justice Operations*, transnational crime was defined in the following manner: "Offences whose inception, prevention and/or direct or indirect effects involved more than one country." *See* document *available at* http://www-staff.lboro.ac.uk/~ssgf/PDFs/HEUNI%20Transnational%20Crime.pdf, at 187.

or more sovereign jurisdictions, and are generally codified in the national legislations of these jurisdictions.[27] Findlay notes that "transnational crime is a social phenomenon involving people, places and institutions, which is also influenced by a variety of social, cultural, and economic determinants."[28] Hence the variety of definitions put forward by politicians, governments, international organizations, law enforcement officials, and scholars.[29] Madsen has defined transnational crimes as those whose resolution necessitates the cooperation between two or more countries.[30]

Discussion continues regarding the constitutive elements of transnational crime as being two: first, the crossing of a border by people or objects or even the intent to do so per se,[31] and second, the *international* recognition of a crime, through international conventions, extradition treaties, or concordant national laws.[32] Trafficking in human beings encapsulates both of these elements, though it is worth mentioning for the clarity of the argument that human trafficking can even happen within the national borders of a country, and it does not have to involve border crossing. However, it is exactly this definitional aspect of human trafficking as a transnational crime, as well as the object of this paper, that emphasizes the idea of the demanding nature of cooperation amongst states as its central component.

This issue was aptly addressed in the most modern global instrument dealing with transnational organized crime: the UN Convention on Transnational Organized Crime of the year 2000 (TOC Convention),[33] which nevertheless in its Article 34 (2) established clearly that offences will be "established in the domestic law of each State Party independently of the transnational nature or the involvement of an organized criminal group…." It further confirmed that elements of transnationality and organized crime are only necessary for the applicability of the TOC Convention and the 2000 Palermo Protocol between and amongst States Parties, which in turn are required to cooperate in order to address human trafficking effectively. But what are the specifics

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[27] Madsen, *supra* note 23, at 9.

[28] *See* Mark Findly, *supra* note 23, at 4.

[29] *See* Lin, *supra* note 10, at 8.

[30] Madsen, *supra* note 23, at 10. He exemplifies the transnational character of such crimes as follows: (1) because the crime itself is transnational in so far as it implies crossing at least one border before, during, or after the fact, such as international drug trafficking; (2) by the consequences; an example is currency counterfeiting in one country, but introduction of the counterfeit notes in the financial system of another; (3) by the transnational character of the crime; a rather typical case is constituted by gangs of highly professional pick-pockets, who ply their trade for a couple of days in one country and then move on to another before law enforcement authorities realize that an organized crime is in execution. *Ibid.*

[31] "or will as in computer fraud, when a cyber criminal gives an order from one county, which is transmitted to and executed in another country." *Id.*

[32] *Id.* Other authors characterize transnational crime differently. For them transnational crime are those activities involving the crossing of national borders and violation of at least one country's criminal laws and basically they posit transnational crime as a violation of one country's criminal laws. According to this definition, if the activity or act in question only violates one country's criminal law and in other words there are no concordant national laws, there will be no international law enforcement cooperation, no extradition, etc. *Id.* at 9, 11.

[33] United Nations Convention Against Transnational Organized Crime, G.A. Res. 25, annex I, U.N. GAOR, 55th Sess., Supp. No. 49, at 44, U.N. Doc. A/45/49 (Vol. I) (2001).

of the TOC Convention on cooperation, and to what extent do countries actually interact on criminal matters on the basis of the TOC Convention? The following few pages delineate international cooperation as mandated by the TOC Convention.

International Law Enforcement Cooperation in the TOC Convention, the Anti-Trafficking Protocol, and Pertinent European Instruments

The Law on the Books[34]

The TOC Convention stipulates that a crime is transnational in nature if it is committed in more than one State,[35] and it identifies three substantial circumstances when a transnational crime could take place, namely:[36]

- If it is committed in one State but a substantial part of its preparation, planning, direction, or control takes place in another State.
- If it is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State.
- If it is committed in one State but has substantial effects in another State.

Trafficking in human beings squarely fits within these defined borders, as do a couple of other crimes. To target these particular crimes, the TOC Convention was also supplemented by three protocols—of relevance here: the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, also called the "Palermo Protocol."[37]

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[34] For an insightful distinction between the law on the books and the law in action or, as he calls it, the "myth" and the "operational code," see W. Michael Reisman, Folded Lies (1979).

[35] United Nations Convention against Transnational Organized Crime, 2000 Art 3(2)(a).

[36] United Nations Convention against Transnational Organized Crime, 2000 Art 3(2)(b, c, d).

[37] Namely: the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, was adopted by General Assembly resolution 55/25. It entered into force on 25 December 2003, *available at* http://www.unodc.org/unodc/en/treaties/CTOC/index.html. In accordance with its article 16, the Protocol will be open for signature by all States and by regional economic integration organizations, provided that at least one Member State of such organization has signed the Protocol. The Protocol against the Smuggling of Migrants by Land, Sea and Air, adopted by General Assembly resolution 55/25, entered into force on 28 January 2004. In accordance with its article 21, the Protocol will be open for signature by all States and by regional economic integration organizations, provided that at least one Member State of such organization has signed the Protocol. The Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition was adopted by General Assembly resolution 55/255 of 31 May 2001. It entered into force on 3 July 2005. In accordance with its article 17, paragraphs 1 and 2, the Protocol will be open for signature by all States and by regional economic integration organizations, provided that at least one Member State of such organization has signed the Protocol.

Its definition of human trafficking[38] determines the scope of application of the trafficking protocol and the convention to trafficking activities: prevention, investigation, and prosecution of Protocol offences. The TOC Convention provides a common basis for criminalization of trafficking activities, formulation of laws, i.e., offences and sanctions; drafting of procedures, but also elements of support and assistance of victims. As the key international instrument for controlling transnational organized crime, the TOC Convention focuses on four major aspects of addressing such crimes, namely on criminalization, international cooperation, technical cooperation, and implementation.[39] Of particular importance in the context of this paper is the fact that the Convention mandates the adoption of new and sweeping frameworks on specific requirements for extradition (Article 16 of the Convention), mutual legal assistance, and law enforcement cooperation (Article 18 of the Convention), and urges for bilateral and multilateral joint investigations (Article 19) by the countries that ratify the convention, and encourages cooperation in the confiscation of proceeds of crime or property.

Seen in broader perspective, cooperation in the investigation and prosecution of cross-border crime takes place at two levels, (1) at an intergovernmental level, following multilateral and bilateral international legal instruments, and (2) at an interagency level, i.e., between prosecutorial offices of the countries involved, between judicial, customs, police authorities, etc.[40] As a recent study in the field noted, the "legal bases of that process … are still deficient, as are the general international instruments governing cooperation among the law enforcement bodies of different countries in their fight against transnational crime."[41]

In Europe, the most important anti-trafficking agreement is the Council of Europe Convention on Action against Trafficking in Human Beings.[42] It has been ratified by 34 countries, including all Balkan countries except Greece and Turkey.[43] In Chapter IV,

[38] The definition of human trafficking is defined in Article 3 of the Palermo Protocol: (a) "Trafficking in persons" shall mean the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, abduction, fraudulence, deception, abuse of power, position of vulnerability, or giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude, or the removal of organs; (b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used; (c) The recruitment, transportation, transfer, harboring, or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in subparagraph (a) of this article; (d) "Child" shall mean any person under 18 years of age.

[39] A good recount of TOC Convention is found in: Mats R. Berdal, Monica Serrano, Transnational Organized Crime and International Security: Business as Usual? 90 (2002).

[40] Center for the Study of Democracy, *Reinforcing Criminal Justice in Border Districts* 81 (2007), *infra* note 133.

[41] *Id.*

[42] Eur. T.S. 197, 16 May 2005.

[43] Status as of July 30, 2011, *available at* http://conventions.coe.int/treaty/Commun/ChercheSig.asp?NT=197&CM=0&DF=&CL=ENG.

the treaty deals with international cooperation. Its Article 32 mandates that states cooperate in investigations and proceedings of criminal offences covered by the Convention.[44] In Article 34, it delineates the procedure for exchange of information. General principles of such international cooperation require "application of relevant applicable international and regional instruments, arrangements agreed on the basis of uniform or reciprocal legislation and internal laws, to the widest extent possible." There are a number of such applicable instruments, but let us shortly mention two of them.

First, as indicated above, cooperation regarding cross-border crime occurs in Europe also under the auspices of the 1959 European Convention on Mutual Assistance in Criminal Matters.[45] This treaty has been signed by all 47 member states of the Council of Europe and by Israel. In 30 articles, this treaty adopts common rules in the field of mutual assistance in criminal matters, from letters rogatory[46] to the service of writs and records of judicial verdicts, the appearance of witnesses, experts, and prosecuted persons, [47] to judicial verdicts[48] and the procedure for requests.[49]

In addition, in accordance with Article 34 of the Treaty of the European Union, the EU Council, on May 29, 2000, adopted the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union.[50] Though not all Balkan countries are members of the European Union, this Convention is an instrument that serves as the basis for cooperation of the Balkan countries with the European Union. Moreover, the purpose of this Convention was to facilitate the application of, *inter alia*, the 1959 Convention mentioned above. It is a very comprehensive document that tries to standardize formalities and procedures in executing requests for mutual assistance amongst countries,[51] requests for both general and specific forms of mutual assistance,[52] ways of hearings, interceptions of communications, etc.[53] It also provides for joint investigation teams to be set up in cases when investigations into criminal offences have to do with demanding investigations with links in two or more countries, or when the circumstances of the case necessitate concerted action of the countries involved.[54] In fact, its novel investigation

[44] Article 32, inter alia, states: "shall co-operate with each other, in accordance with the provisions of this Convention, and through application of relevant applicable international and regional instruments, arrangements agreed on the basis of uniform or reciprocal legislation and internal laws, to the widest extent possible, for the purpose of:… investigations or proceedings concerning criminal offences established in accordance with this Convention." *Id*.

[45] Eur. T.S. 30, 20 April 1959.

[46] *Id*. Chapter II.

[47] *Id*. Chapter III.

[48] *Id*. Chapter IV.

[49] *Id*. Chapter V.

[50] Official Journal of the European Union C 197 of 12.7. 2000, at 1. Text also at http://www.statewatch.org/news/aug00/MLAfinal.html.

[51] *Id*. Title I.

[52] *Id*. Title II.

[53] *Id*. Title III.

[54] *Id*. Article 13.

methods include hearings by video conference (art. 10), hearings by telephone conference (art. 11), controlled deliveries (art. 12), joint investigation teams (art. 13), covert investigations (art. 14), and the interception of telecommunications (arts. 17–20).[55] It is an essential arrangement, albeit general and not specifically focused on cooperation related to human trafficking.

The European Union also changed its policy to reflect the necessity of cooperation of its institutions with third countries, by establishing anti-trafficking legislation.[56] Before that, it was up to each Member State to cooperate with countries of origin of human trafficking. While cooperation in criminal proceedings is seen as functional regarding investigations and exchange of information between the EU and third countries of origin, some organizations raise issues of lack of protection and safety of the trafficking victim,[57] in the process of such cross-border cooperation.

As to the relationship between the various instruments allowing for cross-border law enforcement cooperation, the 1959 Council of Europe Convention can be derogated from by a special regime entered into by States Parties[58]; it is to be assumed that the TOC Convention constituted such a special regime—to the extent it covered the areas and instruments of this treaty. The 2000 European Union Convention supplements the 1959 Convention.[59] Similar multilateral regimes might be equally subsidiary. On the other hand, bilateral cooperation regimes may be *leges speciales* to the TOC Convention. All of this depends on the formulations and intents of the agreements at issue.[60] The exact interrelationships between the various treaty regimes are thus to be determined carefully in each case.

In any event, the TOC Convention appears to be the most salient and specific regarding cases of human trafficking. Right from the start, its goal is to promote cooperation to prevent and combat transnational organized crime more effectively.[61] It aims at facilitating the investigation and prosecution of criminal activities across

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[55] Jürgen Kapplinghaus, *Joint Investigation Teams*: *Basic Ideas*, *Relevant Legal Instruments and First Experiences in Europe* 29, *available at* http://www.unafei.or.jp/english/pdf/RS_No73/No73_07VE_Kapplinghaus2.pdf.

[56] Council, EU plan on best practices, standards, and procedures for combating and preventing trafficking in human beings, 2005/C 311/01. *See also* Council Directive 2004/81/EC on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities.

[57] Terre des Hommes International Federation, *Towards Global EU Action Against Trafficking in Human Beings*: *Collaboration between Countries of Destination and Origin—Providing Adequate Assistance to Child Victims of Trafficking*, in contribution to the EU Ministerial Conference, 19–20 October 2009, Brussels, at 2.

[58] Article 26(2), Council of Europe Convention on Mutual Assistance in Criminal Matters, *supra* note 45.

[59] Article 1(1)(a) European Union Convention, *supra* note 50.

[60] For a detailed analysis of the interrelationships of various treaty regimes, see ILC, *Fragmentation of International Law*: *Difficulties arising from the Diversification and Expansion*, Report of the Study Group of the International Law Commission, U.N. Doc. A/CN.4/L.682 (13 April 2006).

[61] Article 1 of the TOC Convention.

borders by establishing minimum substantive and procedural standards to harmonize legislation and mitigate differences amongst jurisdictions when investigating and prosecuting the crime of human trafficking.

The TOC Convention is very specific on each of the elements of cooperation described above.

Focusing on extradition, Article 16 in its 17 paragraphs directs states to ensure that there are no impediments to extraditing alleged perpetrators of the crimes covered by the convention. Though the dual criminality rule applies,[62] the Convention deems as extraditable offences in any extradition treaty amongst States Parties each of the offences covered by it; in the absence of extradition treaties, States Parties may consider this Convention as the legal basis for extradition in respect to offences enumerated here.[63] In case they would choose not to use the TOC Convention as such basis, they are urged to enter into treaties in order to be in compliance with Article 16. The Convention requires states to expedite extradition procedures and simplify evidentiary requirements for crimes under the Convention,[64] and it prohibits States Parties to refuse a request of extradition only on the ground that the offence entails fiscal matters. States are expected to enhance the effectiveness of extradition by entering into bilateral and multilateral agreements.

The TOC Convention requires that States Parties take measures that would avoid jurisdictional issues when complying with the extradition mandate of the convention. So, through Article 15,[65] countries are required to establish jurisdiction over offences covered by the TOC Convention, in case they refuse to extradite an alleged offender, whether or not their national,[66] but who is present in their territory.

Mutual legal assistance is the subject of Article 18, through which states are obligated to give each other "the widest measure of mutual legal assistance in investigation, prosecutions and judicial proceedings" as regards offences covered by the Convention, based on the transnationality of the offence including victims, witnesses, proceeds, instrumentalities, or evidence located in the territory of the requested state.[67]

The Convention enumerates the following purposes of affording legal assistance:

(a) Taking evidence or statements from persons.
(b) Effecting service of judicial documents.
(c) Executing searches and seizures, and freezing.

[62] Article 16 (1).

[63] Article 16 (3 & 4).

[64] Article 16 (8).

[65] Article 15 (3) (4) of TOC Convention.

[66] If they choose not extradite their national to a requesting country, they will be obliged to submit the case before its own organs of prosecution at the request of the requesting state. The prosecution has to consider these offences on the equal footing with other grave offences in its legislation, and it must cooperate with the requesting state in terms of procedural and evidentiary issues. Article 16 (10) of TOC Convention. The same can be said about extradition requests to serve a sentence. *Ibid* (para. 12).

[67] Article 18 (1).

(d) Examining objects and sites.
(e) Providing information, evidentiary items, and expert evaluations.
(f) Providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate, or business records.
(g) Identifying or tracing proceeds of crime, property, instrumentalities, or other things for evidentiary purposes.
(h) Facilitating the voluntary appearance of persons in the requesting State Party.
(i) Any other type of assistance that is not contrary to the domestic law of the requested State Party.[68]

In order to exchange information as needed, a State Party can submit information about a criminal activity to the competent authorities of a State Party, even without a request from the latter.[69] Further, the Convention prohibits denial of legal assistance on the basis of bank secrecy, but allows such on grounds of lack of dual criminality, unless a State Party, at its discretion, decides to go forward with providing assistance.[70] It further provides for transfer of persons detained or serving sentence in a state, if wanted for identification or testimony by another state, and it details the procedure for such transfer, while still protecting them from double jeopardy.[71] The Convention mandates appointment of a Central Authority in each country to deal with requests for mutual legal assistance, and provides for the exact procedure for and content of requests for legal assistance, as it also specifies grounds for refusal of such requests.[72] Swift turnaround of information requested, respect of deadlines, and bearing of costs for the assistance are all required of the requested state. It also discusses the nature of documents that the requested state can share with the requesting state, namely:

1. Shall provide to the requesting State Party copies of government records, documents, or information in its possession that under its domestic law are available to the general public.
2. May, at its discretion, provide to the requesting State Party in whole, in part or subject to such conditions as it deems appropriate copies of any government records, documents, or information in its possession that under its domestic law are not available to the general public.

[68] Article 18 (3).

[69] Article 18 (4).

[70] Article 18 (8 & 9).

[71] Article 18 (12).

[72] This section provides: (a) If the request is not made in conformity with the provisions of this article; (b) If the requested State Party considers that execution of the request is likely to prejudice its sovereignty, security, *ordre public*, or other essential interests; (c) If the authorities of the requested State Party would be prohibited by its domestic law from carrying out the action requested with regard to any similar offence, had it been subject to investigation, prosecution, or judicial proceedings under their own jurisdiction; (d) If it would be contrary to the legal system of the requested State Party relating to mutual legal assistance for the request to be granted. Article 18 (21).

As seen above, the Convention is particularly comprehensive in the way that the States Parties can cooperate amongst themselves in investigating, prosecuting, and adjudicating transnational organized crimes, though it establishes general measures against transnational organized crime by and large. It is the supplemental Protocols that focus on the specific crimes addressed in each of them.[73] Protocols are to be read and applied in conjunction with the Convention and all offences established by the Protocols are also considered offences under the Convention itself.[74] The TOC Convention and its supplemental Protocols only establish minimum standards for the States Parties, who in turn, may choose to adopt stricter measures.[75]

For the purposes of this paper, reference will only be made to the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol). The Palermo Protocol constitutes the first global legally binding instrument with a globally accepted definition on trafficking in persons.[76]

The accepted definition has facilitated enactment of domestic laws criminalizing conduct related to any of the aspects of human trafficking, and was intended to ease convergence in national jurisdictions by creating grounds for similar domestic criminal offences that would support efficient international cooperation in investigating and prosecuting trafficking in persons cases.[77] An additional objective of the Protocol is to protect and assist the victims of trafficking in persons with full respect for their human rights.[78]

As stated under article 2 (c), one of the purposes for which the protocol was established is to promote cooperation among States Parties in order to meet the objective of putting an end to human trafficking.[79] For this reason, the protocol urges an increase in the information exchange between states in order to determine, *inter alia*: [80]

- Whether individuals crossing or attempting to cross an international border…are perpetrators or victims of trafficking in persons
- The types of travel document used or attempted to use to cross an international border for the purpose of trafficking in persons
- The means and methods used by organized criminal groups for the purpose of trafficking in persons, including the recruitment and transportation of victims, routes, and links between and among individuals and groups engaged in such trafficking, and possible means for detecting them

[73] *See* more details in Documents of United Nations Office on Drug and Crime, *Toolkit to Combat Smuggling of Migrants*: *International Legal Framework*, Tool 3, *available online at* http://www.unodc.org/documents/human-trafficking/Toolkit_Smuggling_of_Migrants/10-50885_Tool3_eBook.pdf p.2.

[74] *Id*.

[75] *Id*.

[76] *See supra*, note 37.

[77] *Id*.

[78] *Id*.

[79] *Id*. Article 2.

[80] *Id*. Article 10 (1).

It also provides for restrictions on the use of information received from a State Party should that party so request from the receiving state.[81]

In combating human trafficking, cooperation goes far beyond policing and prosecuting, and the Protocol provides for a multi-angled cooperation including working together across borders to reduce the vulnerability of people to trafficking as well as to address the demand side of trafficking.

The Law in Action

In the most recent report on the TOC Convention,[82] the Conference of the Parties, which is the monitoring body of compliance with the Convention, provides us with what they call a catalogue of examples of cases involving extradition, mutual legal assistance, and other forms of international legal cooperation requested on the basis of the United Nations Convention against Transnational Organized Crime. The item of this round of monitoring was for the States Parties to report on the issue of compliance with the TOC Convention as regards international cooperation, with particular emphasis on extradition, mutual legal assistance, and international cooperation for the purpose of confiscation, and the establishment and strengthening of central authorities. The aim was to assess whether and how are states using the TOC Convention. Pertinent to the scope of this paper, this catalogue includes only a few examples of cooperation in combating human trafficking.

- *Serbia* indicated in its report that amongst the criminal offences that had been the subject of international legal assistance pursuant to the Convention there were the illegal crossing of State border and trafficking in human beings as well as smuggling.[83] No details were given regarding the kind of international assistance involved.
- *Romania* had sent a request for extradition to the United Arab Emirates since 2009 using as a legal basis the Organized Crime Convention and its Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, but the request was still pending. Pending were also 24 requests that had been formulated during the pretrial stage from 2009 to 2010, out of which one request sent to Morocco related to a case involving human trafficking.[84]
- *Ukraine* reported that in 2008 it had requested legal assistance from the Ministry of Justice of Turkey related to a case of a Turkish citizen who was found guilty of human trafficking, forced prostitution, and attempting to coerce into prostitution.

[81] *Id*. Article 10 (3).

[82] Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Fifth session (Vienna, 18–22 October 2010) CTOC/COP/2010/CRP.5, *available at* http://www.unodc.org/documents/treaties/organized_crime/COP5/CTOC_COP_2010_CRP5/CTOC_COP_2010_CRP5_E.pdf.

[83] *Id*. at 7.

[84] *Id*. at 6.

Investigations revealed that the Turkish citizen had organized and led a Turkish–Ukrainian international criminal group, who exploited female Ukrainian citizens residing in Turkey by selling them into sexual slavery and obtaining illegal profits from those crimes. This cooperation on the basis of the TOC Convention and the provisions of the European Convention on Mutual Assistance in Criminal Matters was reported to have been successful. In another case, in 2010, Ukraine made a formal extradition request to the United Arab Emirates concerning a female Ukrainian citizen, who was wanted, *inter alia*, for trafficking in persons. No response was received to this request.[85]

- In the Americas, *Costa Rica* received a request by Mexico for international criminal legal assistance, to provide "information on various kinds of persons under investigation, including data from the Register of Immovable Assets, migratory movements and procedures, proof of involvement in associations, and driving license applications." Costa Rica had already complied with the request. In another case, Costa Rica made a request to Nicaragua for judicial assistance concerning the investigation in Costa Rica of an offence of trafficking in persons. The specific request asked for the "certification of the migratory movements of a group of nationals of a third country who were victims of trafficking in transit through Nicaragua." Nicaragua had complied with the request, making it possible for Costa Rica to succeed in the prosecution of the case.
- Referring to Article 18 of the TOC Convention, *Ecuador* requested international criminal legal assistance in the investigation of an offence of trafficking in minors. It asked of Costa Rica to "obtain information on the migratory movements and location of a group of persons on its territory. The request, successfully executed by Costa Rica, also made reference to a regional multilateral agreement, namely 'provision 1' of the agreement to promote cooperation and mutual legal assistance among members of the Ibero-American Association of Public Prosecutors, signed in Quito on 4 December 2003."[86]
- Another example comes from *Paraguay* that referred to the TOC Convention as the sole legal basis for mutual legal assistance in "cases related to trafficking in persons, including the search for and possible rescue of victims, as well as for the collection of evidence abroad." Paraguay recorded no extradition cases, but counted 10 requests, 1 active and 9 passive only in the year 2008, followed by 6 passive requests and 12 active requests in 2009, and 3 passive requests and 14 active requests in 2010.[87]

As it is evidenced from the above cases of cooperation, several countries are already utilizing the legal framework provided by TOC Convention, though, regrettably, the reports are quite sketchy, and they do not provide any inside as to the specifics of such cooperation. No word about the functionality of the procedures,

[85] *Id*. at 9.

