

The Harmonization of Law Against Economic Crime

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A. International Law Making Unaffected by Theory

As an academic who has been intensively involved in the making of international criminal law, the author is frequently struck by the lack of communication between the participants in the theoretic discourse and the agencies preparing legal instruments to harmonize the efforts against economic crime.¹ Many academics on the one hand are highly critical of the current development, both because they fear the ideological character of the new concepts (are we creating a 'moral panic'?) and because they see the state of law at risk through the pragmatism adopted by international organizations.² On the other hand, institutions like the United Nations (the UN), the G7, the Organization for Economic Co-operation and Development (OECD), the European Union (the EU) and the Council of Europe rarely see the need for a fundamental analytical debate in this area, since the growth of transnational economic and organized crime seems evident and the relative inefficiency of Nation State in coping with it are in their view legitimation enough for harmonizing standards in substantive and procedural criminal law. In fact, in some instances the pronounced utilitarianism of the international organizations has lead to quite illiberal attempts to block a more fundamental discussion of its basic assumptions and principles. To give just one example: the so-called 'Complementary Multidisciplinary Outline' (the CMO),³ the blueprint for the UN 1988 Convention

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¹ With some remarkable exceptions, see the ISPAC International Conference on Responding to the Challenges of Transnational Crime, 25–27 September 1998 at Courmayeur.

² Winfried Hassemer, in (1989) *NStZ*, at p. 553 et seq.; Winfried Hassemer, in (1992) *ZRP*, at p. 378 et seq.; Klaus Lüderssen, 'Aufgeklärte Kriminalpolitik oder Kampf gegen das Böse?' (1992) *ZRP*, Bd. 1 p. 25 et seq.; Thomas Naylor, Financial Flows in Crime, Presentation at the ISPAC Conference in Courmayeur, (25–27 September 1998) (see *supra* note 1).

³ Declaration of the International Conference on Drug Abuse and Illicit Trafficking and Comprehensive Multidisciplinary Outline of Future Activities in Drug Abuse Control, UN, New York 1988.

against Illicit Traffic in Narcotic Drugs,⁴ in its paragraphs 105 et seq. even invited (mild forms of) censure for those media who should dare to use 'misleading terminology', such as the artificial distinction between so-called 'hard' and 'soft' drugs or the advocacy of 'legalization of the non-medical use of drugs'.

Whatever the position in substance might be, the blocking of the critical discourse resulting in an isolation of international law-making from analytical reflection gives rise to serious concern, because the newly adopted measures to combat transnational economic and organized crime (the norms on money laundering, on criminal organizations and the corresponding procedural measures, like wire tapping and the use of undercover agents) must necessarily conflict with civil liberties if they are to be effective. Introducing such drastic steps is dependent upon democratic accountability, a challenging requirement in the light of still underdeveloped procedures of international co-ordination.

In this article it is the aim to confront the current production of harmonized criminal law with some of the doubts voiced and to discuss conditions of a democratic and rational development of international control structures, where significance of national control is diminishing. After a brief look at some of the reasons for the expansion of criminal law (*infra* Section B) two examples will be given for the recent law production (*infra* Section C) and the types and the procedures of harmonization will be discussed (*infra* Section D). Then the fundamental critique will be addressed (*infra* Section E) and finally the issue of creating structures of global governance in a democratic and accountable manner will be revisited (*infra* Section F).

B. Globalization and the Expansion of Criminal Law

Many practitioners take the need for harmonization of rules against international economic and organized crime for granted. At least at the same rate as the legal economy is developing into international interdependency crime is becoming transnational. Since the end of the Cold War liberalization of world markets has reached a new quality; at the same time, especially in the ailing economies of the East, a marked development towards illegal accumulation of capital has been observed and increasingly the West is getting involved in it, be it through joint ventures or through its financial markets. It would be unfair, however, to merely point to the 'Wild-East' when explaining new crime structures. Important boosters of crime in the West and elsewhere over the last 20 years have been the opportunities offered by illegal markets, especially in drugs. They have generated powerful multi-

⁴ UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (E-Conv. 82/15).

or even transnational organizations. Of course the details are complex and very much in dispute. Specific illegal markets and their conditions generate special types of organizations⁵ and it still needs to be shown under what circumstances large illegally operating complexes can really survive without constant restructuring.⁶ Despite intensive police and intelligence work as well as academic attention⁷ a developed theory of 'Organized Crime' still needs to be written.

Under the conditions of deregulation, increased mobility and the potential of modern means of communication, *corporate* crime has also changed its image dramatically. The pressure to survive is a strong incentive and nationally diverging legal structures offer ample opportunity for transnational illegal economic activities.