[86] *Id*. at 12.

[87] *Id*. at 15.

effectiveness of cooperation, timelines of such cooperation, strengths, and deficiencies of such procedures, if any.

Let us now look into the issue of transnational cooperation in some countries of South-Eastern Europe.

The Reality of Cross-Border Policing in the Balkans

While one can easily find instances of cooperation amongst various anti-trafficking stakeholders, mostly as regards conferences, seminars, and trainings, – finding instances of cooperation in criminal matters remains a mission on its own. There is a dearth of written data on the issue, lack of access to any such existing data, and the only way to receive knowledge on general trends in cooperation is through personal interviews or talks with those supposed to be cooperating. But even such information lacks precision in terms of concrete cooperation or lack thereof, and at times is even contradictory. This section will check into any such cooperation by country, showcasing three of the Balkan countries, namely, Albania, Bulgaria, and Serbia.

Albania

A Government Perspective

Due to an evidenced decrease in foreign victims passing through Albania,[88] the Albanian National Strategy for Combating Trafficking in Human Beings since 2005–2007, and reiterated in the strategy of 2008–2010, claimed in absolute negative that

[88] IOM Counter-Trafficking Service, in a report entitled *Changing Patterns and Trends of Trafficking in Persons in the Balkan Region*, July 2004, wrote about "Possible Causes of Decline in Figures," arguing that the reasons for such a shift include: "Massive operations by Albanian police and international forces, primarily the Italian Interforce Mission during the summer of 2002, to eliminate the use of speedboats carrying trafficking victims and smuggled migrants to Italy; Since 2002, citizens of Romania (in the past, a primary source country) and Bulgaria do not now need a visa to enter the Schengen area. As a result, citizens of these countries no longer need to pass through Albania illegally to enter the EU; Changes in routes for trafficking women from Central and Eastern Europe, which no longer involve transit through Albania; New trafficking methods—use of fake documents and real visas—which allow use of legal modes of transport, such as ferries and airplanes, and which make it harder to detect cases of trafficking." IOM cautioned however that it could not be said that transiting through Albania is a wiped out phenomenon. They expressed concern that there was not enough monitoring by law enforcement agencies and that international victims might have gone undetected. *Available at* http://publications.iom.int/bookstore/free/Changing_Patterns.pdf, at 20.

Albania is *not* a transit nor a destination country for foreign victims, but it is a country of origin,[89] according to which Albanian victims of trafficking are exploited in Greece, Italy, Macedonia, Kosovo, and European Union generally.[90] While Albania's 2007 report on the implementation of the strategy for combating human trafficking for 2005–2007,[91] prepared by the Anti-Trafficking Unit in the Ministry of Interior in February 2007, represents a good recount of efforts made by the Albanian government to combat trafficking, there is not much information on international or regional cooperation to address this issue. It only notes that in the year 2006, there were 13 extraditions related to the offence of human trafficking,[92] while it asserts that amongst the difficulties encountered in its anti-trafficking efforts are issues related to protection and temporary relocation of witnesses, reciprocal legal assistance, and reciprocal recognition of court decisions as well as extradition.[93] The report urges further consolidation of international and regional cooperation related to "legislation, law enforcement and justice against trafficking and traffickers of human beings in order to improve the results in the area of prosecution."[94] The report includes statistics about prosecutions and convictions on human trafficking offences or offences related to trafficking, but it is silent on the statistics as to how many of such prosecutions and convictions were the result of cross-border cooperation.

Most interestingly, the 2011 report maintains that there is a decrease in the involvement of organized criminal groups or human trafficking networks, because according to the authors of the strategy, such criminal groups are involved in more profitable crimes, such as drugs and weapons.[95] It enumerates "achievements" made towards combating trafficking, and *inter alia* it states that Albania has ratified 14 agreements and conventions on international and regional cooperation in the areas of justice, law enforcement, and legal assistance against trafficking and organized crime, including the TOC Convention and the Palermo Protocol as well as the Council of Europe Convention "On Action against Trafficking in Human Beings."[96]

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[89] Republic of Albania, Ministry of Interior, Deputy Minister, National Anti-trafficking Coordinator, *Report on the Implementation of Albania's National Strategy for Combating Trafficking in Human Beings*, February 2007, at 4, *available at* http://s3.amazonaws.com/rcpp/assets/attachments/433_477_EN_original.pdf.

[90] Republika e Shqiperise, Ministria e Brendshme, Zyra e Koordinatorit Kombetar per Luften Kunder Traffickmit te Qenieve Njerezore, *Strategjia Kombetare e Luftes Kunder Trafikimit te Qenieve Njerezore*, 2008–2010, February 2011, at 4 [translated by the author]. *Available in Albanian language at* http://www.dsdc.gov.al/dsdc/pub/strategjia_kombetare_e_luftes_kundertrafikimit_te_qenieve_njerezore_193_1.pdf, (last visited in June 2011).

[91] *Report on the Implementation of Albania's National Strategy*, *supra* note 89.

[92] *Id*. at 11.

[93] *Id*. at 16.

[94] *Id*. at 12.

[95] *Ibid*.

[96] As approved and ratified by the Albanian Parliament pursuant to Law no. 9642, dated 20. 11. 2006.

In enumerating challenges, there is no mention as to cooperation across borders in criminal matters. There is however, a specific objective of the strategy that aims at improving *bilateral* cooperation—regional and international—in areas of criminal justice, courts, and implementation of anti-trafficking laws. The strategy accurately identifies indicators that would testify to meeting the objectives such as number of extraditions, number of requests for mutual legal assistance, number of new agreements in law enforcement cooperation, number of joint operations, number of arrests and investigations, and prosecutions as a result of cross-border cooperation.[97] Such numbers were however nowhere to be accessed as regards the previous strategic plan. It waits to be seen whether these indicators will materialize in due course of the implementation of the present strategy. The latest strategy is however a very good document that also reflects a serious and competent commitment by the Albanian National Coordinator on Trafficking in Human Beings, Professor Iva Zajmi.

In its 2011 report on the implementation of the national strategy on trafficking, the Albanian government evidences improvement from its previous period regarding communication with foreign jurisdictions in human trafficking matters.[98] For instance, they issued new ordinances on rules and procedures when dealing with foreign counterparts in requests for legal assistance[99]; they authorized creation of special registry, in print and electronic, to record criminal convictions of Albanian citizens by foreign jurisdictions[100]; and there was initial approval of the third supplemental protocol to the European Convention on Extradition, dealing with simplified procedures for extradition.[101]

In September 2010, Albania has started negotiations to enter into agreement with EUROJUST. It has also appointed 12 officials as focal points in order to achieve a better exchange of information when cooperating with counterparts in the UK, Italy, Greece, Kosovo, Turkey, Belgium, Romania, Netherlands, France, and the USA.[102] In order to act swiftly, the office of the General Prosecutor in Albania has been

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[97] *Id*. at 31.

[98] Republika e Shqiperise, Ministria e Brendshme, Zevendes Ministri, Koordinatori Kombetar per Luften Kunder Traffickmit te Qenieve Njerezore, *Raport for Zbatimin e Strategjise Kombetareper Luften Kunder Trafikimit te Qenieve Njerezore*, February 2011, at 5 [translated by the author], *available at* http://www.moi.gov.al/drupal1/antitrafik/Raporti%20Vjetor%20i%20Zbatimit%20te%20Strategjise%20Antitrafik%202010_final.pdf.

[99] Udhëzimi i përbashkët i Ministrit të Drejtësisë dhe Prokurorit të Përgjithshëm (nënshkruar nga Ministri i Drejtësisë Nr. 3273/1 datë 28.04.2010 dhe nga Prokurori i Përgjithshëm Nr. 5 datë 21.07.2010) *Për përcaktimin e rregullave mbi formën e letërkërkesës*, *procedurën dhe përkthimin e akteve*.

[100] Udhëzimi i Ministrit të Drejtësisë nr. 3922 datë 28.04.2010 *Mbi mënyrën dhe procedurën e regjistrimit të dënimeve të dhëna ndaj shtetasve shqiptarë nga autoritetet gjyqësore të huaja*.

[101] Me VKM Nr. 884, datë 08.11.2010, është miratuar *në parim Protokolli i Tretë Shtesë i Konventës Europiane Për ekstradimin*, e cila parashikon rregulla të detajuara mbi realizimin e procedurës së ekstradimit të thjeshtuar. Kjo Konventë është nënshkruar, nga përfaqësuesi i Republikës së Shqipërisë, pranë Këshillit të Europës, në Strasburg, më datë 10 nëntor 2010.

[102] 2011 Report, *supra* note 98, at 10.

implementing online exchange of information preceding the routine diplomatic channel of requests for legal assistance to the Ministry of Justice. Based on the principle of reciprocity, in order to expedite such procedures, requests for exchange of information can be put in motion through a direct request to the General Prosecution, in cooperation with the respective office of the foreign country's Embassy to Albania.[103] Though the author was unable to access information about the efficacy of this procedure, in principle it seems to be one that cuts into red tape and thus expedites the process.

Joint investigations are in process with Belgium police authorities regarding the activity of an Albanian organized criminal group operating in Belgium, as well as with the UK police, through the office of the Special Organized Crime Agency (SOCA), in investigating an organized criminal group that traffics women for prostitution in the UK.[104]

As regards statistics, during 2010, Albania has been cooperating in 13 cases of criminal proceedings on human trafficking, namely with Italy (6 cases), Greece (3 cases), Kosovo (2 cases), the UK (1 case), and Slovenia (1 case). Out of these cases, the Slovenian and two of the Italian cases have already concluded investigations.

Extradition records indicate that there have been one human trafficking extradition case to Hungary (Interpol Budapest), and five arrests of individuals accused of the human trafficking offence abroad for the purposes of extraditions to Albania. Two persons were arrested in Italy, one in Greece, one in Belgium, and one in Kosovo. On the offence of exploitation of prostitution, there were eight arrests, namely, two in Italy, two in Greece, and one each in Switzerland, Germany, France, and the USA.[105]

Three individuals were already extradited to Albania charged with the offence of human trafficking, namely, two from Italy and one from Greece; seven others were extradited on the offence of exploitation of prostitution, namely, four from Italy, and one each from Spain, Germany, and France.[106] This practice looks promising and it does credit to the Albanian government.

In a number of cases, the Albanian public was informed through media on such extraditions,[107] which in this author's view is a necessity that needs to be channeled as a standard practice.

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[103] *Id.*

[104] *Id.* at 9.

[105] *Id.* at 11.

[106] *Id.*

[107] For instance, an Albanian citizen, Esat Metaliaj, was extradited from Kosovo through the cooperation of Interpol to Tirana and UNMIK. He had been convicted of 15 years in prison by the Court of Serious Crimes for having trafficked a young girl to Kosovo for prostitution, selling her at 300 Euros. See, Panorama, March 15, 2011, Vrasje e trafikim, ekstradohen dy të kërkuarit, *available at* http://www.panorama.com.al/lajmi-i-fundit/vrasje-e-trafikim-ekstradohen-nga-kosova-te-kerkuarit. In another case, Haki Alimi, citizen of Kosovo was arrested in Albania by Interpol Tirana and extradited to Kosovo. He was convicted of trafficking in human beings by the court of Gjilan, Kosovo and was wanted by UNMIK. Another extradition came from Spain through Interpol Tirana. The convicted was Agim Sufa. *See* Balkanweb, 27 April 2010, *Ekstradohet nga Spanja 40 vjecari I kerkuar per trafik*, *available at* http://www.balkanweb.com/bw_lajme_kryesore.php?IDNotizia=60894&IDCategoria=1.

An NGO Perspective

A comprehensive report produced by ARIADNE Network Against Trafficking in Human Beings in South Eastern and Eastern Europe contains country reports from the respective network NGOs for 13 countries, including Albania.[108] Claiming a thorough research, the ARIADNE report aims big: "to define the deficiencies, gaps or neglected areas in human trafficking, and to make recommendations for the improvement of the situation."[109] While it is interesting to read what is going on as regards anti-trafficking efforts in Albania, it is disappointing to see that the report is superficial, lacks data and real instances of success or failure, and it seems to be more concerned with simply listing efforts done than with serious analysis of the effect of the measures taken. The report enumerates organs and committees that have been set up, but there is not a word about their concrete contributions to implementing laws, regulations, or agreements. The report shows very few tangible results and is entirely silent as regards cooperation in criminal matters. The country is described as a transit country for Kurds, Chinese, Romanians, Moldovans, Russia, and Bulgaria, into Greece, Italy, United Kingdom, France, Belgium, Norway, Germany, and the Netherlands.[110] This statement runs counter to the Albanian government's claim that the country is no longer a transit route for trafficking.

Furthermore, the report notes certain bilateral and regional agreements such as the ones on "the readmission of persons at the border and permission of transit passage" with Italy, Sweden, Hungary, Belgium, Romania, the UK, and Croatia, as well as the agreement between Albania and Greece on the repatriation of unaccompanied minors, victims of human trafficking.[111] The National Referral Mechanism has agreements with Macedonia, Kosovo, Montenegro, Italy, Germany, and England.[112] However, nothing is reported as regards the application of any such agreements. No words on cooperation amongst Albania and other countries in policing and prosecuting the trafficking crime. Even in response to the main objective of the general report, the Albanian account registers only two deficiencies: the witness protection legislation is not fully implemented and many difficulties are there in identifying the trafficked persons.[113] What these two general assertions exactly mean in the context of Albania is not clear; moreover, it is surprising to see that these are the only two areas of concern that a NGO operating in Albania assesses in a country that, as its own report claims, is problematic with trafficking to, through, and from.

It must be noted that the US Trafficking in Persons Report 2011, listing Albania a Tier 2 country, confirms Albania's government assertion that Albania is a country of origin of victims of trafficking for forced labor and sex trafficking, internally in

[108] ARIADNE Network Against Trafficking in Human Beings in South Eastern and Eastern Europe, *Combating Human Trafficking*: *Problems and Prospects* (Ant. N. Sakkoulas Publishers, 2007).

[109] *Id*. at Introduction.

[110] *Id*. at 5.

[111] *Id*. at 6–7.

[112] *Id*. at 9.

[113] *Id*. at 16.

Albania, as well as in Greece, Italy, Macedonia, Kosovo, and Western Europe.[114] As regards the topic of this paper, the USA had one recommendation for Albania. It urged the country to "improve the functioning of regional anti-trafficking committees to improve the identification of and response to domestic trafficking cases."[115]

In February 2011, the government of Albania approved the new 2011–2013 National Strategy to Combat Trafficking in Human Beings, and in July 2011, the government introduced the National Plan of Action to combat human trafficking.[116] This document is well designed and promises availability and accessibility of data related to human trafficking by all stakeholders. It further foresees periodic reporting in the implementation of the strategic plan and collection of specific data and exchange of information nationally and internationally on regular basis.[117] It remains to be seen whether by the end of 2013 the Albanian government will deliver on this promise.

Bulgaria

According to the US State Department's *2011 Trafficking in Persons Report*, Bulgaria is primarily a source country and, to lesser degree, a transit and destination country for women and children subjected to trafficking in persons, particularly forced prostitution, but also forced labor—within the country as well as in various European states.[118] Ethnic Roma are overrepresented among identified trafficking victims.[119] Bulgaria has ratified both the TOC Convention and the Palermo Protocol in 2001.[120] It is thus bound to the substance and procedures required of it to combat

[114] US Department of State, TIP Report 2011, *available at* http://www.state.gov/g/tip/rls/tiprpt/2011/164231.html.

[115] US TIP 2011.

[116] *See* text of the *National Action Plan for the Fight against Trafficking in Human Beings*, *and the National Action Plan for the Fight against Trafficking in Children and Protection of Children's Victims of Trafficking*, *2011–2013*, February 2011, *available at* http://www.moi.gov.al/drupal1/antitrafik/Plani%20i%20veprimit%20ANGLISHT.pdf.

See also newspaper report at AlbLink, *Prezantohet Plani Kombetar kunder trafikimit 2011–2013*, July 1, 2011, available at http://www.alblink.com/?fq=brenda&m=shfaqart&aid=23752.

[117] *Id*. at 68.

[118] US State Department, Office to Monitor and Combat Trafficking in Persons, *Trafficking in Persons Report 2011*, Country Narratives: Countries A Through F, *available at* http://www.state.gov/g/tip/rls/tiprpt/2011/164231.html (*hereinafter* TIP Report 2011).

[119] *Id*.

[120] Bulgaria signed both the Convention and the Protocol on December 13, 2000 and ratified them on December 5, 2001. As to the Convention, see http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12&chapter=18&lang=en; as to the Protocol, see http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&lang=en. The Convention entered into force for Bulgaria on September 29, 2003, the Protocol on September 25, 2003. Center for the Study of Democracy, Sofia, *Reinforcing Criminal Justice in Border Districts* 83 (2007), *infra* note 133.

trafficking in human beings. In 2002, it criminalized Trafficking in Human Beings in Articles 159a–159c of its Criminal Code.[121] Interestingly, under this legislation, the consent of the victim is completely irrelevant. These offences originally carried penalties of 1–8 years of prison for internal trafficking and 3–8 years for international trafficking; in more severe cases, these ranges are extended to 2–10 years, and 10–15 years, respectively.[122] The minimum penalty was raised in 2009 to 2 years imprisonment.[123] The State Department's TIP Report of 2011 considers these penalties as "sufficiently stringent" and commensurate with those for other serious crimes.[124] Overall, the State Department classified Bulgaria in Tier 2; the government does "not fully comply with the minimum standards for the elimination of human trafficking: however it is making significant efforts to do so."[125]

As to the formal authority for investigation and prosecution of the offence, under the Criminal Procedure Code, the prosecutor is the "master of the pre-trial phase" of the criminal justice process and has ample powers.[126] Prosecutors monitor the progress of investigations, give instructions to investigative authorities, and determine what has to be done upon completion of the investigation (bring indictment, suspend or terminate the proceedings).[127] As far as investigations are concerned, all cases of cross-border crimes are now in the hands of investigative police officers.[128] Cross-border human trafficking can now also be investigated using special intelligence means such as undercover officers, "controlled deliveries," or "trusted transactions."[129] Trial takes place before regional courts.[130]

The 2011 TIP Report concludes that Bulgaria has "demonstrated increased law enforcement efforts during the reporting period; however, they did not take sufficient steps to address public officials" complicity in human trafficking.[131] While in 2009 149 sex trafficking and nine labor trafficking investigations were conducted, these numbers rose in 2010 to 160 new trafficking investigations overall, including 11 labor trafficking investigations. 113 individuals were prosecuted for sex trafficking in 2010, compared with 77 in 2009. A total of 117 traffickers were convicted in 2010, 112 for sex trafficking and five for labor trafficking. 43 of the 117 convicted

[121] CSD Study, *infra* note 133, at 9.

[122] *Id*. at 11.

[123] TIP Report 2010, *available at* http://www.state.gov/g/tip/rls/tiprpt/2010/142759.html.

[124] TIP Report 2011, *supra* note 118.

[125] *Id*.

[126] CSD Study, *infra* note 133, at 36–37.

[127] *Id*. at 37.

[128] *Id*. at 35.

[129] *Id*. at 37–38.

[130] *Id*. at 39.

[131] TIP Report 2011, *supra* note 118.

traffickers were sentenced to time in prison; their sentences ranged from 1 to 7 years' imprisonment.[132]

On an instructive microlevel, a comparative study with other cross-border crimes between 2001 and 2006 along Bulgaria's borders with Turkey and Macedonia and along the Southern Black Sea border was conducted in 2007 study by the Center for the Study of Democracy in Sofia.[133] This study concluded that only 0.8% of the trials in that time frame and area concerned trafficking in human beings (the lion's shares were on illegal border crossings and smuggling of persons—72.8%—and smuggling of goods—25.4%).[134] Only six pretrial proceedings were instituted in the region of Svilengrad at the Turkish border, and only two bills of indictment were presented there.[135] Four individuals were convicted.[136] Only two cases for human trafficking were instituted at the Macedonian border, one in 2004 and one in 2006.[137] At the Southern Black Sea Border, 38 pretrial proceedings took place, and 14 bills of indictment were presented to court in the area of Burgas[138]; seven individuals were convicted, two plea bargains were entered into.[139]

As to the legal basis for investigation across borders, Bulgaria has been a member of the 1959 European Convention on Mutual Assistance in Criminal Matters since 1994.[140] It also ratified its two additional protocols.[141] The TOC Convention entered into force for Bulgaria in 2003, so did the Palermo Protocol[142] and the Council of Europe Convention on Action against Trafficking in Human Beings.[143] It also has, *inter alia*, entered into treaties on legal assistance in civil and criminal matters as well as on police cooperation with Turkey[144] and border cooperation with Macedonia.[145] Under its Criminal Procedure Code, international legal assistance shall be provided in line with a treaty to which Bulgaria is a party (Article 471 CPC).[146]

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[132] *Id*. Slightly different figures were reported in the Government's National Strategy on Migration, Asylum and Integration (2011–2020). It states that in 2008, 69 persons were convicted for human trafficking in Bulgaria; in 2009, 108 individuals were convicted for the same offence, 57 of them for internal trafficking for sexual exploitation, and 33 for external trafficking for sexual exploitation. *See* National Strategy, *infra* note 163.

[133] Center for the Study of Democracy, Sofia, *Reinforcing Criminal Justice in Border Districts* 83 (2007), *available at* http://www.c.*Id*.sd.bg/artShow.php?id=9030 (CSD Study).

[134] *Id*. at 43.

[135] *Id*. at 54.

[136] *Id*.

[137] *Id*. at 64.

[138] *Id*. at 72.

[139] *Id*. at 73.

[140] *Id*. at 81.

[141] *Id*. at 83.

[142] *Id*.

[143] *Id*. at 84.

[144] Treaty on Legal Assistance in Civil and Criminal Matters between the Republic of Bulgaria and the Republic of Turkey, ratified on February 18, 1976 and in force since October 27, 1978. *Id*. at 84–85.

[145] *Id*. at 85.

[146] *Id*. at 87.

Letters rogatory are sent to other states via the Ministry of Justice[147]; between 2001 and 2006, none of them were sent to Turkey or Macedonia regarding the crime of human trafficking,[148] none of them were received from these countries either.[149] In 2005, various Bulgarian authorities sent a total of 902 applications for legal assistance in pretrial proceedings, including "8 cases for trafficking in human beings and enticement into prostitution."[150] According to the 2011 TIP Report, Bulgarian law enforcement officials "collaborated with law enforcement counterparts in other governments on 17 human trafficking investigations."[151]

One of the major complicating factors in detection and investigation of cross-border trafficking is said to have been the fact that those offences are "organized by criminal groups and the victims normally cross the border lawfully and in compliance with the border-crossing and visa requirements. … The crime therefore only becomes visible in the country of final destination chosen by the traffickers."[152] This may, however, only partially explain the relatively low numbers of investigation and prosecution.

The Bulgarian Helsinki Committee, in a study on the trafficking of Roma, concluded that human trafficking was recognized very late as a human rights issue in Bulgaria, as the pertinent legislation was adopted in 2003, largely under pressure from the European Union and the USA.[153] There is a National Commission for Combating Trafficking in Human Beings, but both it and its local commissions were considered "formal bodies" to coordinate the efforts of different Authorities in combating trafficking. "[T]heir capacity is insufficient to even perform this function. In practice, these commissions do not operate."[154] Roma are over 50% according to NGOs, over 80% of the trafficking victims, according to policemen interviewed by the Helsinki Committee.[155] "Police follow the crimes in trafficking in human beings, they do not prevent them. They do not collect information about potential victims/perpetrators and do not inform residents in Roma neighborhoods about their rights in case they or their acquaintances appear to be victims."[156]

The 2011 TIP report goes a step further in stating that "Government complicity in human trafficking remained a problem," including officials providing "sensitive law enforcement information to traffickers and intentionally hinder[ing] the investigations of high-level traffickers."[157] While 12 police officers were investigated in 2010,

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[147] *Id.*

[148] *Id.* at 88.

[149] *Id.* at 89.

[150] *Id.* at 90.

[151] 2011 TIP Report, *supra* note 118.

[152] CSD Study, *supra* note 133, at 13.

[153] Bulgarian Helsinki Committee, *Trafficking of Roma in Eastern and Central Europe*: *Analysing the effectiveness of national laws and policies in prevention*, *prosecution and victim support* (author: Slavka Kukova, undated, 2010?), section 1.1.

[154] *Id.*

[155] *Id.* section 1.3.

[156] *Id.*

[157] 2011 TIP Report, *supra* note 118.

compared to four in 2009, "no new prosecutions were started or convictions were obtained against government officials complicit in human trafficking."[158]

In any event, law enforcement cooperation with other countries' governments appears to be on the increase. One promising event was the initial participation by Bulgaria in the first ever Joint Investigation Team established by the European Police Chiefs Task Force and Europol in early 2004. Its target was a multilateral case of trafficking in human beings from and through Bulgaria. The project team, based on novel investigation methods devised in the 2000 Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union,[159] consisted of specialized police officers and analysts from Belgium, Bulgaria, Germany, the Netherlands, and the UK, as assisted by interdisciplinary university research groups.[160] Unfortunately, the project was not completed, because Belgium, Bulgaria, and Germany left it because "a concrete case could not be identified" and because of "lack and/or uncertainty of legislation."[161] Still, trafficking from Bulgaria was further investigated using "conventional instruments of transnational police co-operation."[162]

The Government's new *National Strategy on Migration*, *Asylum and Integration* (*2011–2020*)[163] identifies as one of the main challenges in combating human trafficking that "[t]he Bulgarian institutions still encounter problems with gaining the confidence of victims and convincing them to testify against the traffickers so that adequate investigation could be carried out and heavy sentences could be passed. Bulgaria's joining the Schengen area is expected to increase the migration pressure on the country which means that victims from third countries could enter Bulgaria through its border with Turkey."[164]

For the future, it suggests "increas[ing] the collectability of information on the countries of origin and to enhance the proactive role of the diplomatic and consular representations in providing information on the situation in the respective countries."[165] An "integrated approach" would include the "strengthening" of "international cooperation"; the protection of "human rights and assisting the victims and witnesses"; "implementation of anticorruption measures, in particular against the implication of police officers, magistrates, and other officials;" and "proactive and

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[158] *Id*.

[159] *See supra* note 55.

[160] Jürgen Kapplinghaus, *Joint Investigation Teams*: *Basic Ideas*, *Relevant Legal Instruments and First Experiences in Europe* 29, at 32, *available at* http://www.unafei.or.jp/english/pdf/RS_No73/No73_07VE_Kapplinghaus2.pdf, with reference to Joint Investigation Teams in the European Union: From Theory to Practice (C. Rijken & G. Vermuelen eds., 2006).

[161] *Id*.

[162] *Id*.

[163] National Strategy on Migration, Asylum and Integration (2011–2020), *available at* http://www.mvr.bg/NR/rdonlyres/EBCD864F-8E57-4ED9-9DE6 B31A0F0CE692/0/NationalStrategyinthefieldofMigrationAsylumand IntgrationENG.pdf.

[164] *Id*. at 20.

[165] *Id*. at 30.

counteractive investigation, including through improved cooperation and joint data collection and analysis by police offices and other competent institutions."[166]

Serbia

Serbia, like the rest of the Balkans has fallen prey to trafficking since the early 1990s, but an organized anti-trafficking is only about a decade old. Serbia was mostly known as a transit country for trafficked women from Bulgaria, Moldova, Russia, and Ukraine, coming to Serbia, transiting west to Bosnia, ultimately destined for Italy, Spain, France, and Central and North Europe, or south to Kosovo and Macedonia, on the way to Greece and the Near and Far East. It is also a destination country and a country of origin, and since 2008 internal trafficking seem to have largely increased.[167]

Less than a year ago, in September 2010, Serbia became the first country—one of six joint projects against human trafficking in the world—to start the implementation of the Global Initiative to Fight Human Trafficking (UN GIFT).[168] A Joint Program (JP) of three agencies, United Nations High Commissioner for Refugees (UNHCR), the UN Office on Drugs and Crime (UNODC), and the IOM in partnership with the government of Serbia and namely its National Coordinator for Combating Human Trafficking, at Ministry of Interior, was envisioned to help implement the Strategy for Fighting Human Trafficking in Serbia and its National Action Plan (2009–2011).[169] At that time, Serbia's National Coordinator for Combating Human Trafficking, Mr. Mitar Djuraskovic had stated that "some 70% of activities envisaged by the National Plan of Action for Combating Human Trafficking will be implemented through this project."[170] About 10 months later, when meeting with Mr. Djuraskovic,[171] the progress made in anti-trafficking efforts in Serbia is clearly noticeable. Particularly as it relates to raising awareness amongst the Serbian population, or to the understanding of the dynamics of human trafficking in Serbia, or to engaging all players in the society, the National Coordinator has

[166] *Id*. at 36–37.

[167] *See* ASTRA—Anti-Trafficking Action, *Human Trafficking in the Republic of Serbia*, Report for the period 2000–2010, Belgrade, 2011, at 53.

[168] UN GIFT Serbia Programme Launched, September 16th, 2010, http://www.ungiftserbia.org/?p=182.

[169] Mrs. Sheila Coutts, of the UN.GIFT, Vienna, had considered the project in Serbia as of "great importance as it has shown how a joint initiative of the UN agencies and national partners can become operational and that practically the project will be seen by the UN.GIFT as a pilot and will be used as an example for similar initiatives around the world." *Id. at* http://www.ungiftserbia.org/?p=182.

[170] *Id. at* http://www.ungiftserbia.org/?p=182.

[171] Personal meetings of the author with the National Coordinator during the US Speaker Program, through the US Embassy in Serbia, May 26–31, 2011.

surely gone a long way. The Coordinator and the Republic Team to Combat Trafficking in Human Beings have also been successful in setting up partnerships in the region by initiating and developing joint anti-trafficking activities. All of this is unquestionably positive and deserving of praise.

However, when assessing issues beyond the mandate of the Coordinator, namely cooperation in criminal matters, it is not as easy to access facts and figures that would show progress comparably successful to the ones in the categories of prevention and protection, mentioned above. The recent 2011 report in the framework of the Joint Programme, clearly indicates that such cooperation continues to be very much in its initial stages.[172] In the section on international cooperation, *inter alia*, particularly as it relates to cooperation in criminal matters, the objectives remain:

(a) Creating joint investigation teams and support teams on the country level in the region and beyond, in *ad hoc* cases, and the selection of contact persons with representatives of other countries' institutions in charge of monitoring and coordination of activities related to prevention and suppression of human trafficking.
(b) Coordination of the investigation and prosecution of cases of human trafficking should also be facilitated by improved cooperation with Europol and Eurojust through the creation of joint investigation teams, as well as through the implementation of the Framework Decision of 30 November 2009 on prevention and settlement of conflict of exercise of jurisdiction in criminal proceedings (under the EP Directive).

Five years ago, the 2006 Serbian Strategy to Combat Trafficking in Human Beings, had also considered cooperation in criminal matters a priority. It had, *inter alia*, the following strategic goals mentioned under the international cooperation section:

10.1 Signing and implementing adequate instruments for joint recognition of evidence and joint investigation in cooperation with the prosecution, police, and courts from other countries, including the cooperation with Interpol, Europol, SECI Centre, SEEPAG, and other organizations.
10.2 Improving the system of exchanging data with other countries.
10.3 Accelerating the legal aid procedure, especially the extradition of perpetrators in cases of criminal prosecution for trafficking in persons.[173]

However, there are no clear evaluations as to how such goals were implemented, what problems were encountered, what worked, and what did not work.

[172] *Available at* www.ungift.org/doc/…centre/Krivicnopravni_sistem-FIN_sa_koricama.pdf. The author owes gratitude to Ms. Vesna Coric, LL.M. in Intercultural Human Rights, a young Serbian lawyer, for helping out with this part of the research and translation from Serbia into English.

[173] Strategy to Combat Trafficking in Human Beings in the Republic of Serbia, 05 NO: 10196/2006, Belgrade, 7th December 2006.

Having said that, though there are no easily to be found records of cooperation in criminal matters, it does not mean that such cooperation is inexistent.[174] One such cooperation is the extradition to Serbia, from Italy, of Mladen Dalmacija, considered to be one of the major human traffickers in the region. He was arrested in Bologna in late 2007 following an Interpol arrest warrant issued by Serbia. He had been convicted to 8 years imprisonment by Serbian Special Court for Organized Crime and War Crimes, presiding judge Radmile Dragičević—Dičić, on 30th September of 2005, as the leader of an organized criminal group. He is of Bosnia and Herzegovina citizenship. He led the ring that recruited and trafficked young girls from Ukraine, transiting them through Serbia, destined for Western European countries.[175]

A more difficult cooperation seems to be as regards extradition of Serbian nationals to other countries. Meanwhile, one Interpol employee[176] had even mentioned that the so-called "constitutional prohibition" on extraditions applies to accused committers of trafficking provided they hold Serbian citizenship. The same source mentioned that, for instance, France recently had asked for the extradition of a Serbian national, accused for human trafficking committed in France, but Serbian authorities rejected the request.

It seems, however, that this is not true as such, and that there exists a widespread misperception as to extradition, and most likely state authorities use it as pretext for certain alleged human trafficking crimes.

Realistically, prohibition on extradition is stipulated only by the *Law on Mutual Legal Aid in Criminal Matters*.[177] The Constitution only stipulates in Article 38, paragraph 2, that *A citizen of the Republic of Serbia may not be expelled or deprived of citizenship or the right to change* it.[178]

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[174] Talking with representatives of various institutions of the anti-trafficking team, one finds out that cooperation with neighboring countries like Croatia, Montenegro, and Kosovo seems to be more functional. Cooperation with Italy, for instance, suffers from delays and very lengthy procedures. Also, there are efforts to bilaterally cooperate in such matters. *See* International roundtable "Anti-Trafficking Mechanism and Cross Border Cooperation—Practice of the Netherlands and Republic of Serbia," namely *Anti-Trafficking Mechanism and Cross Border Cooperation—Practice of the Netherlands and Republic of Serbia*, 24 March 2011, available at http://www.astra.org.rs/eng/?p=834.

[175] More information on this case can be found in a report prepared by ASTRA—Anti-Trafficking Action, *Human Trafficking in the Republic of Serbia*—Report for the period 2000–2010, Belgrade, 2011, at p. 139, *available at* www.b92.net/eng/download.phtml?75464,0,0.

[176] Personal interview; name to be kept anonymous.

[177] *Law on International Legal Aid in Criminal Matters*, adopted 18.03.2009, came into force 27.03.2009, Published in Official Gazzete RS 20/09, as related to the author by a Serbian researcher. The author has been unable to locate the English version of the *Law on International Legal Aid in Criminal Matters* available at internet. (seems to be available for subscribers at http://pregled-rs.com/content.php?id=995&lang=en).

[178] An English copy of the current Serbian Constitution is *available at* http://www.predsednik.rs/mwc/epic/doc/ConstitutionofSerbia.pdf.

The previous Serbian Constitution (1990) was more specific on the extradition issue. Article 47 paragraph 2 stated that: *citizen of the Republic of Serbia may not be expelled or deprived of citizenship*, *nor extradited*. The prohibition on extradition was also provided by Article 35, paragraph 2 of the Charter of Human and Minority Rights and Civil Liberties of Serbia and Montenegro (2003) that was in force during the existence of State Union of Serbia and Montenegro. One would not be much surprised of the existence of such a provision, particularly when considering that Serbia had just come out of a war.

Before this piece of legislation was enacted, the legal prohibition on extradition had been stipulated by the Serbian Criminal Procedural Code. Article 16 read in conjunction with Article 7 of the Serbian Law on Mutual Legal Aid in Criminal Matters prescribe needed requirements for extradition. Article 16 paragraph 1 sets as its first condition *that extradition of Serbian citizens is not allowed*. Article 1 of the respective law that determines its scope of application reads: "This legal act regulates the procedural aspects of international legal aid in criminal matters, provided that there is no approved international agreement or if the given agreement does not regulate certain matters."[179]

It is interesting to note here, that the above-mentioned clause "no approved international agreement" is applicable, despite the fact that Serbia has ratified the TOC Convention and the Palermo Protocol. It has, however, not declared, pursuant to Article 16 (5) of the UN Convention on Transnational Organized Crime, that it will take this Convention as a legal basis for cooperation on extradition with other States Parties. So, in the absence of an international or bilateral agreement regulating extradition between Serbia and another State Party to this Convention, the extradition is governed by the above mentioned Law on Mutual Legal Aid in Criminal Matters.

Amongst the most important requirements for extradition is that the person whose extradition is requested is not a Serbian citizen, the act for which the extradition is requested has not been committed on the territory of the Republic of Serbia, against it or its citizens and that an indictment on the basis of which the extradition is requested has not been issued against the same person in the Republic of Serbia. It does however provide that in cases when extradition is denied on the above mentioned grounds, there is always a legal possibility for domestic prosecution,[180] seemingly in compliance with the UN Convention on Transnational Organized Crime (see § 303).

While this *de jure* compliance is acceptable, due to the leeway that governments give themselves when designing international law, this is absolutely not desirable in the context of being serious about putting an end to trafficking in human beings.

[179] The Serbian text of the given law is *available at* http://www.uts.org.rs/index.php?option=com_content&task=view&id=116&Itemid=93.

[180] Read more details on this issue at ASTRA—Anti Trafficking Action, *Human Trafficking in the Republic of Serbia*, Report for the period 2000–2010, Belgrade, 2011, at p. 100, *available at* www.b92.net/eng/download.phtml?75464,0,0.

The war on human trafficking can be waged successfully only if and when governments make a priority of the cross-border cooperation in criminal matters.

Appraisal

Judging from the scarce available data on the issue of cooperation in criminal matters, states continue to exercise their sovereignty completely when it comes to implementing criminal law, and there is widespread reluctance to cooperate seriously in all matters related to a transnational crime such as trafficking. In some cases, cooperation is hindered because of the historical circumstances that surround certain regions, such as Balkans. Having recovered from recent war, countries are still hesitant to cooperate *inter se*, and the principle of mutuality sometimes deteriorates into a tit-for-tat dealing. Though, here and there one can see some progress, the pace at which such cooperation has developed in the past decade is not as promising compared to the setting up of the internal infrastructure in combating trafficking in human beings, that seems to be abundant in structures, committees, task forces, coordinators, organizations, and mechanisms. Awareness of human trafficking also seems to have increased, probably at its highest since the abolition of slavery. However, cooperation on issues related to the trans-border crime of trafficking in persons has been minimal, at least from the perspective of the data available, the gathering of which has been gravely handicapped by the reluctance of the authorities to share such information. Oral discussions with players in this field reveal that, theoretically, there has been much more progress, at least a claim thereof, but finding hard evidence for such cooperation remains very difficult. Such incompatibility amongst different sources of facts and data, coupled with lack of data collation over time, makes it hard to reach a coherent and meaningful result on the reality of policing across borders.

The international legislative framework has created a useful background for potential cooperation, but there seem to be either inadequate follow-up procedures or a general lack of implementation of the ones that exist. While there are numerous agreements that mandate cooperation, indications of tangible results are most of the time missing. Even when one is able to find instances of exchange of information or deeper cooperation amongst countries, they mostly indicate cooperation on an *ad hoc* basis and not a consistent pattern of anti-trafficking crime collaboration.

Strategic plans are nicely designed, and methodologically correct with goals, objectives, and named indicators; results and real indicators are, however, often missing. Even funded research seems to aim more towards policy-oriented conclusions than towards tangible results; there seems to be no clear methodology on data collection, and whatever data systems are used they do not actually provide information that would assist in understanding the levels and kinds of cooperation.

It is quite frustrating to witness reluctance, on many levels, to share data related to human trafficking, either between and amongst agencies, or between and amongst countries. One cannot conclude whether this reluctance occurs because some countries have nothing to share as they have poor data, or because they do not want to share because of fear of information being leaked, *inter alia*, because of internal corruption in certain countries, or links of certain countries' officials with criminal interests, or because of concerns about the protection of privacy, and even because of national security interests. Whatever the reason, the urgency of combating the trafficking crime calls for a duty to share information and to cooperate.

As it stands, this author does not foresee much improvement in this direction for many years to come. Moreover, there is also apprehension as to the longevity of domestic anti-trafficking structures, because of the lack of adequate resources to sustain this abundant, complex, and sometimes overlapping, bureaucratic architecture. Fundamentally, however, despite professions to the contrary, many states do not seem to have made the prosecution of the crime of trafficking in persons an absolute priority. When this happens, they should also address policing across borders in detail and in a concrete operational fashion.

Recommendations

Countries are under an obligation to comply with the TOC Convention and its supplemental protocols, which as described above require international cooperation on matters related to human trafficking. It is necessary that such cooperation goes beyond lip service. Information sharing and joint anti-criminal work are essential in effectively addressing human trafficking.

It appears to be common sense to ask that countries should swiftly respond to requests made by other countries concerning investigations or prosecutions on human trafficking, but the fact that each country regulates such international mutual legal assistance predominantly in its own domestic law, has proved that cooperation in criminal matters is much more difficult than it can be perceived. A better way to create a strong legal basis for cooperation would be the standardization of substance and procedure of this cooperation, at least regionally, in order to mitigate the potentially detrimental impediments of domestic jurisdictions.

While there is abundant formalization in procedure for mutual assistance in criminal matters generally, a better way would be to standardize substance and procedure of the specific cooperation in investigating and prosecuting the crime of trafficking in human beings, whose profile differs greatly from other crimes: its victims are human beings at a large scale. Joint investigation teams on cross-border human trafficking should become a more common phenomenon.

Countries should make it a point to accurately record all aspects of the cooperation amongst them in matters related to human trafficking crime, and properly label each such aspect as successfully addressed or failed. In this way, countries would

know which other countries are seriously tackling the problem, how they are doing it, what countries are procrastinating and in what respects.

Monitoring organs of global and regional agreements should put more pressure on countries' compliance with their obligations related to cooperation in criminal matters.

Within the limits of not impairing effective prosecutorial work, regional and global institutions should create a centralized database of all instances of cooperation in criminal matters, with specific entries for each country. Such a database would make possible a much needed harmonization of respective statistics, and serve as basis for proper assessments of specific needs of certain countries, and for the evaluation of tools within mutual legal assistance, extradition, information exchange, etc., as well as regional or global initiatives on cooperation. The so-called best practices would be showcased and used as illustrations for training tools, and as a warning against failed practices.

These records would also help in advising and instructing amendments of the substantive and procedural legislations on cooperation amongst countries, as it will also help create regional and global institutional memory beyond political developments *du jour* in respective countries.

In their internal structures, the Balkan countries should take more seriously the position of National Coordinators on human trafficking. Such positions should be above and beyond the circle of the political spectrum, in order to be able to ensure a genuine continuation of anti-trafficking efforts and cooperation in the region. Additionally, such coordinators should not be burdened with a myriad of other duties and responsibilities that would detract them from anti-trafficking work.

There is still a lot of work to be done with representatives of law enforcement and the judicial professionals: they continue to need training and education to change their own perceptions regarding human trafficking, the modus operandi of cooperation on this issue, and, above all, to rid them of corruptive practices.

Organizations that sponsor studies on trafficking should advise and direct better on the nature of data to be collected, they should recommend to go beyond mere description of laws, regulations, organs, or committees, and insist that records should evidence and indicate real instances of implementation of these laws and regulations, and the concrete work done by the institutions in charge.

Special focus should be given to empirical research that focuses on evidencing cooperation in criminal matters, with due regard to information that needs to remain classified. Classifying all information related to human trafficking is counterproductive. The secrecy that wraps any such information is partly ungrounded: it is important, even for the purposes of deterrence, that the public be informed of the successes of cooperation in criminal matters.

Anti-trafficking cooperative efforts should thus not mirror the secrecy and lack of information that now often exists on human trafficking as a hidden phenomenon—it is often not very difficult or burdensome to evidence pertinent cooperation and the nature of such cooperation, and to record it when it actually happens.

The US Department of States, in its annual *Trafficking in Persons Report* should include data on international cooperation in criminal matters related to human

trafficking. Cooperation is in essence a part of its international minimum standards, and thus states as well as other stakeholders involved with providing such information, should be required to report on that matter as well. This unilateral monitoring of states' compliance with international minimum standards, albeit standards set by one country, has proven to be a very useful practice in addressing human trafficking worldwide: it should be continued and deepened to reflect the needed cooperation as mentioned above.

The nongovernmental sector should engage in comparative research and critical assessment of government statistics, and into analysis of the data collected from their own activities and from official and unofficial country reports, to be able to see similarities and variations in cooperation amongst countries, to point out strengths and pinpoint weaknesses, and above all to circulate such findings.

Historically conflictual relations amongst countries should not be reasons to affect proper communication and interaction in investigating and prosecuting the horrendous and large-scale crime of trafficking in human beings.

A transnational crime like human trafficking can only be combated in a systematic way: establishing systems of understanding the specifics of the crime, its environment and modus operandi, as well as designing and operationalizing international cooperation in all its aspects, in a way tailored to the specifics of the trafficking crime. International mutual aid in combating human trafficking has a prominent place in multilateral and bilateral treaties as well as in the national strategies and plans of action to put an end to trafficking in human beings.

What remains to be done by the states is to now walk the talk.