Understandably, national or local law enforcement and judicial authorities are rapidly out of their depth, as soon as criminals interact across borders. The traditional approach to co-operation amongst sovereign states has been (and still is) mutual legal assistance, a usually very time-consuming procedure, involving several levels of authorities, with its peculiar mix of political and judicial competence. Invariably, nation states will require certain conditions to be met (dual criminality, speciality, absence of political prosecution, respect of due process of law etc.) and remedies (to the accused or third parties), even though bilaterally or multilaterally⁸ conditions may be relaxed on the basis of mutuality. The principle of national sovereignty favours transnationally active criminals, Nikos Passas in this issue of the *European Journal of Law Reform* even maintains, it has a direct criminogenic effect.⁹

Furthermore both organized and corporate crime make use of the same 'service stations' for their money management: *Offshore resorts* not only fulfil an essential role as tax havens for the globalized economy; typically company law is underdeveloped, company registers are incomplete, registering requirements and supervision is lax. Banking laws make it possible to escape the strict rules on customer identification developed and enforced otherwise, thereby accepting anonymous clients. Finally, it is part of the definition of the 'offshore haven' that mutual legal assistance is difficult to obtain, be it for legal or merely factual reasons. Increasingly it becomes evident that offshore resorts are the 'black holes' of the world economy. No wonder that international organizations are focusing their attention on such under-regulated areas.¹⁰ But, of course, joint action against countries categorized as

⁵ Claudio Besozzi, *Organisierte Kriminalität und empirische Forschung* (Zurich 1997).

⁶ See also Peter Reuter, *Disorganized Crime, Illegal Markets and the Mafia* (Cambridge, Mass. 1983).

⁷ James B. Jacobs, *Busting the Mob, United States v. Cosa Nostra* (New York 1994); Cyril Fijnaut, 'Organized Crime: A Comparison between the United States of America and Western Europe' in (1990) *British Journal of Criminology*, at p. 321 et seq.

⁸ See especially the treaties of the Council of Europe on Extradition (13 December 1957) and Mutual Legal Assistance in Criminal Matters (20 April 1959).

⁹ See p. 399 of this issue.

¹⁰ See UN Report: Financial Havens, Banking Secrecy and Money Laundering, UNDCP, Study prepared by Bloom et al.

offshore resorts raises the question of legitimacy of collective pressure, a point which will be considered later.

In light of these disadvantages it certainly makes sense to seek to overcome the impediments of nationally structured justice. Mutual legal assistance already requires a certain extent of harmonization of substantive law to fulfil the requirement of dual criminality. This traditional condition could only be waived in a group of states with very similar legal principles like the EU.¹¹ This is to say that states would probably only be ready to give up the specific safeguards where they are convinced that the legal order of the requesting state is sufficiently close, so close that further harmonization is not strictly necessary even under the regime of dual criminality. Still, a few typical examples for the expansion or adaptation of criminal law to meet a common standard with a view to co-operate could be given, especially in the area of insider trading or other manipulative activities affecting the stock markets.¹² Other examples could be taken from the work of the Council of Europe on various topics like computer crime or environmental crime, etc.¹³

If it is true that enabling legal assistance is a motive for harmonization, the recent developments show that it needs more for states to actually move. The important initiatives towards harmonization of law to combat economic crime have all been carried forward by a far more *stringent political or economic agenda*. This hypothesis will be clarified pursuing the examples of legislation on *organized crime* on the one and *corruption* on the other hand.

C. Examples: Drugs and Organized Crime – Money Laundering and Corruption

In both areas the world community has taken decisive steps towards a co-ordinated approach. The following narrative of the development over the last ten years serves to illustrate the methods and the meaning of harmonization (*infra* Section D) and to develop the critique (*infra* Section E).

I. Drugs – Organized Crime – Money Laundering

In the second half of the 1980s the illicit drug situation had deteriorated in the cities of the West, especially in the US. The traditional prohibition policy, trying to climb

¹¹ For lifting the strict conditions of dual criminality *see*: Denis Robert, 'Appel de Genève' in *La justice ou le chaos* (Paris 1996) at p. 327 et seq.; in academic writing similar suggestions are made for instance by Lagodny, in (1989) 101 *ZStrW*, at p. 996 et seq. and Vogler, in *Europäische Einigung und Europäisches Strafrecht* (Sieber (ed.)) (1993) at p. 128.