Chapter 7
Defining and Combating Terrorism: International and European Legislative Efforts

Nikolaos Petropoulos

Introduction

Over the last decade, a huge debate has evolved regarding the increased risk posed by terrorism and organized crime both at the national and international levels. Criminal activity is constantly evolving, having as its main characteristics the organized infrastructure, the sharing of responsibility, the cross-border action, as well as other features.

This fact mobilized the international community, which from the very beginning sought ways which could enable more effective action against terrorism and organized crime, both in the field of prevention and in that of suppression.[1] This international reaction has been manifested in the Palermo Convention, which has been signed and ratified by EU Member-States, including Greece. By the enactment of Law 2928/2001 Greece has fulfilled its contractual obligation undertaken by the signing of the Palermo Convention and has become a strong supporter of the global effort in combating organized crime.

According to Article 20 paragraph 1 of the Convention, it is stipulated that Member States should take measures to facilitate the controlled deliveries,[2] implement special

[1] For more details, see Livos, N. (2000). Organized crime: Definition and procedural responses. In Proceedings of the Seventh PanHellenic Conference of Greek Society of Criminal Law, Sakoulas, Athens (p. 28ff).

[2] Article 6 N. 2928/2001.

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investigative techniques[3] such as electronic surveillance or other forms of surveillance, as well as hidden investigative activity by the competent authorities. Greece, fulfilling its commitment, undertaken by the signing of the convention, introduced in its Code of Criminal Procedure article 253A under the heading "Special investigative techniques."[4]

The events that followed the terrorists' attacks of September 11, 2001 introduced the concept of "international terrorism." As is well known, the phenomenon of terrorism has plagued societies for centuries; however, during the last decades, terrorism gradually began to monopolize and capture the interest of international public opinion emerging as one of the greatest problems threatening modern societies, especially those in the western world.[5]

However, the "qualitative change" in the nature of terrorist attacks should not be underestimated, especially after 11 September 2001. This shift includes the adoption of new methods of attacks such as simultaneous bomb explosions (the subway attacks in Madrid and London). This change in the terrorists' modus operandi has rendered terrorism an issue of major concern for the media and the public.

An important point in the understanding of the concept of terrorism is that the fight against terrorism[6] requires a coherent, versatile, and long-term political and legal framework that should not focus exclusively on the adoption of punitive new laws. In such a case, policies inevitably would be prone to overlook the most important part of a successful crime prevention policy, namely its preventive dimension.

Last but not least, one could take into consideration that there has also been widespread concern about the human rights impact of antiterrorism legislation, from the application of enhanced interrogation techniques and the indefinite detention of suspected terrorists to the adoption of tougher antiterrorism laws.

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[3]The article 20 of the Palermo Convention under the heading Special investigative techniques, reads: "*If permitted by the basic principles of its domestic legal system*, *each State Party shall*, *within its possibilities and under the conditions prescribed by its domestic law*, *take the necessary measures to allow for the appropriate use of controlled deliveries and*, *where it deems appropriate*, *for the use of other special investigative techniques*, *such as electronic or other forms of surveillance and undercover operations*, *by its competent authorities in its territory for the purpose of effectively combating organized crime*."

[4]Article 6 Law 2928/2001.

[5]The adoption of a comprehensive agreement to define and outlaw international terrorism has been on the agenda of the international community for more than three decades. The main obstacles in the way of a definition of international terrorism are disagreements on the content of international terrorism, namely on whether wars of self-determination constitute terrorism, the issue of state-sponsored terrorism, and the tensions between combating terrorism and protecting human rights. Dugard, J. (2005). "International law: A South African perspective". 3rd edn. Dugard, J. (1999). "Terrorism and international law, consensus at last?" In E. Yakpo, T. Moumedra (Eds.), Liber Amicorum Mahammed Bedjaoui (p. 159).

[6]Bosi, M. (2004). Anti-terrorism legislation. *Greece and International context*. Sakkoulas, Athens (p. 57).

Definition of Terrorism

Today, there are many different definitions of terrorism, each of which reflects a different approach to this phenomenon. So, depending on the context in which they can be used, the word "terrorism" can include all kinds of violent acts and behaviors such as assassinations, bomb actions, kidnappings, hijackings, and even riots and revolutions.

Therefore, terrorism appears in many different ways, due to the fact that it can be manifested in different forms and in different situations. Moreover, it is a concept too complex, vague, and flexible, which can be easily used to describe situations or behaviors that differ significantly from each other. Consequently, due to its very subjective nature, the term terrorism can be easily manipulated. This explains why there is, so far, no universally accepted definition of "terrorism."

Indeed, there are many definitions of terrorism used both at the national and transnational levels. For example, there are different definitions in national penal codes of individual states, as well as in the framework of regional and international organizations, such as the European Union, the UN, and the Arab League).[7]As far as the European Union is concerned, the discussion on a definition of terrorism within the framework of criminal law in the European Union began in earnest in the year 2001. The legal basis had already been established in the TEU, as amended by the Treaty of Amsterdam.[8] One of the objectives of the union, as declared in article 29 of the treaty, is to provide its citizens with a high level of safety within an area of freedom, security, and justice The various definitions of terrorism, however, do not coincide with each other. On the contrary, it is not uncommon to see more than one definitions of terrorism, being applied in the same territory/jurisdiction. A typical example of that is the US federal legislation where several different definitions of terrorism are used.[9]

However, it is worth emphasizing , as Koufa highlights,[10] that any attempt to define terrorism, should take into consideration all different characteristics of terrorism including use or threat of force, use of intimidation, and the goals pursued by the perpetrators of terrorist acts.

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[7] More information for the national legislations of Member States of UN are included in UNDoc., ST/LEG/SER.B/22 National Laws and Regulations on the Prevention and Suppression of International Terrorism, Part I, United Nations 2004, where different Member States' definitions of international terrorism are listed.

[8] The Amsterdam Treaty, officially the Treaty of Amsterdam amending the Treaty of the European Union, the Treaties establishing the European Communities and certain related acts, was signed on 2 October 1997, and entered into force on 1 May 1999; it made substantial changes to the Maastricht Treaty, which had been signed in 1992.

[9] Schmid., A. (2004). Terrorism-the definitional problem. *Journal of International Law*, *Case Western Reserve University*,*36*(2&3), 77, where four different definitions are mentioned.

[10] Koufa, K., Terrorism and human rights. In: Honorary volume for John Manoledakis, Democracy, Freedom, Security III Athens, Thessaloniki, Sakkoulas (p. 230)

Legislative Measures to Combat Terrorism at the International Level

At the international level, the first steps to combat terrorism were made under the auspices of the United Nations, which adopted the Convention on Offences and Certain Other Acts Committed On Board Aircraft (Tokyo, 9/14/1963). Following this Convention, additional conventions and protocols relating to terrorist acts were adopted.[11]

In addition, the United Nations Convention on the Suppression of Terrorist Bombings (New York, 15-12-1997) and the United Nations Convention on the Suppression of the Financing of Terrorism (New York, 9-12-1999) are particularly important regarding terrorism definition issues. Article 2 of the Convention for the Suppression of Terrorist Bombings stipulates that:

Any person commits an offense within the meaning of this Convention if that person unlawfully and intentionally delivers, places, discharges, or detonates an explosive or other lethal device in, into, or against a place of public use, a State or government facility, a public transportation system, or an infrastructure facility (a) with the intent to cause death or serious bodily injury; or (b) with the intent to cause extensive destruction of such a place, facility, or system, where such destruction results in or is likely to result in major economic loss.

According to the Convention for the Suppression of the Financing of Terrorism, providing or collecting funds, directly or indirectly, unlawfully and intentionally, for using them or knowing that they will be used for the implementation of any act included in the framework of the reported conventions (excluding the Convention for Offenses and Certain Other Acts Committed on Board Aircraft) is considered as punishable offense. This means that even if the terms "terrorism" or "terrorist acts" are not mentioned in most of these conventions, they are related to terrorist crimes.

[11] Among these are:

- Convention for the Suppression of Unlawful Seizure of Aircraft [Hijacking Convention] (The Hague, 16-12-1970).
- Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal, 23-9-1971).
- Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents (New York, 14-12-1973).
- International Convention against the capture of Hostages (New York, 17-12-1979).
- Convention on the Physical Protection of Nuclear Material (Vienna, 3-3-1980).
- Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Aviation, supplementary the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal, 02/24/1988).
- Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (Rome,10-3-1988).
- Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms placed on the Continental Shelf (Rome, 10-3-1988).
- The United Nations Convention on the Suppression of Terrorist Bombings (New York, 15-12-1997).
- The United Nations Convention on the Suppression of the Financing of Terrorism (New York, 9-12-1999).

However, with regard to existing international conventions, the most significant effort to combat terrorism was made with the adoption of the European Convention for the Suppression of Terrorism[12] under the auspices of the Council of Europe. This is the first convention which examines terrorism in general, at least in the sense of naming terrorist acts. Under the provisions of the Convention, it is clearly mentioned that terrorist acts could not be political crimes, crimes associated with a political offense or offenses that were inspired by political motives, which is important for the application of agreements concerning extradition.[13]

The purpose of the Convention is to assist in the suppression of terrorism by complementing and, where necessary, modifying existing extradition and mutual assistance arrangements concluded between member States of the Council of Europe, including the European Convention on Extradition of 13 December 1957 and the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959, in that it seeks to overcome the difficulties which may arise in the case of extradition or mutual assistance concerning persons accused or convicted of acts of terrorism.

The European Convention on the Suppression of Terrorism aims mainly at restricting the possibility for the requested State of invoking the political nature of an offense in order to oppose an extradition request. This aim is achieved by providing that, for extradition purposes, certain specified offenses shall never be regarded as "political" (Article 1) and other specified offenses may not be (Article 2), notwithstanding their political content or motivation.

Last but not least the Convention does not affect the traditional rights of political refugees and of persons enjoying political asylum in accordance with other international treaties to which the member states are party.

European Union

General Facts

In the European Union the need to counter the threat emerging from terrorism has been an issue of concern to the member states mainly since the 1990s. However, since 1975, the European Economic Community had assigned the consideration of issues relating to terrorism and homeland security to the TREVI group, which consisted of officials of relevant prosecuting authorities.[14]

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[12] The European Convention for the Suppression of Terrorism (Strasbourg, 01.27.1977) Full text found in: Alexander, Y., Browne, M.A., Wanes, A.S. (1979). *Control of terrorism-international documents* (p. 165ff). United States: Crane, Russak and Co, Inc.

[13] Council of Europe, European Convention on Extradition (13 December 1957). *ETS 24*. Available at: http://www.unhcr.org/refworld/docid/3ae6b36b0.html

[14] The agreement for the establishment and operation of the TREVI Group signed at Rome, has been declared as confidential and is not accessible either for scientific or educational purposes, see Symeonidou Kastanidou, E. (2005). *Organized crime and terrorism* (p. 165ff). Sakkoulas Athens-Thessaloniki

The most recent developments within the EU in relation to the fight against terrorism focus on the two framework-decisions of the E.U. Council, namely the one on combating terrorism[15] and the second on the European arrest warrant. These legislative developments are undoubtedly a manifestation of the creation of a common area of freedom, security and justice, whose establishmenthas already been provided for in the Convention of Amsterdam.[16]

The European Police Office (Europol)

In 1995, the European Police Office (Europol)[17] was established with the purpose of improving the cooperation among Member States on law-enforcement-related matters, including the field of terrorism.[18] The idea for the establishment of Europol was first discussed in 1975 in the TREVI[19] Working Group, which was created with the initiative of the Netherlands in an effort to combat terrorism, as well as to achieve a coordination of police activities to combat organized crime.

Unlike the police services of Member States, Europol does not have executive powers. It cannot detain individuals, nor can it conduct home searches. Its tasks are to facilitate the exchanges of information, analyze intelligence, and coordinate operations involving several Member States.[20] In particular, the core of the duties of Europol includes the facilitation of information exchange, gathering, and analysis of data and information to facilitate investigations as well as compliance with automated information collection.[21] For this reason, the automatic information system of Europol was established, and initially recorded those who are suspected of having committed criminal acts. However, data of individuals who could be reasonably considered suspects of committing unlawful acts which fall within the jurisdiction of the European Police Office[22] could be recorded as well. The entry extends also to those who may simply be attached to or in contact with these people and thus can

[15] Council Framework Decision 2002/475/JHA (13 June 2002).

[16] Convention of Amsterdam, (preamble of EU Convention, article 2 paragr. 1 EU Convention, article 61 of European Community Convention). From that time on, developments in this issue area have been advanced with a series of special decisions at the sessions of European Council, at Tampere (October 1999) and at Santa Maria di Feira (June 2000).

[17] Stergioulis, E. (2003). *The European Police office* (*Europol*), Nomiki Vvivliothiki (p. 35ff).

[18] For a detailed analysis of Europol's anti-terrorist role, see Deflem, M. (2006). "Europol and the policing of international terrorism: Counter-Terrorism in a global perspective." *JQ*: *Justice Quarterly*, *23*(3), 336–359.

[19] The abbreviation TREVI is composed of the first capital letter of the words "Terrorism, Radicalism Extremism and International Violence".

[20] Convention based on Article K.3 of the Treaty on European Union on the establishment of a European Police Office (Europol Convention), Official Journal OJ C 316 of 27.11.1995.

[21] See article 3 of the Convention of Europol.

[22] See article 8 paragr.2 of the Convention of Europol.

effectively be extended to a wide circle of people not directly related to any criminal action.[23] However, Europol's capacity to effectively handle and share information was often questioned, mainly due to restrictions and problems directly related to Europol's structure.[24]

Immediately after the 9/11 terrorist attacks in the USA in September, the European Union demonstrated a willingness to take all necessary decisions at the political level for the further strengthening of cooperation between Europol, the intelligence services, and police authorities in the field of terrorism. Additionally, a Council decision in 2003,[25] introduced the obligation for every Member-State to establish a special service with the aim of bringing together all information related to terrorist acts[26] and send it immediately to Europol.

Eurojust

In an effort to successfully fight organized crime and terrorism, the EU decided to establish Eurojust in 2002.[27] Eurojust is a judicial cooperation body, which aims to stimulate coordination, improve cooperation, and support national authorities to become more effective in dealing with cross-border, organized crime, and terrorism. Additionally, through operational meetings and networking efforts within the European Union (EU) and beyond, Eurojust can play a significant role in the EU's counterterrorism effort.[28]

Eurojust consists of national prosecutors, magistrates, and police officers and within its tasks falls the coordination of national prosecuting authorities for combating all crimes referred to the competence of Europol, including that of terrorism. Eurojust also supports criminal investigations in these areas. Moreover, Eurojust has undertaken the independent processing of personal data, which is provided by the related authorities of Member States and its partners and can be exchanged with other organizations under certain conditions.[29]

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[23] See also Kaiafa-Gmpanti, M. (2003). Coordinating Institutions for fighting organized crime in the EU: From the police (Europol) in the judicial coordination—The prospect of protecting fundamental rights. *Poiniki Dikaiosini*, *1*, 165.

[24] Europol's Antiterror Role Muted by Limited Powers. Philip Shishkin. *Wall Street Journal* (*Eastern edition*). New York, NY: Apr 7, 2004. p. A.17.

[25] EU L 16 of 22/1/2003, p. 68.

[26] See Declaration of the Heads of State or Government of the European Union and of the Chairman of the Committee, Brussels 19/10/2001.

[27] Decision of the Council of 28/2/2002 (2002/187/ΔEU, EU L 63 of 6/3/2002 P.1-13).

[28] Coninsx, Michèle, & José Luís Lopes da Mota (2009). The international role of Eurojust in fighting organized crime and terrorism. *European Foreign Affairs Review*, Summer, 165–169.

[29] Article 27 of the Convention of the Council.

The European Arrest Warrant

The European Arrest Warrant was introduced under the decision made by the Council of Ministers of the European Union (EU) in June 2002.[30] It[31] is a judicial decision or order of a Member State of the European Union issued for arresting and surrendering of offender who is in the territory of another Member State of the European Union for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.

Furthermore, as far as jurisdictional issues are concerned, it is worth noting the following point: The competent judicial authority for the receipt of the European arrest warrant, the arrest and detention of the requested person, the subsequent introduction of the case to the competent judicial authority and the final execution of the decision on whether or not the requested person will be prosecuted is made by: (a) The Public Prosecutor of the city where the requested person reside. (b) The Public Prosecutor of Athens, in case the requested person has no known residence.

A key feature of the EAW is the inclusion of a list of offenses for which the principle of double criminality is abolished.[32] When the requested person is arrested under the European arrest warrant, his case is processed by the district attorney (public prosecutor) without delay. The Public Prosecutor, after having verified the person's identity, informs them of the existence and content of the warrant, for their right to resort to legal consultant and an interpreter, and provides them with the possibility of consenting to their surrender to the State issuing the warrant.

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[30] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States. OJ L 190, 18.7.2002, p. 1.

[31] In Greece, the first implementation of the European Arrest Warrant was related to the request by the Spanish authorities for the delivery of a 58-year old priest from Rethymnon, Crete to be tried in criminal court in Barcelona for the sexual abuse of against a minor girl. According to the Spanish authorities, the requested priest allegedly committed a seduction act in 2001–2002 in Barcelona, where he was delivering Greek language lessons to minors. The Appeals Court had ordered the temporary detention and accepted the request of extradition, in order to proceed to trial. The priest appealed to the Supreme Court against the European arrest warrant, but the Supreme Court dismissed all the claims of the 58-year-old priest. The priest, who until his surrender to the Spanish authorities was performing teaching tasks in an elementary school in the prefecture of Rethymno, was charged—after a complaint of the Spanish authorities—for sexual harassment against a 6-year-old girl in Barcelona. Specifically, during the period 2001–2002 when he had been appointed to Barcelona in order to teach the Greek language to the Greek Orthodox school, he had been accused by a Spaniard, whose 6-year-old daughter was a student of the priest. The mother complained that the priest had engaged in sexual gestures in the genital area of the girl. Under the warrant issued by the investigating authorities in Barcelona on December 18, 2004, the 58-year-old priest was arrested on the basis of an Interpol warrant on January 18, 2005. On February 7 the Court of Appeals in Crete discussed the request of Spanish authorities and decided to deliver the priest to the Spanish authorities. In March 2005, the Criminal Division of the Supreme Court with decision number 591/2005, granted the Spanish authorities' request for the extradition of the priest to Spain, in order to be tried for the sexual abuse of a minor.

[32] European Arrest Warrant Art. 2.

The Framework-Decision on Combating Terrorism

After the September 11 attacks in the USA and the global impact they had—which is usually referred by mass media as "shock and awe"—the EU adopted 2002/475/JHA Framework Decision of 13 June 2002 on combating terrorism. The goal of this legislative initiative was to harmonize the relevant laws of the Member States of the EU. This framework-decision created the impression that a significant strengthening of EU's capacity to combat terrorism had been achieved.[33]

With the implementation of this Framework Decision, a common definition of terrorism as a crime has been adopted for the first time in Europe. Additionally, the decision includes a definition of the concept of a terrorist organization and of crimes linked to the commission of a terrorist act. However, a common criticism expressed by analysts is that the Framework Decision does not really include a definition of terrorism but simply defines as terrorist crimes[34] , a list of crimes, based on an objective element "*of its nature or context to seriously damage a state or an international organization*, *and a subjective element*, *which has to do with the aim of the perpetrator*: (*a*) *to seriously intimidate a population or* (*b*) *to unduly compel the public authorities or an international organization to perform any act or to refrain from executing it or* (*c*) *to seriously destabilize or destroy the fundamental political*, *constitutional*, *economical or social structures of a country or an international organization*."[35]

Thus, the above approach to the definition of terrorism that is attempted at the Framework Decision, does not seem to take into account the main feature that distinguishes terrorism from other crimes of the ordinary criminal law, a feature described as "political dogmatism."[36] It is true, indeed, that the essential element which distinguishes an ordinary criminal from a terrorist is their motivations as well as their objectives. While a criminal tries to procure for himself a financial or other benefit, a terrorist, on the other side, through his deeds, attempts to promote "political, ideological, economic, and social change."[37]

However, a complete understanding of the rationale behind this legislative effort should not ignore the wider socio-political environment that led to the adoption of this Decision. The attacks, mainly resulting from religiously motivated terrorism, are far more lethal and of a larger scale than those carried out by conventional leftist terrorist groups that were active in various European countries throughout the second half of the twentieth century. Terrorism is considered as a

[33] International Law Update, Jan 2002, Vol. 8, p. 14.

[34] Elisavet Symeonidou—Kastanidou (2004). The definition of terrorism. *European Journal of Crime*, *Criminal Law and Criminal Justice*, *12*, 14–35.

[35] Elisavet Symeonidou—Kastanidou (2002). The definition of terrorism. *Penal Justice*, *1*, 65.

[36] Livos N. (2005). The problem of security and security as a problem. The example of the Penal Law. In Honorary volume for Ioannis Manoledakis, democracy, freedom, Security III Athens, Thessaloniki, Sakkoulas (p. 197).

[37] Bosi, M. (2000). *Regarding the definition of terrorism*. Travlos Publications, Athens (p. 131ff).

direct threat to the principles of the EU. The preamble of the Framework-Decision reads: "The European Union is founded on universal principles of human dignity, freedom, equality and solidarity, respect for human rights and fundamental freedoms. It is based on the principle of democracy and the rule of law, principles which are common to the Member States. Terrorism is one of the most serious violations of those principles."

Within the EU, the issue of the convergence of different legal systems of EU Member States on terrorism-related issues appears to be a top priority. According to the Decision's text, Member States undertake the obligation to adopt definitions of terrorism and of terrorist groups similar to those given in the Decision's text. Additionally, the Decision commits all member states to impose more severe penalties than those provided in their respective penal codes, when the wrongful acts described in the Decision are related to terrorist crimes.

The integration of the above decision in the Greek legal system, resulted in the Amendment of the Greek Penal Code and the introduction of article 187A[38], which includes a list of criminal acts that come under the definition of terrorist acts.[39]

Therefore, the crimes which are described by the law are regarded as terrorist acts and are punishable when certain conditions, related to the purpose and the commission of such crimes described in Article 187 P.C., are satisfied.

Initiatives at the Balkans

As far as the regional antiterrorism initiatives are concerned, a special reference should be made to work of the Southeast European Cooperative Initiative (SECI). SECI was, until recently the only regional operational organization (regional center) in Southeastern Europe aimed at strengthening and facilitating the cooperation of Police and Customs authorities of the member countries in combating transborder crime. In October 2011, with the entering into force of the Convention of the South East European Law Enforcement Center (SELEC), SECI was replaced by SELEC.

[38] The definition of terrorism was first discussed in the Greek parliament in 1978 during the voting of the first Greek antiterrorist law (774/1978). The debate on the definition of the term lasted several hours, however the minister of interior insisted that the lack of a clear definition of terrorism is not an obstacle: "The concept of terrorism is clear to everyone: it is clear to us all here in the Parliament and it is clear to those outside the Parliament who are using it as a mean of influence of political developments". Retrieved from http://www.hellenicparliament.gr/Vouli-ton-Ellinon/I-Bibliothiki/Koinovouleftiki-Syllogi/Praktika-Synedriaseon/

[39] The Report of the Scientific Committee of the Parliament, mentioned that the new provision on the definition of terrorism was vague. The Minister of Justice commented: "Taking into consideration the various problems related to the definition of terrorism, we demand from the legislator to regulate the *complex* phenomenon of a terrorist act within a purely descriptive concept", Appendix of the session of Parliament 24/6/2004.

Within SECI,[40] an Anti - Terrorism Task - Force (ATTF) was set up in 2003 and is coordinated by Turkey. The aim of the Task Force, being a regional bridge among national antiterrorist investigators, is to organize law enforcement activities and carry out regional coordination initiatives to prevent, detect, investigate, and combat terrorism-related crimes.

Experts from observer countries and international organizations are invited to attend the regular meetings of the ATTF; thus this initiative offers the possibility not only to SECI Center countries to cooperate among themselves but also to develop and strengthen relationships with countries and organizations beyond the SECI Center area.

The ATTF has three subgroups, focused respectively on terrorist groups (coordinated by Turkey), on weapons of mass destruction (coordinated by Romania), and on small arms and light weapons (coordinated by Albania). Some notable actions of the ATTF include the following initiatives[41]:

- The organization of workshops for sharing best practices from investigations (i.e., terrorist bomb attacks in Istanbul in November 2003).
- The establishment of a Network of National Contact Points on Anti-Terrorism related issues.
- The organization of training courses (Turkey availability) on antiterrorism-related issues (for example 30 Bosnian Police officers were trained in Ankara on operations against hijacked planes).
- The preparation of a booklet on Antiterrorism (citations).

SECI's role, organization, and operation were evaluated by the European Commission's SECI Centre Assessment Mission in a report released in 2004 which concluded that "the Bucharest-based SECI Regional Centre for Combating Trans-Border Crime has played a major role in developing law-enforcement cooperation and has contributed to the overall regional security and political stabilization."[42] Given the tenor of this report, additional support should be offered to the development of regional law-enforcement cooperation centers. Regional centers such as SECI, and now SELEC, constitute a promising way to increase regional communication and create reliable partners in counterterrorism. The EU should support these

[40] The legal framework of the SECI Center is the SECI Agreement signed in May 1999 and ratified by each member state, but currently the Center is in the process of transformation to SELEC (Southeast European Law Enforcement Center); the new legal framework, SELEC Convention, was signed by all member states.

[41] Among SECI's international initiatives, was the organization in October 2010 in Sarajevo, of the "SEE Workshop on Cooperation and Coordination in Counter–Terrorism Matters" which was co-organized by the SECI Center and the UN CTED, CTI-TF, UNODC, RCC, Ministry of Security of Bosnia and Herzegovina, and the Governments of Austria and Turkey.

[42] Retrieved from http://www.stabilitypact.org/pages/press/detail.asp?y=2004&p=31. Accessed 21 May 2012.

centers in two ways: first, by increasing support for operations and initiatives; and second, by enhancing cooperation between Europol and regional centers. However, any effort to establish closer ties between different agencies should be built on mutual trust.

Balancing Antiterrorism Legislation and Human Rights

The analysis of the antiterrorism legislation at both national and international level, shows that making new laws was a first-order response to the so-called "War on Terror." Some countries had counterterrorism laws in place prior to the attacks on September 11, 2001, which were then expanded after that date. However, the impact of these counterterrorist laws on human rights have generated serious rule of law concerns.[43]

To begin with, it should be noted that not all human rights protection measures will necessarily weaken national security and, correspondingly, not every security measure will necessarily be in derogation of human rights. Indeed, at least at the European level, the enforcement of antiterrorism legislation has not been combined with a suppression of human rights, in the first place. However, there has been a limited number of cases where European governments have allegedly been engaged in questionable antiterrorist practices including participation in extraordinary renditions, enhanced interrogation techniques, racial profiling, and so forth.

There is a need to maintain a balance between security (namely protection from terrorist acts) and human rights. On the one hand, governments often claim that the measures designed to ensure national security (including antiterrorism legislation) are necessary preconditions for the exercise of human rights. On the other hand, human rights advocates argue that anti-terrorism legislation represents nothing but a direct or sometimes concealed effort to suppress and violate human rights.

Compliance with the obligations emanating from human rights legal instruments necessitates the protection of citizens from terrorist acts, as well as the protection of citizens from the abuses often associated with certain counterterrorist measures Perceptions such as those adopted following 9/11, that the government's primary goal was only to increase security, and that human rights were relegated to secondary importance should not be accepted without criticism. The government must therefore construct, and seek to maintain, a delicate balance between the two, namely security and human rights.

Additionally, law-enforcement agencies when enforcing antiterrorism legislation should take into account two basic law-relatedprinciples, namely the principles of

[43] Golder, B., & Williams, G. (2006). Balancing national security and human rights: Assessing the legal response of common law nations to the threat of terrorism. *Journal of Comparative Policy Analysis*, *8*(1), 43–62.

proportionality[44] and necessity.[45] Individuals that are subject to police control, stop, and frisk and profiling methods should only be treated this way if authorities have intelligence on them; this will provide cause for the police to believe that these individuals represent a threat to the public order.[46]

Conclusion

Although terrorism is not a new phenomenon, the major terrorist attacks in the USA as well as in Spain and the UK, led governments and international organizations to create laws and policies in an effort to define terrorism, even in such broad terms, and achieve the goal of preventing further terrorist activity.

Having briefly surveyed the issues relating to terrorism definition-related issues, the first conclusion to be derived is that a common international definition of terrorism is deemed necessary, first and foremost, to satisfy the needs of law-enforcement, prosecutorial, and judicial authorities.

Moreover, there is consensus among policy makers across the globe that the prevention of terrorism will be one of the major tasks of governments and regional and international organizations for some time to come.[47] In response to the globalized nature of terrorism, antiterrorism law and policy have become matters of global concern. One of the main characteristics of antiterrorism law is that it is increasingly transnational in nature.

On the European level, a focus on an antiterrorism agenda has been a political priority after the 9/11 terrorist attacks, and efforts to build a strong and effective counterterrorism approach include both legislative initiatives and enhancement of existing structures such as Europol. Policy makers in Europe claim that EU action against terrorism has been predicated on the preservation of fundamental rights and freedoms as enshrined in the European Convention on Human Rights and Fundamental Freedons. However, some of these legislative efforts have been rightly criticized for riding roughshod over these principles, and EU policies have been challenged for restricting human rights. Last but not least, antiterrorism policy should be guided by a commitment to cooperation and to the implementation of the measures agreed upon by member states.

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[44] Barak, A. (2009). Annual Lecture in Law and Society—"*Human Rights and Their Limitations*: *The Role of Proportionality*" 04.06.2009. Retrieved from http://www.fljs.org/section.aspx?id=2895 22 Mar 2012.

[45] Talbot, R. (2004). "The balancing act: Counter-terrorism and civil liberties in British anti-terrorism law." In *Law after ground zero* (pp. 123–138). London, UK: Glasshouse Press.

[46] Feldman, D. (2006). "Human rights, terrorism and risk: The roles of politicians and judges." *Public Law, 2*, 364–384.

[47] Ramraj, V.V., Hor, M., Roach,, K. (2005). *Global anti-terrorism law and policy* (p. 125). Cambridge University Press.

Chapter 8
International Legislative Initiatives to Combat Human Trafficking

Vassilios Grizis

Introduction

Human trafficking has become the third biggest criminal business worldwide, after drug trafficking and trafficking of weapons. It has become one of the most lucrative criminal enterprises, which has its own long established criminal industry connected with related activities such as money laundering, drug trafficking, document forgery, smuggling etc.[1]

Changes that took place during the period from 1989 through 1991 in Eastern Europe at the social, political, and economic levels, led to the decline of the welfare state, and transitioning economies suffered from inflation and massive unemployment. The vast majority of the population in these countries was struggling to find a way to exit poverty.[2] Richer Western European Countries and Greece were among the first European Countries to experience a significant wave of immigration. This immigration flow immediately increased the number of people seeking hope in Europe, increasing the immigration pressure on EU countries, already a favorable destination for immigrants coming from poor countries of Africa and Asia.[3] What is particularly important is the fact that almost every country, especially in the western world, is affected by trafficking, whether as a country of origin, transit, or destination for victims.[4]

[1] http://www.unicef.de/download/trafficking-see.pdf

[2] US State Department, Trafficking in Persons Report (2007).

[3] United Nations Office on Drugs and Crime, Trafficking in Persons: Global Patterns (Vienna, 2006).

[4] International Organization for Migration, Counter-Trafficking Database, 78 Countries, 1999–2006, available at http://www.iom.int/jahia/jsp/index.jsp (full citation is needed).

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Additionally, the establishment of the European Union, initially with the Maastricht Treaty of 1992 and later on with the Treaties of Amsterdam in 1996 and Nice in 2001, resulted in the abolition of border and customs controls within the EU area, thus rendering the free movement of people and goods[5] much easier. However, this new reality in border controls facilitated the development of different forms of illegal activity across the EU area. Additionally, the Schengen Treaty,[6] which was signed by almost all EU Member States[7] and became an EU acquis created new challenges in the area of internal security. With the Schengen Agreement and its Supplemental Application Agreement[8] an area of free movement of persons and goods was created by removing all intra-state control checks at EU States common borders.

Within this rapidly transformed international social and political environment, new forms of crime have emerged. Criminal networks, in Western Europe and elsewhere, including in developing countries, are particularly active in the trafficking of human beings; such trafficking includes labor exploitation and sexual exploitation of people coming from poor countries.[9] The vast majority of trafficking victims are persons who are by definition vulnerable physically, socially, and economically, namely the minors[10] and young women. As a result of these socio-economic changes around the world, trafficking in human beings has been transformed into a modern form of slavery and an epidemic with 27 million slaves around the world.[11]

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[5] See title I of EC Convention. http://europa.eu.int/eur-lex.

[6] The Schengen Agreement was signed in 1985 in the village of Schengen, on the borders of Luxembourg, France, and Germany. The main purpose of the Schengen Agreement is the abolition of physical borders among European countries (Schengen zone members).

[7] The Schengen Agreement applies to most European countries. The Schengen Agreement covers a population of over 400 million and a total area of 4,268,633 square kilometers (1,648,128 square miles).

[8] Both were ratified by Greece with Law 2514/1997 (Government Gazette A΄ 140/27-6-1997).

[9] It is estimated that, in 1991, in Greece alone, there were almost 7000 prostitutes, of whom almost 5,500 were Greek and the rest were immigrants. However, in 1996 the total number was estimated in almost 10,400, of whom almost 4,300 were Greeks and the rest were immigrants; see Aggelos Tsigris, Trafficking and sexual exploitation of woman (or women? Check the title again). The results of a research. Publications Ant. N. Sakkoula, Athens-Komotini 1997, p.35.

[10] According to the official report of UNICEF for the living conditions of children around the world, in 2006, it is estimated that 1.200.000 children happens to be victims of trafficking, see related info at http://www.unicef.gr

[11] http://www.unodc.org/unodc/en/human-trafficking-fund.html. The United States State Department has carried out some of the most extensive research into the efforts of governments to combat severe forms of trafficking in persons. In their view, trafficking in persons is a global market:

Victims constitute the supply, and abusive employers or sexual exploiters represent the demand. The supply of victims is encouraged by many factors including poverty, the attraction of a perceived higher standard of living elsewhere, weak social and economic structures, a lack of employment opportunities, organized crime, violence against women and children, discrimination against women, government corruption, political instability, armed conflict, and cultural traditions such as traditional slavery. . . On the demand side, factors driving trafficking in persons include the sex industry, and the growing demand for exploitable labor. Sex tourism and child pornography have become worldwide industries, facilitated by technologies such as the Internet, which vastly expand choices available to consumers and permit instant and nearly undetectable transactions (United States State Department 2004a: 19–20).

Human Trafficking vs. Migrant Smuggling

As we have already mentioned, each year hundreds of thousands of migrants are moved illegally by highly organized international smuggling and trafficking groups, often in dangerous or inhumane conditions. However, to cope with the pernicious problem of human trafficking, one should distinguish between this problem and the one of migrant smuggling.[12]

To begin with, one could define human smuggling as a business transaction between two willing parties involving movement across borders, usually by illegal means. It occurs with the consent of a person(s), and the transaction usually ends upon arrival at the country of destination. On the other hand, human trafficking starts when one party deprives another party of the freedom of choice by using threats, force, coercion, deception of fraud for the purpose of exploitation. That being said, human trafficking is a direct violation of basic human rights which can occur both across and within borders.[13] Needless to say, the definition one would adopt would have a direct impact on anti-trafficking policies, as well as on the support of particular agendas.

A decisive factor in conceptualizing human trafficking is that its victims are commodities in a multibillion dollar global industry. Subsequently, criminal organizations are choosing to traffic human beings because, unlike other commodities, people can be used repeatedly and because trafficking requires little in terms of capital investment.

Different Forms of Human Trafficking

Human trafficking has assumed alarming dimensions over the last couple of decades, mainly because of the above-mentioned international, political, and social changes. Human trafficking is favored by organized crime[14] due to its high profitability. Interestingly enough, individual criminals as well as criminal networks around the

[12] "Human Trafficking and Migrant Smuggling: New Perspectives on an Old Problem." Policy Brief, Harvard University, May 14, 2007, pp. 34 ff.

[13] Galma Jahic James O. Finckenauer, Representations and misrepresentations of human trafficking, Trends in Organized Crime, Volume 8, Number 3, 2005, pp, 24–40.

[14] See Nikolaos Livos, Organized crime, Concept and procedural methods to tackle, Speech to the Organized Crime in terms of criminal law, Proceedings of the Seventh Hellenic Conference, Athens 2000, Greek Association of Penal Law, p. 17, and pp. 33–34 and Lambros D. Karabelas, The legislative and case-law dealing with organized crime: organized crime from the perspective of criminal law, Proceedings of the Seventh Hellenic Conference, Athens 2000, Greek Association of Penal Law, p. 157.

world that were previously involved in the illegal trade of arms and drugs[15] have become active in human trafficking by exploiting modern means, such as the Internet,[16] in order to facilitate trafficking and the subsequent exploitation of human beings.

We could briefly summarize the specific types of human trafficking in the following categories:

a. Trafficking of immigrants with economic exploitation being the main reason for their transport. The perpetrators exploit the future-immigrants' need to overcome transportation difficulties—posed by distance and prevention measures taken by host countries—thus undertaking or facilitating their transfer. However, immigrants are usually asked to pay huge sums of money in exchange for their transport to their desirable destination country. On the other hand, illegal immigration as a phenomenon that usually affects various aspects of the host country's socio-economic status quo, poses an additional threat to the public order of the host country itself. That is, uncontrolled entry into the host country of people who may be involved in criminal activities in their country of origin could create an atmosphere of fear related to what is often referred to as "imported crime."[17]
b. The exploitation of immigrants while they are job hunting. Human trafficking criminal networks, after the smuggling of immigrants is completed, often continue to exploit them while they are looking for a job, providing them with the so-called protection or mediation. That is, human traffickers often take advantage of immigrants' ignorance of the host country's language, the local customs and habits, the legislation and so on and so forth and often demand an additional amount of money to offer their assistance so that immigrants could overcome these obstacles.
c. The exploitation of the work of immigrants. In this case, the perpetrators employ and exploit immigrants' labor themselves by offering lower salaries, keeping them

[15] See data published by the Ministry of Citizen Protection, on the website: http://www.ydt.gr/main/Section.jsp?SectionID=10101. According to an article in Kathimerini on 8/12/2006 under the title: "32 billion dollar profits of the networks," the profits of slavery are estimated at more than 32 billion dollars annually. Article available at http://news.kathimerini.gr/4dcgi/_w_articles_world_2_08/12/2006_208161

[16] According to an article published in Kathimerini on 24/12/2006 under the heading "booming cybercrime" 2006 was the first year in which incidents of movement (trafficking) of minors from country to country were recorded. Websites catering to the needs of pedophiles were numbering several thousand subscribers. Moreover, according to the report, prostitution through Internet websites was a new booming trend and fees for trafficking famous models across Europe for sexual exploitation could be as high as € 4,500 per trafficked person. Two women of Czech origin were arrested at a central Athens hotel, and during their interrogation they confessed that they had earned a total of $ 60,000 in 3 weeks. The head of the criminal network was residing permanently in the Czech Republic and was coordinating the whole network company using his personal computer.

[17] Lambros Sofoulakis The "illegal migration" on the continent during the last 5 years, and especially its relationship to other forms of "cross border" crime Poiniki Dikaiosini Journal 1 / 2005, p. 84 ff.

without insurance or forcing them to work under inhumane and unsafe conditions.[18] Members of these trafficking networks, using force, fraud, or coercion, manage to recruit, harbor, transport, obtain, or employ a person for labor or services in involuntary servitude, peonage, debt bondage or slavery. Victims can be found in domestic situations as nannies or maids, sweatshop factories, janitorial jobs, construction sites, farm work, restaurants, or even panhandling.[19]

d. The trafficking of women for sexual exploitation. The perpetrators take advantage of the demand for sexual services in host countries and the labor supply of young women from poor countries. Sex trafficking usually takes place in a variety of public and private locations such as massage parlors, spas, strip clubs, and other fronts for prostitution.[20] Victims may start off dancing or stripping in clubs and are often coerced into more exploitative situations of prostitution and even pornography. Most of these women live in conditions of substantive slavery, literally incarcerated in houses, suffering food deprivation and subjected to systematic physical and psychological violence.
e. Trafficking in human beings in order to facilitate trade in human organs. The global demand for human organs has set the stage for an exploding and poorly understood global business in human organs. The perpetrators take advantage of the increased global demand for human organs used for transplantation in violation of the relevant domestic and international laws and treaties. Victims of human trafficking, often living under inhumane conditions, identify themselves as members of socially excluded groups, and are prone to becoming victims of trafficking in human organs.[21]
f. The trafficking of children for sexual exploitation. In this case, the perpetrators take advantage of the demand expressed by adults for sexual services by children
g. Black market adoption is another form of human trafficking which emerged over the last decade fostered by the increasing demand from childless couples[22] combined with the growing number of foreign orphans available, as a result of wars, failed states and devastating socio-economic changes.

The above mentioned categorization makes it clear that the crime of trafficking itself is directly related to the exploitation, either financial or sexual, of human beings. The absence of the element of exploitation leads to other types of crime.[23]

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[18] Patrick Besler, Forced Labour and Human Trafficking: Estimating the Profits, working paper (Geneva, International Labour Office, 2005). Retrieved from http://digitalcommons.ilr.cornell.edu/forcedlabor/17 at February 17th 2012.

[19] Article on newspaper Kathimerini on 25.10.2006, under the title "Criminal networks, human trafficking and panhandling." Available at news.kathimerini.gr

[20] Lara Fergus, Trafficking in women for sexual exploitation, Published by the Australian Institute of Family Studies (online) http://www.aifs.gov.au/acssa/pubs/briefing/b5.html. Accessed on February 11, 2012.

[21] Costas Kosmatis, The "vulnerable" or "socially excluded" groups as victims of the commodification of human organs, Poiniki Dikaiosini Journal 3 / 2005, p. 348 ff.

[22] For a more formal treatment of supply and demand functions in this market, see Gillian Hewitson, "The Market for Surrogate Mother Contracts," The Economic Record, 73 no. 222 (September 1997) p. 212–224.

[23] A. Sykiotou, The concept of victim in trafficking, Poinika Chronika Journal 2006, vol. 1, p. 684–693.

International Legislative Instruments

The UN

There is a wide consensus that the role of transnational organized crime in the trafficking of people is growing.[24] As smuggling and trafficking-related activities take place in numerous countries, governments cannot successfully combat these offences in isolation. In addition, many countries lack specific provisions to deal adequately with these issues. For this reason, the international community has begun a concerted effort to thwart international criminal networks.

The first legislative efforts to address the international phenomenon of slavery had been undertaken by the League of Nations at the relevant convention on slavery.[25] (According to this Convention, the signatory states undertake the obligation, derived from Article 2, to prevent and suppress the trafficking of slaves (as defined in Article 1 paragraph 2 of the Convention thereof) and achieve the complete elimination of slavery (as defined in Article 1 paragraph 1 of this convention).[26]

This ratification was considered necessary given that, in the meantime, the UN replaced the League of Nations. As a result, the legal instruments developed by the League of Nations with this Convention, were now under the auspices of the successor organization, the United Nations. The inhuman institution of slavery, which affects human freedom and the dignity of human nature alike, was eventually prohibited by a series of legislative texts adopted by the UN. Thus, article 4 of the Universal Declaration of Human Rights prohibits slavery, in whole or in part, and the conduct of the slave trade. Furthermore, with the Multilateral International Geneva Convention of 07.09.1956, which was also adopted under the UN auspices.[27] States sought to efficiently address the problem of slavery, after having attempted to abolish other aspects of slavery and slave trade.

The most recent and comprehensive effort to address the crime of trafficking, as it appears today, took place with the Protocol of the UN "for prevention, combating and punishing of trafficking in persons especially women and children," signed on 12/12/2000 in Palermo,[28] including the UN Convention against Transnational

[24] http://www.whitehouse.gov/sites/default/files/Strategy_to_Combat_Transnational_Organized_Crime_July_2011.pdf

[25] The convention was adopted on 25.09.1926, ratified by Greece with Law 4473/1930 (Gov. 62/26-2-1930 A).

[26] The Convention was amended by the Protocol of 12.07.1953, signed in New York and was ratified by Greece with Law 2965/1954 (194/23-8-1954).

[27] The convention was ratified by Greece with Law 1145/1972—Government Gazette 105/30-6-1972.

[28] Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime—Adopted and opened for signature, ratification and accession by General Assembly resolution 55/25 of 15 November 2000. Available at http://www2.ohchr.org/english/law/protocoltraffic.htm

Organized Crime. The Protocol is only applied to crimes with a transnational character, which are committed by a criminal network. Article 3 of the Protocol, which is particularly interesting when it comes to definitional issues, provides a clear and coherent definition of trafficking in human beings.

Human trafficking is defined[29] as "the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs"[30]

International Labour Organization

The General Assembly of the International Labour Organisation signed the International Labour Convention No. 29 on 06.28.1930 (which was ratified by Greece with Law 2079/1952, Government Gazette A 108/13-6-1952). According to the Convention, each Contracting State was bound to the immediate abolition of forced labor for the benefit of employers, companies or private legal persons (Articles 4 and 5 of the Convention). Moreover, contracting states undertook the obligation to work for the gradual abolition of forced labor within the shortest possible time (Article 1). In Article 2 of the Convention, the concept of forced labor is defined and extensive and detailed arrangements for the transitional period following the gradual abolition of forced labor in favor of the State are provided.

One of the forms of human trafficking discussed earlier, namely child labor exploitation was partially addressed by International Labour Convention No. 182 of 06.17.1999,[31] (According to this Convention, each Contracting State is obliged to prohibit and eliminate the worst forms of child labor (Article 1 of the Convention), namely forbid employing people under the age of 18 (Article 2 of the Convention)). A definition of forms of labor exploitation is included in Article 3 of the Convention: namely, slavery, serfdom, forced recruitment of children, jobs that endanger workers' health, safety or moral integrity of children or the use of children in illegal activities, as well as their sexual exploitation.