¹² So far for instance the Swiss law against insider trading (Art. 161 of the Criminal Code) has exclusively been applied in mutual legal assistance cases.

¹³ *See* the references given by Ulrich Sieber at p. 445 of this issue.

from the street vendors up the chain of dealers to the bosses, had obviously failed, the influx of drugs had grown further and the number of dependants had multiplied. The drug problem contributed significantly to the deterioration of the state of inner cities.

Even though some allowances for therapeutic treatment were made,¹⁴ the initiatives to finish the (especially from a US perspective) incomplete building of international treaties against illegal drugs¹⁵ were intended to promote an all out war against drug trafficking. This involved a multi-faceted approach, attacking all stages of the production, distribution and financing chain: apart from the already traditional provisions against trafficking in all its forms, preparative acts, such as handling of *precursor chemicals*, tableting machines and other paraphernalia were addressed, special powers to board vessels on high seas were conferred to Member States. A new focus was placed on the money management, especially on the laundering of profits from drug trafficking. Apart from specific provisions criminalizing *money laundering*, the new Vienna Convention of 1988 addressed the confiscation of assets as well as mutual legal assistance also in these, for most states new areas of law. For the first time a provision addressed the issue of bank secrecy¹⁶ on a world-wide basis.

The next stages are well known. The G7 was not satisfied with the slow process of ratification and implementation of the Vienna Convention, and it decided to speed up proceedings by commissioning specific Task Forces on some of the vital sub-issues of this new world-wide programme to radically implement a prohibition policy.¹⁷ Just as interesting as the outcome of the work of these Task Forces, especially the Financial Action Task Force on Money Laundering (the FATF), is the process they introduced into the world of harmonization of law. It was to set standards in the development of rules against economic crime.

Originally an *ad hoc* structure that collected pre-existing rules on the prevention and repression of money laundering from the Basle Statement of Principles (on due diligence in the financial sector) and the 1988 Vienna Convention (on criminalization of money laundering and forfeiture), the FATF rapidly developed into an institution, for the first time managing to regulate and to push implementation of an entire area of law on a world-wide basis in less than ten years. The first version of its '40 Recommendations' adopted in 1990 was written in less than half a year, with no ulterior ambition and very little academic preparation. This approach conforms with the nature of its topic. 'Money laundering' may be a highly evocative term, it is, however, astonishingly enough, not part of the legal tradition of most states involved. For some it is the expansion of a classical rule on handling, however,

¹⁴ Art. 3 para. 4 (b)–(d) of the 1988 UN Convention (*see supra* note 4).

¹⁵ Cf. until 1988 the earlier conventions of 1961, 1971 and 1972.

¹⁶ Art. 7 para. 5 of the 1988 UN Convention (*see supra* note 4).

¹⁷ *See* the Financial Action Task Force on Money Laundering (the FATF) as well as the Chemical Action Task Force on Precursor Control (the CATF).

abandoning the focus on stolen goods; for other countries it is a form of accession to the crime after the fact. Its role is, however, very pragmatic: the rationale usually cited – a means to get organized crime where it hurts most, by hitting its financial resources – is an exaggeration and an understatement at the same time. On the one hand the statement promises a standard of effectiveness the instrument cannot live up to, therefore some authors ask for further toughening of the legal structures.¹⁸ On the other hand the consequences go far beyond tracking down of criminals. The world-wide implementation of anti-money laundering schemes has led, quite independently, from their value to investigators, to the enforcement of a completely new standard of record keeping throughout the entire financial profession. Elsewhere it has been argued, that in fact part of the function of the efforts against money laundering has been to create preconditions for a world-wide instrument of global financial control.¹⁹ At the same place the author has suggested that we should not be astonished if these different goals should clash in specific cases.

The 1990 Recommendation of the FATF, this provisory collation of regulatory and criminal law provisions,²⁰ has made an astonishing career. It was used as the blueprint for regionally binding law, such as the EC Directive of 1991,²¹ indirectly also for the Council of Europe Convention No. 141 of 1990²² as well as for model legislation of the UN²³ and the Organization of American States (OAS).²⁴

In the meantime, standards have been further refined, the Recommendation was amended and completed in 1996.²⁵ More countries have joined the FATF or regional subsidiaries and similar groups have been created (the Caribbean Financial Action Task Force, (CFATF)). The main function of the FATF has since shifted towards co-ordinating the work of central units in Member States involved in the screening of notifications of suspicious circumstances. For our purposes two elements of the further development in the FATF are crucial:

¹⁸ See the article by Barry Rider at p. 501 of this issue.