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[29] Aricle 3 of the Protocol. Available at http://www2.ohchr.org/english/law/protocoltraffic.htm

[30] See related translation of Athanasia P. Sikiotou at her book: Trafficking in the Balkans, Victim, Offender and repressive strategies, Publications Ant. N. Sakkoulas, Athens-Komotini, 2003, p. 124

[31] Ratified by Greece by Law 2079/1952 ,Government Gazette 119/15-6-2001)

The Council of Europe

The European Convention on Human Rights and Fundamental Freedoms (ECHR), (ratified by Greece with Law 53/1974, Government Gazette 256/20-9-1974) prohibits any kind of detention in conditions of slavery or servitude and any forced or compulsory labor (Article 4). The specific interest of the Council of Europe to combat the modern criminal human trafficking was expressed in a series of recommendations, such as R (2000) 11 related to the action against trafficking for sexual exploitation,[32] R (2001) 16 related to the protection of children from sexual exploitation,[33] R (2002) 1545 related to the campaign against trafficking in women,[34] R (2003) 1610 related to immigration concerning the trafficking of women and prostitution,[35] (2003) R 1611 on trafficking in organs in Europe[36] and culminated with the adoption of the Convention of Action against Trafficking in Human Beings, signed in Warsaw on 05.16.2005.[37] The Convention's objective is to establish a close cooperation among Member States of the Council of Europe in order to prevent and combat the phenomenon, while the convergence of national legislations would also be desirable. The Convention sets out in Article 4, the same definition of trafficking as that of Article 3 of Palermo Protocol and completes the regulation by including the UN Convention against Transnational Organized Crime. However, it has extensive references to the victim of human trafficking, which is the natural person who suffers the acts of trafficking, as these are defined in the same article (see Article 4 of the Convention).

In the EU

Following the Maastricht Treaty and the creation of the EU, the process of harmonizing norms is a new reality in the field of criminal law. This convergence occurred primarily in order to serve the immediate needs of building a common, if possible, criminal policy of the EU towards certain forms of crime. This need emerged as an outcome of the contemporary socio-political environment of Europe, because of the effective abolition of border and customs controls and the regime changes in Eastern Europe following the fall of the Berlin Wall and the collapse of the Soviet Union. So, the territory of the EU gradually became not only the first stop, but the main and desirable destination of thousands of immigrants from Eastern Europe. These people,

[32] Full text available at http://www.coe.int/T/E/human_rights/trafficking/PDF_Rec%282000%2911_E.pdf

[33] Full text available at http://www.coe.int/t/dg3/health/recommendations_en.asp

[34] Full text available at http://www.coe.int/t/dg3/health/recommendations_en.asp

[35] Full text available at http://www.coe.int/t/dg3/health/recommendations_en.asp

[36] Full text available at http://www.coe.int/t/dg3/health/recommendations_en.asp

[37] Full text available at http://conventions.coe.int/Treaty/en/Treaties/Html/197.htm

whose total number was added to the already large numbers of migrants from the developing countries (in Africa and Asia in particular) became part of the spread of human trafficking within the EU. Taking into account that human trafficking had all with the distinct characteristics of cross-border crime conducted by organized criminal networks, EU political bodies decided to adopt new rules applicable to all Member States in order to tackle the problem.

The general legal framework, which deals with forms of organized and cross-border crime at EU level, included the Joint Action 98/699/JHA on the identification, tracing, freezing, seizing, and confiscation of instrumentalities and proceeds of crime, the Joint Action 98/733/JHA on charges of involvement in criminal organization in EU Member States, the Joint Action 98/428/JHA establishing a European Judicial Network, the joint action 98/427 JHA on good practice in mutual legal assistance in criminal matters, which was also a series of specific legislative provisions related to the treatment against forms of trafficking. These legislative provisions also included:

– the Joint Action 96/700/JHA for a program of incentives and exchanges between those who are responsible for combating human trafficking and sexual exploitation of children, which would develop coordinated initiatives on combating human trafficking and sexual exploitation of children, child disappearances and the use of telecommunications for the purpose of trafficking, and sexual exploitation of children (Article 1),
– 7/154/JHA Joint Action on combating trafficking and sexual exploitation of children, which has already been repealed by Article 9 of No. 2002/629/JHA FD, and
– Joint Action 96/748/JHA on extending the mandate given to the Drugs Unit of Europol, with which the powers of Europol were expanded in relation to the exchange and analysis of data and information including crimes of trafficking, as long as two or more Member States are involved.[38] (proper citations for all these documents are needed)!

The convention for the establishment of Europol, which was ratified by Greece with Law 2605/1998 (Government Gazette A 88/22-4-1998), includes a definition of trafficking[39] that had been supplemented by Council Decision of 12/03/1998. This definition is broader than the corresponding definition in the Protocol of the UN, since there is no requirement of transport or facilitating entry of third country or committing an act of speculation[40] for committing the crime of trafficking.

[38] Full text of the Joint Actions available at http://eur-lex.europa.eu/el/index.htm

[39] "Human trafficking is the issue where the person find itself under the real and illegal sway of other persons who use violence, threats, misuse of a relationship of dependency or deceit, aiming in particular the exploitation of prostitution, other forms of sexual exploitation and violence of minors or trade of orphan children. These forms of exploitation also include the manufacturing, selling or any kind of distributing pornographic material, showing children."

[40] See Athanasia P. Sikiotou, Trafficking in the Balkans, Victim, Offender and repressive strategies, Ant. Sakkoulas, Athens-Komotini 2003, pp. 133–134; see also Elizabeth Symeonidou-Kastanidou, Organized Crime and Terrorism, Modern developments in European and Greek law, Sakkoulas SA, Athens-Thessaloniki 2005, pp. 217–218.

The only condition is the mere inclusion of "illegal person in power of others" which seems to be the necessary element. According to this definition, the concept of trafficking includes cases of trafficking in babies as well, since the trafficking of abandoned children is mentioned in the definition without the prerequisite of labor or sexual exploitation.

The top legislative initiatives at the EU level to combat trafficking in human beings are the Framework Decision No. 2002/629/JHA of 19.7.2002 on combating trafficking in human beings,[41] the Framework Decision No. 2004/68 / JHA 12/22/2003 to combat sexual exploitation of children and child pornography,[42] and the Framework Decision 2002/946/JHA of 28 November 2002 on strengthening the legal framework to prevent the facilitation of unauthorized entry, transit, and residence.[43] These legislative initiatives, complement the respective legislation of the first pillar through Directive 2002/90/EC of 28 November 2002, in which is defined the facilitation of unauthorized entry, transit, and residence.[44]

In 2002/629/JHA Framework Decision of 19.7.2002 on combating human trafficking, the definition of trafficking includes only labor and sexual exploitation (Article 1), omitting the protection of cases of trafficking in baby organ removal. It establishes a single threshold for protection of childhood, considering as a child in need of special protection, any person under 18 (Article 1, paragraph 4). This means, for example, that the use of fraudulent or coercive means for the termination of employment or sexual exploitation is not necessary in cases where the victim is a minor (Article 1 § 3). In Article 3, paragraph 2, there is a provision on aggravating circumstances, in the following cases:

– the life of the victim or the victim was particularly vulnerable (for example a minor), the circumstances caused particularly serious harm to the victim or
– the act was carried out by a criminal networks.

In Articles 4 and 5 Member States undertake the obligation to establish criminal liability for people responsible for crimes of trafficking and criminal sanctions against them as well.

For children in particular, namely persons below 18 years of age (Article 1 A 2004/68/JHA FD)[45] and for the crimes of sexual exploitation a comprehensive and satisfactory legal framework is suggested. The sexual exploitation includes forcing a child into prostitution or pornography, sexual activity with a child by force or by offering money or by other benefits or by abusing a position of power, under Article 2 of No. 2004/68/JHA Framework Decision of 22.12.2003,[46] while the Article 3,

[41] L 203 of 1-8-2002, p. 1.

[42] L 13 of 20-1-2004, p. 44.

[43] L 328 of 5-12-2002.

[44] L 328 of 5-12-2002.

[45] Full text available at http://eur-lex.europa.eu/el/index.htm

[46] Full text available at http://eur-lex.europa.eu/el/index.htm

refers to crimes of child pornography. Greek legislation has implemented these basic provisions in Articles, 348 A, 249, 350, 351 A of the Greek Penal Code.[47]

In the first pillar of European Community and in accordance with Articles 61 and 63 paragraph 3 of Treaty of European Community (Title IV) Directive 2002/90/EC was adopted, which requires the application by the Member States of "appropriate sanctions" against those who intentionally assist a person or persons, who do not have the nationality of a Member State, to enter or transit the territory of a Member State in breach of the law of that State.

Following the decision of the ECJ 13/09/2005 Case C-176/2003[48] the "appropriate sanctions" may be penal in nature, in accordance with the relevant interpretation of the ECJ. (poorly written and confusing. It is better to eliminate) An additional element that leads to this conclusion is the obligation of Member States under Article 2 of Directive 2002/90/EC to take all necessary measures to implement the sanctions in Article 1 of Directive in case of inciting, abetting, and attempt. These "necessary measures," can only be of penal nature since we are talking about incitement, complicity, and attempt.

Moreover, Article 1 of the Framework Decision 2002/946/JHA of the Council explicitly mentions the need for adoption of criminal sanctions against breaches of articles 1 and 2 of Directive 2002/90/EC by Member States, which indeed may apply to legal persons (Articles 3 and 4 of the Framework Decision). According to paragraph 2 of Article 1 of the Framework Decision 2002/946/JHA Member States can establish sub-sentences for those crimes, such as confiscation of the means of transport used to commit the crime, prohibiting the perpetrator from pursuing directly or through a third party the professional activity in which the offense was committed, and deportation.

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[47] Full text available at http://www.unodc.org/doc/enl/2010/Greece_Criminal_Code_Excerpts_Trafficking_in_Persons_R-2010-34.pdf

[48] "*Framework Decision 2003/80 on the protection of the environment through criminal law, being based on Title VI of the Treaty on European Union, encroaches upon the powers which Article 175 EC confers on the Community, and, accordingly, the entire framework decision being indivisible, infringes Article 47 EU. Articles 1 to 7 of that framework decision, which entail partial harmonisation of the criminal laws of the Member States, in particular as regards the constituent elements of various criminal offences committed to the detriment of the environment, could have been properly adopted on the basis of Article 175 EC in so far as, on account of both their aim and their content, their principal objective is the protection of the environment, which constitutes one of the essential objectives of the Community. In this regard, while it is true that, as a general rule, neither criminal law nor the rules of criminal procedure fall within the Community's competence, this does not, however, prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective. That competence of the Community legislature in relation to the implementation of environmental policy cannot be called into question by the fact that Articles 135 EC and 280(4) EC reserve to the Member States, in the spheres of customs cooperation and the protection of the Community's financial interests respectively, the application of national criminal law and the administration of justice." Retrieved from http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62003J0176:EN:NOT on June 19th 2012.*

In paragraph 3 of Article 1 of the Framework Decision 2002/946/JHA a distinct form of crime is introduced and applied in cases when crimes defined in article 1 paragraph 1 and 2 Directive 2002/90/EC, are committed for financial gain, or as part of the function of a criminal organization as defined by the Joint Action 98/733/JHA.[49] In case such a crime is committed, the maximum term of imprisonment cannot be less than 8 years or, where it is necessary for the consistency in the national system of penalties (Article 1 paragraph 4 of the Framework Decision 2002/946/JHA of), the maximum term cannot be less than 6 years.

Initiatives in the Balkans Area

In the aftermath of four Yugoslav wars, ongoing efforts at reconstruction in Southeastern Europe have devoted relatively limited attention to dimensions of human security that enhance protections for the region's most vulnerable populations in their daily lives. It is in this context that Southeastern Europe, and especially the Western Balkan region, has emerged as a nexus point in human trafficking.[50]

To address the emerging problem of human trafficking, various initiatives took place in the Balkans area, originating both from State entities as well as from NGOs or private actors. Such an initiative was the one undertaken by the NGO CARE. The project, called "Combating Human Trafficking Initiative in B&H, Croatia, Serbia and Montenegro" (2006–2008)[51] was a regional, multicountry initiative to build the capacity of key NGOs and anti-trafficking networks to support the implementation of the national anti-trafficking strategies, particularly the components that focus on prevention, education, and awareness. The project supported the development of networks of NGOs in four countries in Southeastern Europe.[52] The project aimed to strengthen the capacity of civil society organizations, specifically grassroots women's rights advocacy organizations, in regionally and nationally coordinated actions to prevent human trafficking and gender-based violence (GBV).[53]

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[49] L 351 of 29-12-1998, p. 1.

[50] Richard Friman, Simon Reich, Human Trafficking, Human Security, and the Balkans. University of Pittsburgh Press, 2007, p. 45ff.

[51] http://www.carenwb.org/index.php?sadrzaj=1&task=viewsubcat&skid=8&catid=3 Accessed on February 23 2012

[52] http://www.carenwb.org/index.php?sadrzaj=1&task=viewsubcat&skid=8&catid=3 Accessed on February 23rd 2012

[53] Other NGO initiatives include La Strada Foundation, International Catholic Migration Committee (ICMC), Transnational AIDS/STD Prevention Among Migrant Prostitutes in Europe (TAMPEP), Save the Children, International Research and Exchanges Board (IREX), and many other Local nongovernmental organizations.

As far as regional law-enforcement initiatives are concerned, during its existence, Southeast European Cooperative Initiative (SECI)[54] supported specialized Task Forces combating trafficking in human beings and drugs, commercial fraud, and stolen cars. The SECI Illegal Human Beings Trafficking Task Force was established in May 2000 on the initiative of the Romanian Government and comprises the Regional Task Force and the Regional Coordinator. The regional structure was supported by the local structures. National Task Forces in all SECI countries are headed by National Coordinators (not yet appointed in some of the countries). The Task Force operated through liaison officers, from all participating countries, working out of the SECI Centre in Bucharest. The liaison officers were in permanent contact with their national authorities through their respective designated National Focal Points, which communicate directly with the National Coordinators and the National Trafficking in Human Beings Squads.[55] In September 2002, SECI organized one of the largest regional anti-trafficking actions, called Operation Mirage, which resulted in over 20.000 police raids in bars, hotels, nightclubs, and border points in Bosnia-Herzegovina and Kosovo; 293 traffickers were identified, several of whom were tried in Bosnia-Herzegovina, in Serbia, and in Kosovo.[56]

Additionally, there are a number of international agencies working on the issue of human trafficking in the Balkan region. The most active include the Organisation for Security and Co-operation in Europe (OSCE), the Council of Europe (CoE), the International Organisation for Migration (IOM), The UN High Commissioner for Human Rights (UNHCHR), United Nations Children's Fund (UNICEF), the United Nations Population Fund (UNFPA), the UN High Commissioner for Refugees (UNHCR), International Labour Organisation (ILO), International Centre for Migration Policy Development (ICMPD), and the International Migration Policy Programme (IMP). Overall, these organizations are engaged in a number of activities to combat trafficking in human beings, including in the fields of law enforcement, public awareness, research, training and support for NGOs. However, an analysis of the role of these organizations is beyond the scope of this paper.

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[54] SECI, the Regional Centre for Combating Organised Crime was established as a result of the Agreement of Cooperation to Prevent and Combat Trans-border Crime, an agreement on cooperation between the law-enforcement agencies, signed by the SEE countries. In October 2000, Romania and SECI signed the Headquarters Agreement between the SECI Centre and Romania, which entered into force in April 2001 and the SECI Centre became operational in November 2000. http://www.secicenter.org/. Accessed on February 25th, 2012. In October 2011, and after the entering into force of the Convention of the South East European Law Enforcement Center (SELEC), SECI was replaced by SELEC.

[55] Southern European Cooperative Initiative, SECI information materials, Bucharest, 2001. Retrieved from http://www.secicenter.org/

[56] Richard Friman, Simon Reich, Human Trafficking, Human Security, and the Balkans. University of Pittsburgh Press, 2007.

Conclusion

It is clear that combating human trafficking involves various aspects relating to victim protection, law enforcement, and prevention as well. Legislative efforts are just one of the factors that play a role in dealing with the problem itself.

However, the analysis of this approach highlights the need for a new definition of trafficking, both nationally and internationally. This definition will look at trafficking, as a phenomenon, from a sociological and criminological perspective. Apart from any legislative initiative or law amendment, substantial success in combating the phenomenon of trafficking can only be achieved by a comprehensive socio-political and ideological reconstruction that will focus on human beings themselves.

Which institution or international organization could spearhead the effort to curtail the human trafficking problem in Europe? Undoubtedly, the European Union must recognize that human trafficking is a serious human rights issue and should hold member states and prospective member states accountable for prevention initiatives in accordance with the Charter of Fundamental Rights.[57] The EU should insist that the prospective Western Balkan states improve their records on prosecution and punishment. This improvement should not only include legislative efforts but structural reforms as well; for example, closer and more effective cooperation between law-enforcement agencies. A good start towards this direction could be the strengthening of SECI.

Similarly, in a more proactive approach, the EU should support local initiatives to address the root causes of trafficking such as domestic violence and low economic opportunities, especially during times of economic turmoil and insecurity that could fuel the root causes of human trafficking.

That being said, before attempting to implement any proposed solutions, legislative amendments or other reforms one should never forget that the causes of trafficking are complex. While there are numerous contributing factors, including mass unemployment in many countries of origin, inequality, discrimination, and gender-based violence in our societies, the patriarchal structures in the countries of origin as well as destination; the demand side including the promotion of sex tourism in many countries of the world, and the attitudes of many of men, the primary root cause is poverty, most particularly among women.

Having said that, significant progress towards solving the problem of such exploitation can only be achieved if we commit ourselves towards changes and actions that aim to address the root causes of the problem. This would entail, cooperative actions at the international level combined with transnational initiatives to reduce unemployment and poverty and by strengthening, the role of women and the protective framework for minorities. In other words, we have no alternative but to

[57] Kate DeBusschere, Chasing Human Traffickers in the Balkans: the EU Must Ask for More. Zahraničná politika 4/2007. Retrieved from http://www.zahranicnapolitika.sk/index.php?id=475

engage with the root causes, no matter how complex, difficult and forbidding they may be. Anti-trafficking initiatives must offer sustainable options for escaping the cycle of poverty, abuse, and exploitation.

Last but not least, concerning the law-enforcement cooperation in the field of anti-trafficking of human beings, the following points should be borne in mind: firstly, coordinating the efforts of law-enforcement agencies has not been and is not an easy task.[58] Additionally, effective law enforcement at the international level is essential in combating trafficking of human beings, both at the level of prevention (through intelligence exchange) as well as that of suppression (through arrests, raids, and other operational tools). International partners, such as Interpol, Europol, and the World Customs Organization, as well as regional partners such as Europol and the SECI should actively participate in conferences, meetings, and specialized workshops, in order to advance the implementation of local, regional, and international legislation on human trafficking, as well as to build trust and share best practices.

It is widely accepted that cross-border cooperation between national and international law-enforcement agencies is necessary for an effective criminal justice response to trafficking.[59] Among others, such an approach could include carrying out joint anti-trafficking special campaigns or exercises aiming to increase communication, improve mutual trust, and establish mechanisms for frequent meetings among law-enforcement agencies. After all, what we have learned from various forms of crime (including forms of transnational crime such as human trafficking) is that ongoing police cooperation is vital: before, during, and after every unlawful activity.

To sum up, what is required in the fight against human trafficking is more and better disaggregated information, appropriate legislation, adequate law-enforcement response,(including close cooperation), the protection of victims of human trafficking, improved coordination among countries of origin, transit, and destination—and, last but not least, political will.

[58] http://www.fas.org/irp/crs/RL30252.pdf. Accessed on February 24, 2012.

[59] Anne T. Gallagher and Paul Holmes. "Law Enforcement Cooperation in Anti-trafficking Cases" Crossing Borders: Promoting Regional Law Enforcement Cooperation. Australian National University, Canberra. Apr. 2009. p. 34ff.

Chapter 9
Aspects of Accountability in Law Enforcement: A Case Study of Bosnia and Herzegovina

Selma Zekovic

Background

The years of efforts in conflict resolution and development of conflict-prone regions of the world have emphasized the importance of security sector reform. The United Nations (UN) has recognized its importance in the *Resolution on millennium development goals* (UN 2000), which acknowledged that security from disorder, crime, and violence is critical for reducing poverty and achieving sustainable economic, social, and political development. Efforts of various international organizations involved in mitigating violent conflicts have assisted in raising awareness of the importance of a country's security sector and the important role that it plays in stabilizing states and regions that are prone to conflict. Bosnia was no exception in that regard, as peace building efforts in the country have shown in years following the end of the armed conflict.

Following the signing of the Dayton Peace Agreement (DPA), Bosnia found itself in a very difficult situation vis-à-vis stable security system, as the system itself was over-fragmented, with different structures in different parts of the country being in charge of it. DPA left the responsibilities for defense, law enforcement, intelligence, and even most levels of the judiciary to two entities,[1] the Federation of Bosnia and Herzegovina (FBiH) and Republika Srpska (RS). This came as a result of ethnic divisions which were a direct consequence of the 1992–1995 conflict.

The views and opinions expressed in this article are solely those of the author

[1] Bosnia and Herzegovina is largely a decentralized country and it comprises two autonomous entities: the Federation of Bosnia and Herzegovina, and Republika Srpska, with a third region, the Brčko District, governed under local government.

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In spite of intense ethnic tensions, significant progress was made in the security sector under the auspices of the international community. However, recent political developments, which will be discussed in the coming chapters, threaten to nullify the positive developments. This comes as a result of opposing views that different ethnic groups have over the future of the country. Therefore, the progress made in the security sector is currently being challenged by the RS government. It claims that institutions which were established while reforming the security sector are not in line with the provisions of the DPA. This mainly relates to those institutions that were either imposed by the Office of High Representative (OHR)[2] or were put in place under a significant pressure by the international community. The reason behind these claims lays in the fact that the RS government has been constantly trying to fight the establishment of a strong state of BiH, which could eventually derogate prerogatives of entity governments, in this case the RS government. This also reveals another important characteristic of the reform of the security sector in Bosnia which makes it different from neighboring countries. In December 2009, in their report entitled: "Independence of Judiciary: Undue Pressure on BiH Judicial Institutions" the Organization for Security and Cooperation in Europe (OSCE) reported to be "deeply concerned about the nature of statements expressed by some prominent political representatives, particularly but not exclusively from the Republika Srpska, in relation to the work of the Court of BiH and BiH Prosecutor's Office. While the executive and legislative powers may legitimately scrutinize and comment on the functioning of the judiciary, the Mission's assessment is that these statements, due to their harsh content, unsubstantiated nature, and frequency, overstep the limits of acceptable criticism and constitute undue pressure on these independent institutions" (OSCE 2009).

Thanks to the provisions of the DPA, the peace building process in Bosnia involved a range of international organizations, most of them designated to implement certain aspects of the agreement. They ultimately evolved into the key players of the reform of security sector in the country. In that regard, some of the most important organizations in this process were the UN, the North Atlantic Treaty Organization (NATO), the European Union (EU), the OSCE, and the Council of Europe (CoE). While NATO was involved mainly with the military aspects of security, the OHR was in charge of the civilian aspects of the peace agreement and for the overall coordination of international organizations (Hadzovic 2009).

Security institutions established through security sector reform—facilitated by the international community in the country—are Border Police, State Investigation and Protection Agency, Court and Prosecutor's Office of BiH, Indirect Taxation Agency, and Ministry of Security. These institutions have prerogatives that cover the entire country and are important factors in terms of the accountability discussed in this paper.[3]

[2] The Office of the High Representative (OHR) was established by the DPA as an *ad hoc* institution to oversee implementation of the civilian component of the agreement and is accountable to the Peace Implementation Council (PIC). With the appointment of Mr. Paddy Ashdown as High Representative in 2002, the High Representative also became the European Union Special Representative in Bosnia and Herzegovina.

[3] For further information about these institutions, please see Appendix.

Accountability Mechanisms of the Security Sector

According to Schedler (1999), accountability refers to the various norms, practices and institutions whose purpose is to hold public officials (and other bodies) responsible for their actions and for the outcomes of those actions. It is concerned, in particular, to prevent and redress abuses of power. Accordingly, this definition of accountability obliges public officials to inform the public of their actions and to provide reasonable explanations for them. Representatives of government are constantly required to answer to those they represent. They are required to act upon criticisms or requirements that they encounter, and to accept responsibility for failure, incompetence, or deception. Thus, accountability requires transparency in the decision-making process, as it assumes the necessity of sharing information with the public in a timely manner. This, of course, cannot pertain unconditionally to all aspects of governance, as there is a need to adhere to certain legal requirements of confidentiality for the sake of national security.

The present definition therefore helps us not only to specify the main aspects of accountability, but also to identify key areas of consideration for accountability in Bosnia and Herzegovina. These are as follows:

- The political situation.
- State institutions.
- Civil society and the media.

Each of these areas is linked to the reform of the security sector and has certain specificities which can mainly be attributed to the postwar context, post-socialism era, aspirations towards EU integration and, most importantly, the ethnic complexity of Bosnian society. As the analysis of these areas will show, this environment is significantly affecting security institutions, especially those in charge of law enforcement, and it adversely affects the quest for accountability. One of the key areas to be considered in that regard is the current political situation in the country which is addressed in the following section.

Political Situation

Even today, 17 years after the conflict, lack of accountability exists in all spheres of Bosnian society. This does not mean, however, that accountability mechanisms do not exist. On the contrary, accountability mechanisms have been developed in most of the sectors, mainly due to pressure from the international community.

The current situation in Bosnian society is a direct consequence of country's recent history. BiH is a transitional society which was recently transformed from a single-party socialist system into a pluralistic society. However, in spite of the fact that this process of transformation into pluralism in BiH began a long time ago,[4]

[4] The first democratic elections in Bosnia and Herzegovina were held in November 1990.

serious challenges persist. This is not only the consequence of a situation where all political parties in the country are organized along ethnic lines, but also because of the existence of many actions which are incompatible with democracy, such as obvious attempts of the largest ethnic groups to establish a democratic polity which subjugates basic tenets of democracy to the ones of ethnic group interests.[5] The current situation most probably can be considered as a legacy of the recent armed conflict between the three ethnic groups, which intensified interethnic polarization and massively strengthened the political domination of ethno-nationalist political parties in the post-conflict period. Moreover, the DPA, signed in 1995, which brought the war to an end, not only created an extremely cumbersome policy process that frequently results in deadlock, but it also left unresolved the conflicts that had come to the fore in the 1992–1995 war and enshrined the ethno-nationalist principle as the foundation of public discourse (Vogel 2006).

Consequently, the overall situation in BiH, including its security sector, may be described as being in a state of "unfinished peace," whereas elected representatives of all three constituent peoples[6] repeatedly polarize the political situation in order to hamper progress and the establishment of core democratic values and processes. Heated rhetoric has become more frequent in the past several years, which coincides with the intentions of the international community to gradually transfer the ownership over the reform process to local politicians. This deterioration has been noted by many analysts familiar with the situation in the Western Balkans. For example, a study by the United States Institute of Peace (Bassuener and Lyon 2009) argues that "today, political dialogue in Bosnia is sadly reminiscent of the immediate pre-war (and post-war) era. Aggressive rhetoric has escalated the ambient level of uncertainty and tension among Bosnia's citizens to a postwar high. Politicians from RS and the Federation often use language designed to raise tensions and polarize the population."

The main characteristics of the institutional structure, including that of the security sector, are over-fragmentation, antagonism between different political and ethnic interests, insufficient capacities in terms of skills and staffing structures, as well as lack of appropriate resources. International actors involved in the reform processes have been confronting the inconsistencies such as facing the situations where establishing adequate capacities do not necessarily secure sufficient level of operability or, similarly, situations where providing capacity-building activities might not necessarily result in the improvement of execution of day-to-day tasks. This also represents one of the main obstacles for BiH's aspirations towards Euro-Atlantic integration as concluded by the Foreign Policy Initiative BiH: "…besides an absence of political will to render the system functional, BiH is also plagued by an incompetent, inefficient

[5] The postelection distribution of power is based not only on the elections results, but also on ethnic considerations. Even the DPA embedded these ethnic criteria when it comes to distribution of key elected positions.

[6] Bosnia and Herzegovina is a homeland to three ethnic groups, or so-called constituent peoples. These are Bosniaks (Muslim), Serbs (Orthodox Christians), and Croats (Roman Catholics). Regardless of ethnicity, a citizen of Bosnia and Herzegovina is often identified in English as Bosnian. At the same time, the term Herzegovinian is maintained as a regional distinction.

and ill-informed public administration that has been protected by the Laws on Civil Service at state and entity levels. Even if or when political consensus is reached, the inert public administration will seriously hamper BiH's future chances of successful EU integration" (Foreign Policy Initiative BiH 2009).

Additionally, legislative authorities have been influenced by numerous lobbyists; executive authorities are overburdened with a multitude of organizational flaws and inadequate financial and technical support; staffing structures are not sufficient to face current challenges; and corruption is pervasive at all levels of administration. According to the 2009 European Commission's (EC) Progress Report, Bosnia and Herzegovina has not yet achieved any significant progress in the fight against corruption (European Commission 2009a, b). Bosnia and Herzegovina is the worst ranked European country on this list. The EC Progress Report points to the same problems year after year, of which corruption is one of the most distinctive. In each report, Bosnia and Herzegovina makes either "insufficient" or "minimal" progress, which is a direct consequence of the lack of political will to fulfill European Union anticorruption standards. That is the main reason why Transparency International has placed Bosnia and Herzegovina on 99th place of the 2009 Corruption List, out of 106 countries ranked worldwide (Transparency International 2009). It is for this reason that progress in BiH is stagnant. In fact, the only thing that seems to be advancing is corruption.

Taking into account all these institutional deviations, it is not a surprise that many social norms and values have been seriously challenged in the Bosnian context. For example, although the Strategy against Juvenile Offending for Bosnia and Herzegovina for the period 2006–2010, along with the Action Plan 2006–2010, was adopted on 27 July 2006 by the Council of Ministers of BiH (the body established within the scope of DPA equivalent to the state government) under the auspices of international community, it only came into force two years later. The delay was due to the fact that the BiH Ministry for Human Rights and Refugees, which was tasked to propose members of a coordination board, failed to reach consensus about the membership. The indifferent attitude of responsible officials towards the execution of the Council's decision ended only after several brutal murder cases committed by minors triggered the protests in the capital city.

These developments are indicative of the unnecessary politicization of almost all issues in Bosnian society, a situation that could seriously hamper the establishment of effective security mechanisms. The crucial problem in BiH is the lack of consensus even on basic issues such as the future of BiH, that is, whether the country is going to be centralized or decentralized. This is further accentuated by issues that came to the fore as a result of the conflict such as the categorization of the conflict as an aggression by neighboring countries or a civil war; the understanding of war crimes and seeing the perpetrators as war criminals or as national heroes; as well as the strategic positioning of the country—self-reliant or pursuing some regional options. Under such circumstances, it is very difficult, if not impossible, to establish an effective security system which will equally serve all citizens. It is also almost impossible to have accountability introduced and entrenched in such a system as most officials are accountable only to their political parties' headquarters rather than to the public whose interests they should be protecting in the first place.

This of course affects the functioning of institutions at the state level that are supposed to deal with security issues, and it is discussed in greater detail in the following section.

State Institutions

The state institutions of Bosnia and Herzegovina that are responsible for the design, approval, and implementation of security policy are the Presidency of Bosnia and Herzegovina, the Parliament of Bosnia and Herzegovina, the Council of Ministers of Bosnia and Herzegovina, the Armed Forces of Bosnia and Herzegovina, the High Judicial and Prosecutorial Council, the Court of Bosnia and Herzegovina, the Prosecutor's Office of Bosnia and Herzegovina, the Ministry of Security of Bosnia and Herzegovina, including its organizational units, the State Investigation and Protection Agency, the Border Police, the Service for Foreigners Affairs, the Intelligence Security Agency of Bosnia and Herzegovina, and the Indirect Taxation Administration.[7]

It should be noted that only the first three institutions from this list have been provided for by the DPA. These are the Presidency, the Parliament, and the Council of Ministers. The remaining institutions were established through reform processes that were mainly the result of enactment or "arm twisting" by the international community, primarily the OHR (Hadzovic 2009). As a result, the functioning of these institutions has been undermined by the entity governments—mostly RS, but there have been a few examples that involved the FBiH as well—as their sole existence is seen as a threat to politicians whose primary concern are interests of their entities and their own ethnic group. Needless to say, this further undermines the attempts at accountability that could be exercised by these institutions. In this context, it is worth mentioning the issue of police reform that was seen as the single biggest threat that these politicians have encountered during the reform of security sector. As Wilfried Martens, a former Belgian Prime Minister, who chaired the Police Restructuring Commission established by Lord Paddy Ashdown in July 2004, notes: "the core of the problem was of a political nature: how could I possibly awaken the political will of the representatives of the three ethnicities to meet one of the basic requirements for a common state?" (European Union Police Mission 2007)

Police Reform

Despite the attempts of the European Union (EU) and the OHR to pursue meaningful reform of the police service in BiH, this proved to be one of the least successful undertakings of the international community. Originally, it was envisaged that police reform would be based on the three principles whereby the police would be organized at the state level, be financed from a single budget, and be free of political

[7] See Appendix for further information on some of these agencies.

interference. Not even the fact that that this was a condition for the initiation of accession talks and the signing of the Stabilization and Association Agreement with EU has helped to have a successful police reform. Instead, the EU has essentially abandoned these principles. Following a lengthy and exhausting process and negotiations, in April 2008, the Parliamentary Assembly of Bosnia and Herzegovina adopted two police reform-related laws which were accepted by the European Union as a satisfactory sign of progress: the Law on Directorate for Coordination of Police and Agencies for Support to Police Structure of BiH, and the Law on Independent and Supervisory Bodies of the Police Structure of BiH.

These laws were seen as a watered-down version of the originally envisioned police reform. They prescribed the establishment of a Directorate for the Coordination of Police Bodies, as well as seven new police coordination bodies at the state level that will not directly affect the autonomy of the various police institutions at entity and cantonal levels. These shall include Directorate for Coordination of Police Bodies, Agency for Forensic Examinations and Expertise, Agency for Education and Advanced Training of Personnel, Agency for Police Support, Independent Board, Board for Complaints of Police Officials, and Public Complaints Board. Even though over the years these institutions have gradually become more operational, the EU Progress Report for BiH in 2011 noted that institutions created by the police reform laws were established at a slow pace. The lack of institutionalized cooperation between all law enforcement agencies and the limited strategic guidance remain challenges for efforts to achieve more efficient policing (European Commission 2011).

Accountability Mechanisms

Despite the fact that police reform has essentially failed, the reform efforts have eventually resulted in the establishment of some law enforcement agencies and institutions that are functioning, though with some difficulties. As in democracies, oversight of intelligence tends to be a shared responsibility of the executive and legislative powers. Bosnia is no exception in that regard. There is no doubt that democratic parliamentary control of military forces, police forces, and intelligence services, among other security structures, by constitutionally established authorities vested with democratic legitimacy is indispensable to the stability and security of BiH and the region, as well as for upholding the rule of law.[8]

[8] In spite of the fact that the term "rule of law" is widely used, there is no single agreed-upon definition. It refers to a principle of governance in which all persons, institutions, and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency (The UN Secretary General 2004).

Given that international actors in BiH have played a key role in the introduction of the democratic instruments, the Bosnian model has somehow integrated their main characteristics with adequate adaptations to the local circumstances. For instance, the oversight in the USA is unique to the extent to which responsibilities and powers reside in the legislature. Parliaments in most countries have committees devoted to intelligence oversight, but none of these committees have equal authority (Lowenthal 2000). To that extent, BiH, as a newly established parliamentary democracy, has through its Parliamentary Assembly established a Joint Committee on Defense and Security in December 2003. Besides the defense sector, the Committee is responsible for Parliamentary oversight over the following: the BiH Ministry of Security, the BiH Ministry of Foreign Trade and Economic Relations (concerning weapons import/export, and production), Border Police, State Investigation and Protection Agency (SIPA), National Interpol Office, and BiH Mine Action Centre (BH MAC). The Committee comprises 12 members, 6 from each House of the Parliament. The Committee has a chair-person and two deputies reflecting the country's ethnic balance. Since its inception, the Committee has established very intensive international cooperation mainly through bilateral cooperation with similar parliamentary bodies in other countries or implementation of different staff development activities for relevant domestic institutions. For instance, in 2009 the Committee organized three bilateral visits (Slovenia, the USA, and Italy) and hosted the same number of foreign delegations (Slovenia, Czech Republic, and Sweden). At the same time, the Committee organized five seminars for international and national counterparts, while its members attended more than 50 seminars and workshops organized in BiH and abroad. In addition to this, the Committee reviewed and commented on 11 proposals of the law which were then forwarded to relevant institutions in line with established parliamentary procedures.

The establishment of this Committee has set a good example for other parliamentary oversight bodies such as the Joint Security-Intelligence Committee for Oversight over the Intelligence Security Agency (OSA), which was established based on the legislation of the BiH Intelligence Service. Since its establishment in April 2004, the committee monitored the challenging formation of the Intelligence Security Agency and lobbied the Parliamentary Assembly of Bosnia and Herzegovina to adopt legislation that would ensure adequate democratic oversight of the agency. The establishment of this committee has been playing a significant role in the democratization of the intelligence sector in the country, given the fact that, after the DPA, three intelligence services operated in BiH. These were defined according to the major ethnic constituencies (i.e., Serbs, Croats, and Bosniaks). In 2002 a new structure was agreed upon, which established two intelligence agencies: Intelligence Security Service (FOSS) in the FBiH and Intelligence and Security Service (OBS) in the RS. However, after several affairs had been revealed to the public through local media, it became obvious that the ethnic character of these agencies cannot be preserved. One case relates to the "Orao" affair where high-ranking officials from the RS were implicated in selling aircraft parts to Iraq, which constituted a breach of the UN embargo. Additionally, in March 2003, another affair involving RS defense structures was made public. International Stabilization Forces (SFOR)

conducted a raid in the RS Parliament building and found that the intelligence unit of the Army of Republika Srpska[9] was conducting surveillance and spying on international officials from the USA, OHR, NATO, and EU, as well as FBiH officials (Hadzovic 2009). These cases, along with an ongoing defense reform, facilitated the establishment of a single intelligence service and provided the necessary leverage for the OHR to pursue this reform and to push local counterparts into accepting the reform agenda. This process was particularly supported by some members of the Bosniak political elite in the country such as Šefik Džaferović, the Speaker of the BiH Parliament's House of Representatives who stated that "there is a need to address the issue of intelligence structures in the country and the key role in the process should be played by the international community" (Večernji list 2003).

However, the legacy of war was not the only obstacle in establishing the intelligence service, provided that it had a very negative perception as an instrument of political control in the former communist system. Nerzuk Curak, professor at the Faculty of Political Science at the University of Sarajevo, describes the intelligence sector as "a dinosaur resisting the modern age whose resistance is supported by uninventive and narrow-minded politicians who would like to have their people in the intelligence community and who would provide to them … intelligence which will be used by them to increase their political power" (Curak 2004).

In terms of cooperation with different spheres of society, it is important to mention that there is little dialogue between the media, academia, and the intelligence service in BiH. Denis Hadzovic, Secretary General of the Centre for Security Studies in Sarajevo, blames this on the underdeveloped civil society sector (Hadzović 2007). On the other hand, in spite of the lack of quantitative indicators of the effectiveness of the parliamentary committee, it is certain that this body has been regularly communicating with the public, as well as it has been involved in many bilateral and multilateral activities—seminars, conferences, etc. The committee has been regularly publishing its activity reports, while its members have been responsive to media with regard to commenting on various security-related issues.

In addition to these two committees, it should be mentioned that both entities have parliaments which also maintain parliamentary oversight committees. Originally, these committees had jurisdiction over former ministries of defense and interior of the FBiH and the RS. However, following the full transfer of defense responsibilities to the state level—on January 01, 2006—the entity parliamentary committees remained responsible for overseeing their respective entity ministries of interior and their subordinated police forces. In FBiH, besides the FBiH Ministry of Interior and FBiH Police Administration, there are ten cantonal ministries of interior and police administrations attached to them, while the MoI and police administration are centralized in the RS.

[9] The Armed Forces of BiH was formed from three armies: the Army of BiH (dominantly Bosniak with numbers of Serbs and Croats), the Army of Republika Srpska (Serb), and the Croat Defence Council. These were unified in 2005.

Civil Society and the Media

Civil society and the media can play a significant role in making public officials accountable to the public. As a transitional country, Bosnia is facing new challenges in this regard as its civil society sector only recently started to take hold. Despite the fact that the establishment of nongovernmental civil society organizations (CSOs) was allowed during the period of socialism (1945–1992), these were mainly restricted to the sports and cultural spheres. Since the signing of the DPA, there has been a boom of different CSOs throughout the country. Since their registration is allowed at different levels of governance, which mainly depends on the scope of their activities and geographical area in which they are active, it is very difficult to identify their exact number. According to the information provided by the International Council of Voluntary Agencies (ICVA 2005), there were 6,528 CSOs and 70 foundations registered in BiH in 2005. This relatively large number of registered organizations does not mean that there is a kind of "revolution" within civil society. In fact, many of these organizations deal with strictly limited issues, such as those pertinent to honeybee keepers and fishermen associations and have quite a limited membership.[10] Additionally, even though the number of existing CSOs is one of the main parameters for the evaluation of the maturity of civil society, this is not the only indicator of a truly capable civil sector. The fact that the vast majority of these CSOs are financed solely by different levels of governance, e.g., municipalities, cities, cantons, and entities, indicates that their independence and impartiality may be seriously challenged.

In addition to this, findings of the consulting firm "Atos Consulting," which has since 2004 been working in the Balkans on issues of justice, security, and aid effectiveness on behalf of the United Kingdom Government, show that "in the justice and security sectors in BiH engagement of CSOs is currently limited and sporadic" (Worner 2009). They also found that compared with other institutions in their sectors, the Ministry of Security and the Ministry of Justice are still relatively weak and "neither institution has a strong track record in CSO engagement. Furthermore, little is known about the CSOs that operate at the state level in the justice and security fields, or that are active on issues that come under the policy remits of the state ministries" (Worner 2009).

At the same time, the research which was conducted in 2008 within the scope of the project implemented by the British Embassy in BiH—Conflict Prevention Pool—showed that representatives from the aforementioned ministries demonstrate little understanding of CSOs and particularly about CSOs that exist in their areas of responsibility or how to engage with them. For instance, more than two-thirds of interviewees could not provide satisfactory definition of CSOs and their role. According to the opinion of the interviewees, the most important obstacles for improving the engagement with CSOs are lack of budgetary means, inadequate staffing, and confidentiality of their work. Likewise, representatives from CSOs

[10]According to the law, any three physical or legal persons may register as a CSO.

have little understanding of the role and activities of the Ministry of Justice and Ministry of Security and have little positive experience in engaging with them (Warner 2009).

The most logical explanation for these results is that the extent of CSO engagement at state level is restricted by the mandates of both ministries. Many of the ministries' functions are related to sectoral coordination and harmonization, or focused on international cooperation. As a result, only a limited number of sectors in these ministries will find natural partners in BiH civil society and vice versa. This, however, does not prevent CSOs from advocating changes in this regard, changes that could bring about more accountability within this sector.

At the same time, the relationship between the media and the security sector is a complicated one, and is not free of tensions. This is particularly true when it comes to the military, a sector which is traditionally rarely open to public scrutiny. A more effective role of civil society in security issues is a necessary outcome of a broader concept of security, which has been defined differently by various authors. For instance, Kofi Annan provides the following definition: "Human security, in its broadest sense, embraces far more than the absence of violent conflict. It encompasses human rights, good governance, access to education and health care and ensuring that each individual has opportunities and choices to fulfill his or her potential. Every step in this direction is also a step towards reducing poverty, achieving economic growth and preventing conflict. Freedom from want, freedom from fear, and the freedom of future generations to inherit a healthy natural environment—these are the interrelated building blocks of human—and therefore national security" (Kofi 2000). In this respect, the recent changes in the perception and meaning of security render the traditional limited access to security no longer acceptable. The media play an important role in accelerating this process and in keeping the public informed on what security is about in its own country (Caparini 2004).

The second half of the twentieth century in Bosnia can be described as one of repression of civil society and of the state-dominated media. During the 1990s' war, the situation aggravated and continuing uncertainty characterized state and interethnic relations. Even though the DPA and Constitution of BiH said almost nothing about the media, in December 1997 the Independent Media Commission was established at the Bonn Conference in order to set norms for public broadcasters. These norms regulate issues such as the establishment of public broadcasters, financing, freedom of information, and decriminalization of libel and defamation. This was followed by the 1998 Madrid Conference where a state strategy for media reform was adopted which led to comprehensive reform of the media laws in both entities and the establishment of a public broadcasting service at the state level. However, since these reforms were initiated and completely controlled by the international community,[11] domestic politicians who oppose establishment of a strong state declared them as nondemocratic and nontransparent in spite of the fact that these reforms

[11] These decisions were imposed by the High Representative and the implementation was financed by European Union, Soros Foundation, and USAID. More information on the decisions can be found at http://www.ohr.int/decisions/mediadec/default.asp?content_id=98.

were imposed for the sole purpose of creating media pluralism and preventing usage of the media for the "verbal war." Despite these significant improvements, the local media are still facing many challenges. Some of these are the common challenges which are present in the rest of the world (public or private ownership, profitability vs. public education, Internet era, etc.), while other challenges are specific to the Bosnian society. Such challenges, *inter alia*, include demands to establish equal ethnic representation of employees in public media, and more serious political pressure on the media and threats against journalists that increased in the run-up to the elections, with reports of government interference, intimidation, and surveillance (Freedom House 2011).

The experiences of other countries in the region, such as those in Croatia, Serbia, and Kosovo, showed that the democratization of media seemed to be "a gigantic experiment guided by an infinite number of theories" (Sukosd and Bajomi-Lazar 2003), as many organizations that were working on this issue came from various countries accustomed to media models that differ significantly. The assistance which was provided and directed in this way most often by the international community seemed to be insufficient to establish authentic reform of the media. In addition to this, in the past several years, international aid to BiH seemed to be drying up and the whole process of democratization of the media has slowed down. This has undermined efforts aimed at increasing accountability of Bosnian officials.