¹⁹ Mark Pieth, 'The Prevention of Money Laundering: A Comparative Analysis' in (1998) *European Journal of Crime, Criminal Law and Criminal Justice*, at p. 159 et seq.

²⁰ Daniel Zuberbühler, 'Pflichten der Banken und Finanzinstitute zur Bekämpfung der Geldwäscherei—Konsequenzen aus den Empfehlungen der Financial Action Task Force on Money Laundering' in *Geldwäscherei und Sorgfaltspflicht, Schriftenreihe Schweizerischer Anwaltsverband* (Zurich 1991) Bd. 8, at p. 65 et seq.

²¹ Council Directive of the European Communities of June 1991 on Prevention of the Use of the Financial System for the Purpose of Money Laundering (Council Directive 91/308).

²² Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, Strasbourg, 8 November 1990, Council of Europe, No. 141.

²³ Model Law on Money Laundering and Confiscation in Relation to Drugs, Legal Advisory Programme, November 1995, UN International Drug Control Programme (the UNDCP).

²⁴ The model texts written by the Organization of American States (through its Comisión Interamericana para el Control del Abuso de Drogas (the CICAD)).

²⁵ Financial Action Task Force on Money Laundering, 'The 40 Recommendations of the Financial Action Task Force on Money Laundering' (revised), 28 June 1996.

- (1) The FATF is still an *ad hoc* structure, working on the basis of recommendations. It has, however, especially with its follow up mechanism, the mutual country evaluations, introduced a *new methodology* into international law: using pre-existing procedures of country evaluations, especially from access proceedings to the OECD, and developing them into an instrument of *peer pressure*, leaving the evaluated country little alternative but to comply with the, merely politically binding, standards. This methodology is now being adopted in many other *fora*, including those working on the topic of corruption (*infra* Section II).
- (2) The second aspect inspiring change has been the *expansion of the scope* of predicate offence of money laundering from drug trafficking to all serious crime in 1996.²⁶ What may seem at first sight a technicality proves to be a decisive move for the future development: the emancipation from the drugs topic makes money laundering a polyvalent concept, to be used not only in all areas of the combat against criminal organizations, but also in typical areas of corporate crime, like corruption, fraud and tax evasion (*infra* Section II).

This in turn is merely a stepping stone to the next stage of production of norms against criminal organizations: the draft of a UN Convention against Organized Crime,²⁷ the sister to further instruments against macro criminality.²⁸

Pursuant to a Resolution of the Economic and Social Council (ECOSOC) of 1998²⁹ an 'Intergovernmental Ad Hoc Committee on the Elaboration of the Comprehensive International Convention against Organized Transnational Crime' has prepared first drafts. The purpose of this initiative is, as its title says, to elaborate a comprehensive instrument against all sorts of activities categorized as 'organized crime', including trafficking in firearms, illegal trafficking in and transporting of migrants as well as trafficking in women and children. The draft texts first attempt harmonization of national laws on the participation in criminal organizations or conspiracies as well as, once more, the criminalization of money laundering and the adoption of provisions on seizure and confiscation. The drafts also refer to the described prudential standards to prevent money laundering and to control money flows. Furthermore, they suggest witness protection programmes and new, far-reaching concepts of mutual legal assistance and extradition.

If the individual provisions of the UN drafts are not in themselves entirely new, the texts assemble a kind of collage of all those provisions to counter transnational

²⁶ Rec. 4 of the Revised Recommendation of the FATF of 1996 (*see supra* note 25).

²⁷ Report of the Informal Preparatory Meeting of the Open Ended Intergovernmental Ad Hoc Committee on the Elaboration of the Comprehensive International Convention Against Organized Transnational Crime, Buenos Aires, 31 August–4 September 1998.

²⁸ Compare next to the UN Conventions Against Terrorism and the Efforts to Create an International Court of Criminal Law.

²⁹ ECOSOC Res. 1998/14.

economic and organized crime developed over the last decade, nationally or regionally, with a view to declare them legally binding in the largest possible geographic area. The texts offer alternative definitions of the 'criminal organization' equally broad in scope. Either the definition follows the European approach, endeavouring to grasp the crime entrepreneur, or the US approach of listing areas of predicate offence and linking them to a conspiracy type provision. On both tracks the scope is inevitably wide and the line between the really dangerous and the everyday crime is difficult to draw. A recent draft definition of 'organized crime' refers to:

group activities of three or more persons, with hierarchical links or personal relationships, which permit their leaders to earn profits or control territories or markets, internal or foreign, by means of violence, intimidation or corruption, both in furtherance of criminal activity and to infiltrate the legitimate economy.³⁰

As with many domestic statutes the fear of omitting cases has led to an extremely vague concept and the inclusion of the international dimension does not really limit its field of application: couldn't, to give an extreme example, the mere payment of a bribe by the staff member of a foreign company to a local official in order to motivate him to fulfil his duties be qualified as a group activity based on hierarchical links, which permits its leaders to earn profits or control market by means of corruption?

Of course it might help to require as a minimum a serious offence, but it would be difficult to exclude straightforward bribery from this category as soon as it goes beyond so-called 'facilitation payments'.

This is merely an example on the basis of a text that is in no way finalized. Similar examples could be added using the draft texts on money laundering, confiscation and corporate liability. The provisions on money laundering pick up the treble definition found in the Vienna Convention of 1988, which is in itself a compromise between criminal and civil law approaches. Drafted at the risk of serious overlaps, it addresses the conversion or transfer of property for the purpose of concealment etc., knowing about the criminal background as well as mere concealment of the nature etc. Subject to legal principles also the mere acquisition and possession constitute money laundering. Countries are once more invited to expand knowledge standards to include 'ought to have assumed'. If the description of the criminal act is not in itself new, the definition of the predicate offence goes well beyond the FATF recommendation of 1996 by referring to '*any offence as a result of which proceeds were generated*'.

The UN draft texts of 1998 on organized crime may be seen as a milestone in the development of harmonized law on transnational economic crime: the concepts of 'organized crime' and 'money laundering' have been *neutralized* from their ties to specific illicit markets and the discussion whether alternative measures could reduce such markets and opportunities of gain. The 'collage' technique used in the UN texts

³⁰ Art. 1 option 2 s. 2, Draft of 4 September 1998.

picks up 'pre-fabs' from other, more concrete contexts and generalizes them, a tendency observed also in other *fora*, for instance the EU, where 'money laundering' is now also applied in view of protecting the financial interests of the community.³¹ So far there has been little discussion on the consequences of applying concepts, originally developed in a relatively circumscribed, highly pragmatic law enforcement context, throughout the entire criminal law. It is understandable, therefore, that the most recent steps by the UN set the scene for a highly critical discourse.

II. Corruption

A second major project of harmonization of criminal law in the 1990s is the development of international standards against transnational corruption, which needs to be mentioned. Again there is more behind such initiatives than the mere search for legal harmony: A mixture of economic interests and the moral climate in the post-Watergate US led to the enactment of the Foreign Corrupt Practices Act (the FCPA) in 1977, a statute criminalizing the bribery of foreign public officials (and further categories of recipients) in commercial transactions as well as detailing rules on accounting and auditing for public companies.³² The uncovering of a whole series of transnational corporate corruption scandals by the Carter Administration (compare the Lockheed Scandal) at the heyday of the general critique of behaviour of multinational corporations internationally³³ on the one hand, and US interests in fostering competitiveness of their own private sector on the other hand, helped to introduce the legislation. Since other industrialized countries refused to follow suite and a respective draft Convention in the UN failed,³⁴ US business was left in a competitive disadvantage.

Under pressure by US business, Congress modified the FCPA slightly in 1988 and requested the administration to take further steps to internationalize action against transnational corruption using various *fora*. Since the moves were primarily motivated by foreign trade interests, it seemed logical to request action by the OECD. The response was initially rather slow. It took from 1989 until 1994 to create a first platform.³⁵ The follow up mechanism attached to the OECD Recommendation of 1994, however, allowed not only to keep the discussion alive, but to examine concrete issues in detail. Between 1994 and 1997 a political swing around took place,

³¹ Protocol II to the Treaty on the Protection of Financial Interests of the Communities of 19 June 1997.

³² Foreign Corrupt Practices Act 1977, as amended in 1988, 15 USC § 78 dd-1 (prohibited foreign trade practices by issuers).

³³ The general critique of behaviour of multinational companies has led to the enactment of the OECD Guidelines for Multinational Enterprises of 1976.

³⁴ Cf. for references, Dieter Doelling, Gutachten C zum 61. DJT 1996, p. 103; *see also* Noonan, *Bribes* (Berkeley 1984) at p. 676 et seq.