Migration Management

As a part of the security sector, management of both regular and irregular migration has a prominent position. Moreover, this field is important because in the former Yugoslavia, Bosnia and Herzegovina had no international borders, meaning that it did not have any real competencies to regulate migration. After the war, the situation changed and the process of the establishment of a migration management system began with strong support from the international community.

Bosnia's geographical position and new geopolitical situation in the Balkans have brought BiH at the crossroads of migration and trafficking routes from "the East" to "the West." Moreover, current globalization trends cause rapid changes in the area of migration and these will most probably be continued following the 9/11 attacks, given that the countries in the developed world have begun closing down and imposing migratory regulations. In Europe these trends triggered the development of various information systems (EURODAC system that registers asylum seekers and illegal (irregular) migrants, Schengen Information System, Visa Information System, etc.) and enactment of different provisions regarding "securitization" of border policing, inclusion of carrier responsibility into immigration acts, biometric passports, etc. (Uccellini 2010).

The EU and the USA have done a great deal in establishing building capacity and equipping the migration management structures in BiH, which mainly took place through their assistance programs. Today, the country operates within the three-tier

migration management model.[12] This model follows the EU standards and serves as the basis for further development, such as the introduction of the fourth tier of control—international cooperation—as well as development of integrated border management practices. An improved primary legislation, which is mainly related to the 2008 Law on Movement and Stay of Aliens and Asylum, clarifies the particular roles of the implementing agencies and procedures to be followed.

However, similar to other fields, the core challenge facing Bosnia in managing both regular and irregular migration is not primarily one of legislation, it is one of capacity. The 2008–2011 BiH Migration Strategy states that despite distinct developments seen over recent years, the capacities of individual agencies and bodies still require improvement. Concepts and practices introduced with new legislation are often entirely new to BiH and as such, their implementation is weak. A much more proactive approach is assumed by new procedures and closer cooperation along similar standards across agencies. Furthermore, authors of the Migration Strategy indicate that "historically, the Ministry of Foreign Affairs (MFA) visa sections and Sector for Foreigners Affairs (SFA) had more of an administrative nature; hence their adaptation to their new roles has not been without difficulties. More police-styled and well-established agencies such as the Border Police and SIPA are better able to adapt to such concepts. However, concern exists that the visa sections of both the SFA and MFA will struggle with their roles—not because they don't want, but simply because they do not how to. A lack of accountability within these agencies adds to the risk that bad practices could go unnoticed and/or unchallenged and practical development of the whole of migration enforcement will be undermined" (Ministry of Security of Bosnia and Herzegovina 2008).

Such a situation carries high potential for breaches of international human rights norms and standards. Moreover, political interferences seem to challenge the technical progress made so far. Unfortunately, these problems have surfaced not only in the sector of migration management but also in other issue areas, hence the concern expressed by international actors involved in projects in BiH. For instance, the European Commission reported to the EU Council and the European Parliament that "the functioning of the state-level executive and legislative bodies has continued to be negatively affected by the prevalence of ethnically oriented considerations" (European Commission 2010). Also, the EC reported that the civil service is still highly politicized and in need of professionalization, transparent and efficient recruitment procedures. "Little progress has been made in preventing political interference and limiting the role played by ethnic identity and party membership in public administration, as demonstrated during the harsh and lengthy processes to appoint new directors in a number of key institutions, including the Directorate for European Integration, Indirect Taxation Authority, Communications Regulatory Authority, etc. Little progress has also been made in modernizing procedures and in

[12] (1) Pre-entry—Visa and Consular Sections (under the Ministry of Foreign Affairs); (2) On-entry—Border Police (under the Ministry of Security); (3) After-entry—Service for Foreigners Affairs (under the Ministry of Security), also responsible for the short-term detention of migrants prior to their expulsion from the country.

ensuring closer cooperation between the various administrations within the country" (European Commission 2009a, b). All these issues adversely affect the development of an accountability culture within these institutions.

Citizenship Review Commission

In recent history, Bosnia and Herzegovina has not been an attractive destination for foreign settlers. However, the 1992–1995 armed conflict attracted a large numbers of foreign fighters and mercenaries from various countries. Volunteers came to fight for a variety of reasons including religious or ethnic loyalties, and in some cases for financial gain. The number of the volunteers is still disputed as it has never been systematically analyzed. After the war, vast majority of these soldiers left BiH, but some decided to settle permanently. Those who decided to stay had to legalize their status in the country, as the DPA stipulated that "all forces in Bosnia and Herzegovina as of the date this Annex enters into force which are not of local origin, whether or not they are legally and militarily subordinated to the Republic of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina or Republika Srpska, shall be withdrawn together with their equipment from the territory of Bosnia and Herzegovina within thirty (30) days. Furthermore, all forces that remain on the territory of Bosnia and Herzegovina must act consistently with the territorial integrity, sovereignty and political independence of Bosnia and Herzegovina" (General Framework Agreement for Peace in Bosnia and Herzegovina 1995).

However, a significant number of these persons were allowed to stay in Bosnia and Herzegovina due to their matrimonial relations with Bosnian citizens, as well as the fact that many have come from Former Yugoslav republics.[13] Even though the last census in BiH was conducted in 1991 and there is a constant lack of reliable statistical demographic data, there were many attempts to estimate the total number of foreign soldiers who were permitted to stay in BiH after the war. According to Ms. Selimbegovic, an investigative journalist, the number totaled to 11,000, including those from ex-Yugoslav republics (Selimbegovic, article "Passport for Bare Life", Dani Magazine 2001). Those foreigners who acquired Bosnian citizenship were never systematically scrutinized until the situation that emerged after 9/11, when naturalized citizens from Islamic countries came to the focus of attention as potential security threats. According to the estimation provided by Mr. Misic, a former Deputy Minister of Foreign Affairs of BiH and the Head of the State Anti-Terrorism Task Force, the total number of the latter varied between 1,400 and 1,800 soldiers (Azinovic, Free Europe Radio 2007).

[13] People from ex-Yugoslav republics had favorable treatment in BiH in this regard due to strong cultural, ethnic, and overall historic heritage. Similarly, after the dissolution of Yugoslavia, many Bosnian citizens acquired citizenship in other republics, such as Croatia and Serbia, among others.

It was only in 2005 that the State Commission for Review of Decisions on Naturalization of Foreign Citizens (CRC) was established by means of amendments to the BiH Law on Citizenship. Members of the commission included officials of the Ministry of Security, Ministry of Civil Affairs, four experts from BiH institutions, and three international members. The main task of the CRC was to review the status of all persons who acquired BiH citizenship in the period from 6 April 1992 to 1 January 2006. The CRC was initially established as a temporary body with the mandate of one year, but only after several months of its existence, it became obvious that the workload by far exceeded the capacities of this body. In 2007 the OHR prolonged its mandate for another year, as there was a possibility that due to the 2006 general elections, the state parliament may not become operational to extend the CRC mandate on time. At a later phase, the CRC has been integrated into the structures of the BiH Ministry of Civil Affairs, which, in a certain way, secured its sustainability (European Commission 2009a, b).

However, due to the latest political (ethnic) tensions in BiH, which could be arguably categorized as acute as those in the early 1990s, it is no surprise that the work of the CRC has been regularly scrutinized by local politicians who use every opportunity to reiterate the threat for their own national corpus. Additionally, the work of the CRC caused intense public debate, substantiated by the fact that the citizenship review procedure took place behind closed doors and persons involved were not present to hear their cases being discussed. Furthermore, the final decisions did not contain detailed justifications and appeal procedures were defined ambiguously, i.e., an appellant's request for reviewing the decision did not postpone the execution. In September 2007, a commission of the European Parliament indicated that the CRC had revoked the citizenship of 613 people, mostly originating from Islamic countries, with the largest numbers having immigrated from Turkey (137), Egypt (63), Syria (49), and Algeria (37). By December 2008, the CRC had revoked the citizenship of fifty more persons, bringing the estimated total to above 660, of which 400 were individuals of Islamic origin. In spite of the fact that these persons were allowed to initiate administrative proceedings before the Court of BiH, only few of those affected initiated such proceedings. Most reasonable explanation for such low number of appeals is the fact that these do not secure postponement of removal from the country. On top of everything, the judicial system in BiH has been struggling with the problem of a huge number of unsolved cases, so these processes tend to become never-ending stories. According to the information provided by the High Judicial and Prosecutorial Council of BiH, the number of unsolved cases in Bosnian courts exceeds 1.9 million, with the trend pointing to further growth (High Judicial and Prosecutorial Council of BiH, 2006).

The following case of a so-called Algerian group, which may be directly linked with the process of securitization of migration policies in BiH after 9/11, describe not only the inefficiency of relevant actors in BiH to adequately tackle this sensitive issue, but, at the same time, it also provides additional insight into the complexity of Bosnian society and its failure to take accountability seriously.

The "Algerian Group" Case

The most prominent post-9/11 incident that drew major attention and political debate in BiH was the case of "Algerian group." Namely, in October 2001 Bosnian authorities arrested 6 Arabs (5 Algerians and 1 Yemeni), who had worked for Islamic charity branches in BiH headquartered in Saudi Arabia, the United Arab Emirates, and the United Kingdom. Of the six arrested, five had Bosnian passports, while one had a Bosnian residence permit, as all of them had married Bosnian women and had gained legal status in BiH. They were held in Bosnian custody during a three-month investigation into US claims that the men had plotted an attack on the US and UK embassies in Bosnia and Herzegovina. The investigation however produced no evidence to justify their detention and the six men were to be released by the FBiH Supreme Court and Human Rights Chamber of the BiH Constitutional Court at the recommendation of the prosecutor. But, just hours before their release in January 2002, the six men were handed over to the US Army base in Bosnia and deported to Guantanamo Bay.

Many international institutions, governmental and nongovernmental, including bodies of the European Parliament and the Council of Europe,[14] as well as Transparency International and Human Rights Watch have concluded that the act of extradition of the Algerian Group constituted a major violation of human rights and freedoms. According to the Helsinki Committee of Bosnia and Herzegovina, the harshest violations committed at the time were the arbitrary and illegal dispossession of citizenships and extradition to a country with the death penalty and a threat of torture and other inhumane and degrading treatment (Helsinki Committee of BiH 2008). Moreover, the Committee indicated that Bosnia and Herzegovina violated the international legal instruments it had previously committed itself to respecting, including the Universal Declaration of Human Rights, the International Covenant on Civic and Political Rights, the European Convention on Human Rights and Freedoms, and the Convention on the Reduction of Statelessness.

In addition, the Bosnian government did not only fail to comply with all the above-mentioned international instruments pertaining to the case, but it also failed to assume the responsibility imposed by its own Human Rights Chamber, a judicial body established under Annex 6 of the DPA. Namely, this Chamber had the mandate to consider alleged or apparent violations of human rights as provided in the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Protocols thereto, and alleged or apparent discrimination arising in the enjoyment of the rights and freedoms provided for in the Convention and 15 other international agreements listed in the Appendix to Annex 6 of the DPA. Its decisions are final and binding and the respondent parties are obligated to implement them fully. The Chamber established that deportation of Bosnian citizens was illegal and they ordered the Bosnian government to use all diplomatic mechanisms to protect the human rights of deportees and secure their return to BiH (Human Rights Chamber of Bosnia and Herzegovina decisions: CH/02/8679, CH/02/8689,

[14] http://assembly.coe.int/CommitteeDocs/2006/20060606_Ejdoc162006PartII-FINAL.pdf.

CH/02/9690, and CH/02/8691 issued on 11 October 2002 and CH/02/8961, CH/02/9499 issued on 4 April 2003).

As a result of these decisions, the Bosnian government assumed responsibility to address this issue and start negotiations with the US government. In April 2004 the Commission for Human Rights, Immigration, Refugees and Asylum of the BiH Parliament addressed the request to the BiH Presidency to start negotiations with the US government on repatriation of the six deportees (Commission for Human Rights, Immigration, Refugees and Asylum of the BiH Parliament, House of Representatives document No. 01/5-059-1030/04 from 21 April 2004). In June 2005, the Chairman of the Council of Ministers of BiH addressed the EU Parliament and reiterated the readiness of the Bosnian government to secure the repatriation of the six deportees. Following this, in September 2005 the BiH Parliament adopted a resolution which recommended that the Bosnian government should react immediately and start negotiations on repatriation (BiH Parliament resolution from 16 September 2005). Nevertheless, in spite of all these declarative reactions, the Bosnian government undertook only two concrete steps. The first one was the visit of an official delegation to Guantanamo Bay prison, where they met only those detainees who were still Bosnian citizens. The second one was submission of a request to the United States Attorney General to release detainees who were still Bosnian citizens. The immediate response to the latter step was an official diplomatic note sent by the US government informing the Bosnian authorities that the USA was considering the release of the detainees. In this note, American authorities also requested additional information on whether these persons represent a security threat to the USA or not. Unfortunately, the Bosnian government did not respond to this request and the detainees remained in prison until the final decision was made through a judicial proceeding in 2008 (Selma, Memorandum Order of the US District Court for the District of Columbia, 20 November 2008, civil case 04-1166(RJL). US District Judge, Richard J. Leon). By doing this, BiH became the only member of the Council of Europe, whose citizens were detained in Guantanamo Bay, which failed to successfully arrange release of at least one of the detainees. Despite the inadequate response of Bosnian authorities following almost seven years of imprisonment, five of the six detainees were released from Guantanamo Bay as a result of a decision issued by the US District Court for the District of Columbia on 20 November 2008. The sixth man, Belcacem Bensayah has been denied his petition for writ of habeas corpus.

The apathy towards the violation of detainees' rights characterized not only Bosnian authorities, but also the nongovernment sector. Besides a few sporadic mini-protests, mainly driven by detainees' family members, there was no significant pressure exerted towards the authorities. However, during this seven-year controversial process, detainees managed to remain in the public eye mainly due to the fact that they were quite often used as a way to obstruct the agendas of politicians who were involved in the extradition process. As a result of these political pressures, the Prosecutor's Office of the Sarajevo Canton opened an investigation against former Chairman of the BiH Council of Ministers,[15] the deputy minister of the FBiH

[15] The Council of Ministers of Bosnia and Herzegovina is the executive branch of the government of Bosnia and Herzegovina.

Ministry of Interior, and several high-ranking police officers. This two-year process was carried out without intensive media coverage. It ended on 9 April 2010 when the Prosecutors Office terminated the investigation based on lack of evidence. The decision on termination of the investigation was published and broadcast in almost all local media in BiH, but once again it failed to evoke any significant reactions from the public.

The above-mentioned 7-year long controversy reflects poorly on the status of human rights, the judicial system, NGO sector, the media, and the overall political situation; in addition, it is indicative of the inefficiency of the executive and legislative structures set up under the auspices of international community. This does not necessarily involve the responsibility of international actors, as their role was strictly limited to the process of establishing local bodies which were supposed to assume the responsibility as soon as these became operational. In such a situation, all serious and systematic consideration of the concept of accountability in the security sector may be seriously challenged as a result of the existing inconsistencies. Nonetheless, this specific case could also be looked at through a different prism, inasmuch as there were many international actors involved in this case, and their failure to abide by international standards was telling. Still, the weak position of BiH on the international scene should not justify the inefficiency of its government and its noncompliance with basic international standards.

Concluding Remarks

Clearly much more work needs to be done in order to ensure a proper balance between preserving national security and improving democratic processes to uphold human rights and freedoms. Sustainable accountability mechanisms cannot be established overnight, especially in a war-torn country such as Bosnia and Herzegovina. First and foremost, it is imperative that key domestic political actors resolve their differences and find compromise on the most important issues for the future of the country. An important step in that direction would be the adoption of policies that would support further democratization of the country, along with the implementation of international and EU standards in this regard.

The overarching principles of the rule of law cannot be adhered to by mere rule adoption. The country has to have absorption capacities to implement necessary reforms and install stable accountability mechanisms. Therefore, the existence of accountability mechanisms is not enough when there is no true commitment to abide by the rules set by them.

Factors characterizing young democracies, such as corruption, the lack of institutional knowledge and capacities, as well as ineffective civil society actors, need to be addressed. Civil society and the media also need to become more engaged in the political process in order to publically scrutinize the actions of elected officials who fail to meet the expectations of the public.

Annex

The Court of Bosnia and Herzegovina

Within its criminal jurisdiction, the Court of Bosnia and Herzegovina has jurisdiction over criminal offences defined in the Criminal Code of Bosnia and Herzegovina and other laws of Bosnia and Herzegovina. The Court has further jurisdiction over criminal offences prescribed in the Laws of the Federation of Bosnia and Herzegovina, Republika Srpska, and the Brčko Disctrict of Bosnia and Herzegovina, when such criminal offences: (a) Endanger the sovereignty, territorial integrity, political independence, national security, or international personality of Bosnia and Herzegovina; (b) may have serious repercussions or detrimental consequences to the economy of Bosnia and Herzegovina or may have other detrimental consequences to Bosnia and Herzegovina or may cause serious economic damage or other detrimental consequences beyond the territory of an Entity or the Brcko District of Bosnia and Herzegovina.

Within its administrative jurisdiction, the Court is competent to decide on actions taken against final administrative acts issued in the exercise of a public function.

Within the appellate jurisdiction, the Court of Bosnia and Herzegovina is competent to decide upon appeals against judgments or decisions delivered by the Criminal or Administrative Division of this Court, extraordinary legal remedies against final judgments rendered by the divisions of the Court, save the requests for reopening of proceedings.

The Prosecutor's Office of BiH

In October 2003, the Parliament of Bosnia and Herzegovina adopted the Law on the Prosecutor's Office of Bosnia and Herzegovina which was enacted by the Decision of the High Representatives of Bosnia and Herzegovina issued in August 2002. The first four National Prosecutors were appointed to their positions in the Prosecutor's Office of Bosnia and Herzegovina on 16 January 2002. The first International Prosecutor in the Special Department for Organised Crime, Economic Crime and Corruption within the Prosecutor's Office was appointed by the High Representative in March 2003. With the Completion Strategy of the International Criminal Tribunal for the Former Yugoslavia in place (2003), it is obvious that the Court of Bosnia and Herzegovina and the Prosecutor's Office of Bosnia and Herzegovina should have a jurisdiction over the prosecution of war crimes and they should take over the war crime cases from the Hague Tribunal. Therefore, in 2004 a set of legal acts was drafted and it was adopted by the BiH Parliament in December 2004. In January 2005 the third department, the War Crimes Department, was established within the Prosecutor's Office of Bosnia and Herzegovina which prosecutes war crimes cases.

The Constitution of Bosnia and Herzegovina stipulates jurisdiction of the Prosecutor's Offices at the entity levels, whereas the Prosecutor's Office of Bosnia and Herzegovina was additionally established as an institution with special jurisdiction for proceedings before the Court of Bosnia and Herzegovina against crimes stipulated by the Law on the Court of BiH, Law on Prosecutor's Office of BiH, Criminal Code of BiH, Criminal Procedure Code of BiH, Law on Transfer of Cases from the International Criminal Tribunal for the Former Yugoslavia to the Prosecutor's Office of BiH.

The jurisduction and scope of activities of the Prosecutor's Office are stipulated by the Law on Prosecutor's Office of Bosnia and Herzegovina whereby the Prosecutor's Office is:

- An organ competent for conducting investigations of criminal offences under the jurisdiction of the Court of Bosnia and Herzegovina pursuant to the Criminal procedure Code of Bosnia and Herzegovina and other applicable laws.
- An organ competent for receiving requests for international legal assistance in criminal matters pursuant to the laws, multilateral and bilateral agreements and conventions including extradition or transfer of persons wanted by the courts or organs of the territory of Bosnia and Herzegovina and other States, or the international courts or tribunals.
- An organ in charge of producing statistical reports on its activities (Progress Report), including information on the status of criminality in Bosnia and Herzegovina.

The Prosecutor's Office of BiH is a sui generis institution and it is not superior to the entity Prosecutors' Offices, but its jurisdiction is limited to prosecution of crimes stipulated by the aforementioned laws.

The Ministry of Security of Bosnia and Herzegovina

Ministry of Security of Bosnia and Herzegovina was established in February 2003. This Ministry is composed of the following administrative organizations: Border Police of Bosnia and Herzegovina, State Investigation and Protection Agency (SIPA), Service for Foreigners Affairs, and Bureau for Cooperation with Interpol.

Ministry of Security of Bosnia and Herzegovina is Responsible for:

Protection of international borders, domestic border crossings and traffic regulation at BiH border crossings; prevention and tracing of perpetrators of criminal offences of terrorism, drug trafficking, counterfeiting of domestic and foreign currencies and trafficking in persons, and of other criminal offences with an international or

inter-Entity element; international cooperation in all areas within the remit of the Ministry; protection of persons and facilities; collection and use of data relevant for the security of BiH; organization and harmonization of the activities of the Entity Ministries of Internal Affairs and of the District of Brčko of BiH in accomplishing the tasks of security in the interest of BiH; meeting of international obligations and co-operation in carrying out of civil defense, coordination of activities of the Entity civil defense services in BiH and harmonization of their plans in the event of natural or other disasters afflicting BiH, and adoption of protection and rescue plans and programs; Implementing BiH immigration and asylum policy and regulating procedures concerning movement and stay of aliens in BiH.

Border Police

Border Police of Bosnia and Herzegovina (former BiH State Border Service) has been established on the basis of the BiH Law on State Border Service which was imposed by the High Representative in BiH.

The new Law on BiH Border Police (State Border Service) adopted in October 2004 defines the BiH Border Police as an administrative organization with operational independence within the BiH Ministry of Security. The Border Police was established for the purpose of performing police tasks linked to the BiH border surveillance and border crossing control including other tasks regulated by the Law.

The State Investigation and Protection Agency

The State Investigation and Protection Agency (SIPA) was established in 2002 upon the adoption of the Law on the Agency for Information and Protection, which defines the Agency as an independent institution of Bosnia and Herzegovina in charge of collection and processing of information of interest for the implementation of international laws and the BiH Criminal Code, as well as for protection of VIPs, diplomatic and consular missions, and government institutions of Bosnia and Herzegovina. In June 2004, after the adoption of the Law on the State Investigation and Protection Agency, SIPA became the first police agency with full police authorizations and competencies across the entire BiH territory. This Law defines SIPA as an operationally independent administrative organization within the Ministry of Security of BiH, whose competencies include prevention, detection, and investigation of criminal offences falling within the jurisdiction of the Court of BiH, physical and technical protection of VIPs and buildings, protection of endangered and threatened witnesses, as well as other duties falling within its competencies as prescribed by the Law.

The Service for Foreigners Affairs

The Service for Foreigners Affairs was created by Law on Service for Foreigners Affairs and began work on 1 October 2006. The Service is an administrative organization within the Ministry of Security of BiH.

Competencies of the Service for Foreigners Affairs include administrative tasks regulated by the Law on Movement and Stay of Foreigners and Asylum, as follows: Registration of residence or change of residence of foreign nationals; issuance/withdrawal of identification and travel documents to aliens; verification of guarantee letters and invitations; annulment of visas for aliens; issuance of residence stickers for aliens; matters concerning asylum claims; approval of and extension of temporary/permanent residence; cancellation of temporary/permanent residence and detention of aliens; expulsion of aliens; dealing with documentation and its registration regulated by the Law on Movement and Stay of Aliens and Asylum, and registration under the jurisdiction of the Service.

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Index

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