³⁵ *See* the Recommendation of the Council on Bribery in International Business Transactions adopted on 27 May 1994 (C (94) 75 FINAL).

helped along by macro economic changes towards globalization. Now corrupt officials were considered impediments to market access by most 'major trading partners' in the OECD club. A combination of political pressure, change of attitude after overcoming the East–West rift and the realization that a new approach was not all that utopian brought about the breakthrough. Of course parallel developments in other *fora*, especially in the Council of Europe, the OAS, the business community (compare the International Chamber of Commerce)³⁶ as well as non-governmental organizations (compare Transparency International)³⁷ helped considerably. Further significant interaction took place between the G7, the OECD and the World Bank.

The techniques used in establishing new standards are closely related to those described in the section on organized crime and money laundering: *peer pressure* has many ways and prefers soft law, at least in an initial phase. This allows a rapid, flexible process. The impact of merely politically binding 'recommendations' should, however, not be underestimated: 'soft law' is not a 'soft option'. Combined with monitoring procedures and political sanctions (like the risk of public exposure by peers) it has proven to be highly effective. On the other hand its democratic legitimization is slim. Therefore it has been considered essential that the key parts of the programme be confirmed in conventions subject to ratification by Parliaments of Member States. In the OECD framework, just as in the Council of Europe, the EU and, to a lesser extent, the OAS, the anti-corruption programmes adopt a multi-disciplinary approach, including rules banning tax deductibility of bribes, accounting and auditing standards, civil law remedies and sanctions in the area of public procurement etc.

Not only the OECD,³⁸ but also the OAS,³⁹ the Council of Europe⁴⁰ and the EU⁴¹ have adopted criminalization Conventions addressing the bribery of foreign public officials. The context and the methodology vary considerably according to the role of the respective institution.

1. OECD

It has already been pointed out that the OECD initiative is very much rooted in a fair trade agenda, attempting to establish a level playing field of commerce for the

³⁶ International Chamber of Commerce, Extortion and Bribery in International Business Transactions, 1996 Revisions to the ICC Rules of Conduct.

³⁷ Civil Society is very prominently represented by the still young NGO 'Transparency International' with its head office in Berlin.

³⁸ Apart from the already mentioned Recommendation 1994 (*see supra* note 35), compare the Revised Recommendation of the Council on Combating Bribery in International Business Transactions, adopted by the OECD Council on 23 May 1997, and the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, adopted by the Negotiating Conference on 21 November 1997.

³⁹ Inter-American Convention against Corruption of 1996.

⁴⁰ Criminal Law Convention on Corruption, adopted by the Committee of Ministers in Strasbourg on the 4 November 1998.

⁴¹ *See infra* notes 47–49.

competitors on world markets. This is not its only goal; fostering good governance and taking responsibility for activities of economic entities based in its area of influence are also envisaged. Still, the OECD efforts, especially the Convention of 1997 on criminalization of bribery of foreign public officials,⁴² concentrate on reducing the 'supply' of the corrupt funds; the legal concepts focus on the briber and try to develop autonomous criteria for public officials world-wide.

The limited scope allows for a rapid implementation. Member States have been expected to ratify the Convention and implement legislation accordingly in the course of only one year. Even if this political deadline has been a little optimistic for some countries, most states will have enacted legislation by the end of 1999. For companies doing business abroad the date of entry into force of the Convention (February 1999) will be a decisive stimulus to change international rules, since a large multinational company will hardly be able to differentiate several standards of due diligence according to regions in the world.

2. *Council of Europe*

Amongst the regional efforts against corruption the instruments of the Council of Europe are the broadest. Antecedent further steps in civil and administrative law and based on an action plan adopted by the Heads of States in 1997 a criminal law convention has been finalized in November 1998,⁴³ touching not only on active and passive domestic corruption, on trafficking in influence, on private to private commercial corruption but also on transnational bribery. The Council of Europe has a traditional role in harmonization of criminal law in Europe and in fostering human rights.⁴⁴ More recently its mandate includes the legal integration of Eastern Europe into Europe. The new instruments will be essential in rendering mutual legal assistance more effective. Some difficulties will arise from the far-reaching possibilities to opt out (reservations). The risk of a patchwork of different solutions is by no means banned. Again, a follow up mechanism⁴⁵ will make sure that the process stays alive.

3. *EU*

The instruments of the EU to combat and prevent corruption are developing fast, while, they are set in the very specific context of this organization. The treaties do not confer powers to enact criminal law to the Community. However, in the framework of the so-called 'third pillar' of the Maastricht Treaty⁴⁶ a vehicle has been

⁴² See *supra* note 37.

⁴³ See *supra* note 39.

⁴⁴ European Convention on Human Rights of 4 November 1950.

⁴⁵ Conseil de l'Europe, Accord instituant le Groupe d'Etat contre la Corruption—Greco—GMC (98) 21.

⁴⁶ Arts. K et seq. of the Treaty of the EU of 1993 (Maastricht Treaty), now amended by the Amsterdam Treaty.

created to introduce co-ordinated legislation in 'Justice and Home Affairs'. The issue of corruption was approached by the EU so to speak through the backdoor.

The Treaty on the Protection of Financial Interests of the Community of 1995⁴⁷ is the basis for the First Protocol of 1996⁴⁸ focusing for the first time in Europe on criminalization of transnational bribery. It is, however, limited to the bribery endangering the community's economic interests and to the geographical area of the Union.

This Protocol has in turn been used as a stepping stone to go one step further, to drop the requirement of endangering the community's interests, in the 1997 Convention on Bribery.⁴⁹ These instruments are currently being ratified and implemented.

Meanwhile, the European Commission is trying to develop supranational law against corruption in the context of actual community law (the 'first pillar') based on its competence in non-criminal law. In its programme one will find old friends addressed already in the Foreign Corrupt Practices Act and in the OECD context, like the topics of tax treatment of bribes and rules on accounting and auditing.

Finally, reverting to the protection of the EU budget for a moment, initiatives to actually unify criminal law, including transnational and supranational bribery in the context of the EU are well under way with the new draft of a *Corpus Juris*, which has met great interest in the European Parliament. It could eventually develop into a unified core criminal code for the EU, however, it is too early for any reliable prediction.⁵⁰

Summing up, interesting developments may be identified in the context of the EU, they are however limited to its geographic scope even if they may be seen as steps on the way to regional supranationality.

4. Organization of American States

The aims of the *OAS* Convention come rather close to those of the Council of Europe, even if its method is somewhat different. The '*Inter-American Convention Against Corruption*' of 1996 also applies a broad concept of bribery. It goes beyond traditional approaches by including 'illicit enrichment', a criminally sanctioned reversal of the responsibility of explanation for sudden increases in an official's assets. This instrument is a compromise between Latin-American interests in mutual legal assistance and extradition and the North-American agenda in criminalizing

⁴⁷ Treaty of the EU on the Protection of Financial Interests of the Communities of 26 July 1995 (95/C 316/03).

⁴⁸ First Protocol to the Treaty on the Protection of Financial Interests of the Communities of 27 September 1996 (96/C 313/01).

⁴⁹ Convention of the EU on the Fight Against Corruption of 26 May 1997 (97/C 195/01).

⁵⁰ Delmas-Marty, *Vers un espace judiciaire européen. Corpus Juris, portant dispositions pénales pour la protection des intérêts financiers de l'Union européenne* (Paris 1996); Delmas-Marty, 'The EU and Penal Law' at p. 473 of this issue.

active transnational commercial bribery. So far this instrument does not have a follow-up mechanism attached, but the OAS is currently developing a more comprehensive action against corruption, including non criminal measures.

5. UN

Finally, within the broadest geographic scope, the recent initiatives of the UN need to be mentioned. The UN have resumed work⁵¹ on corruption with two general Assembly Resolutions in 1996.⁵² They basically pick up the items of other instruments and welcome the efforts without, however, wanting to interfere with this work. These policy statements will in turn serve as a basis for further work in integrating the corruption issue into the programmes against organized crime mentioned. Currently, ECOSOC is targeting the abuse of offshore resorts for purposes including the preparation and after treatment of bribery. The General Assembly has recently taken note of a study by the UN Office for Drug Control and Crime Prevention on financial havens.⁵³

D. Methodology: Between 'Functional Equivalency' and 'Unification'

The complex institutional history of rules against corruption should not obscure that, again very similar structures to those mentioned in the previous section, are implemented. Harmonized standards include newly criminalized behaviour, ancillary legislation on corporate liability, confiscation and money laundering as well as rules on mutual legal assistance and extradition.

The methodology adopted diverges according to the role and traditions of the organization involved in harmonization. Whereas the OECD, as a narrow one issue approach, however, including a large group of countries with very different legal traditions, hardly goes beyond requesting 'functional equivalency', the EU with its struggle for an adequate protection of supranational interests (namely its budget), most prominently with its *Corpus Juris* project, is heading for *unification* of substantive criminal law and supranational procedural structures (European prosecutors). There are worlds between these techniques. Functional equivalency merely asks to reach the same goal by whatever means the country thinks appropriate, whereas unification really means identical legal definitions. However, there will be bridges between both regimes via the monitoring processes mentioned above.

⁵¹ An earlier draft anti-corruption convention in the UN failed 1979.

⁵² General Assembly Resolution 51/59 and 51/191.

⁵³ See *supra* note 9.

E. Critique

From the narrative on the development of international standards in two areas it has become clear that the expansion of criminal law has come about in a very pragmatic way: sectorially introduced concepts have only gradually been linked together. On an international level little thought has been given to an overall view so far. The argument for change has always been the perception of new and dramatic developments in the world of transnational crime. Rarely, however, empirical research has been commissioned prior to changes of law. It is therefore not astonishing if fundamental critics maintain that the production of criminal law in the 1990s is driven by a 'moral panic' rather than serious rational assessment.⁵⁴ And, in fact, even in the aftermath empirical research on organized crime is rare and a very tedious business. If we do not simply want to confess to beliefs, opt to be a 'left' or 'right' radical or 'conservative',⁵⁵ concrete difficulties have to be overcome. Not only are sources not readily accessible, but the concepts as such are in dispute. The fundamental doubts are mirrored in the concrete critique which has been developed basically along three lines of thought. These are considered below.

I. *Disregarding Essential Principles of the Rule of Law*

Open wording and lack of precision in defining the elements of new crimes (e.g. participating in organized crime, money laundering, bribery) are difficult to defend in the light of the fundamental concepts of modernity, especially the traditional principle of legality. For Beccaria it has been one of the crucial safeguards against the discretionary use of power by the absolutist gentry to define in advance as clearly as possible what is forbidden. The definitions of the criminal action in money laundering in many national legislations and international texts are generally so wide that almost any transaction or even simple possession (with knowledge of provenance) would suffice. The suggestions to reverse the onus of proof on to the person in possession lead a step further towards insecurity. And yet, in the author's experience, uncertainty is used as a deliberate stimulus of self-control: here, just as in the parallel case of transnational corruption, the primary aim of the international standards of criminal law is to convince the private sector (be it the financial or the business sector in a broader sense) to introduce preventive standards. Fostering sound corporate governance is certainly a good idea, however, it may be disputed that this aim should be achieved by systematically and deliberately introducing insecurity through vague criminal provisions. It makes citizens and the private sector

⁵⁴ Felix Herzog, *Gesellschaftliche Unsicherheiten und strafrechtliche Daseinvorsorge* (1991) at p. 11 et seq., 138 as well as the authors cited in *supra* note 2.

⁵⁵ In Jock Young's terminology.

dependent upon ulterior discretionary decisions. The methodology of control comes close to the arbitrariness of incalculable occasional leniency or pardon exercised by the landed gentry or the monarchs in the Europe of the 18th century.

II. Pragmatic Expansionism

A second line of critique refers to the way the new rules are generated and deplors that there is no critical reflection on what type of rules are suited to be enforced by criminal law. The traditional principle reserving criminalization for offences against elementary rules of social conduct, the concept of *ultima ratio*, is disregarded by the tendency towards a very pragmatic expansionism and the creation of sometimes merely technical offences.

This critique would dispute the necessity of many new norms, because alternative sanctions would have prevented the situation from deteriorating. Again there are parallels to the use of criminal law as a military type means of control in the 18th century, where all sorts of unrest were immediately countered with harsh legislation (compare the 'Blacks Act' in Great Britain).⁵⁶ There is strong evidence to be found that the role reserved for criminal law diverges substantially amongst legal traditions. US legislators do not seem to have too many qualms to regulate entire areas of the economy by criminal law, whereas the continental European tradition would place more emphasis on civil and administrative law. In an international setting, however, creating common standards frequently seems technically easier and maybe also cheaper, since criminal law does not need an extensive supervisory structure, it may even suffice to hit at the occasional 'black sheep'. This leads directly to the third line of critical discourse.

III. Hegemony and Lack of Democratic Control

It has been mentioned that the impulse to harmonize criminal law frequently depends upon economic or political interest. For both of the above examples (international rule making on organized crime and on corruption), it can be shown that standards have been introduced with a substantial degree of political pressure.

This may seem evident with rules against illicit trafficking in drugs, money laundering and organized crime, where one nation has pushed for international action for decades. However, especially regarding the 1988 Vienna Convention and the FATF programme of 1990, further explanation may be necessary, why some of the economically and politically stronger countries accepted such far-reaching and expensive standards at a time when they were domestically still virtually untouched by large scale drug trafficking (like Japan in 1988). Of course they still could have been motivated by the wish not to stand aside. An additional explanation, however, has been offered above; that at least the hidden agenda, controlling money flows world-wide, touched a cord with most participants (compare *supra* Section C.I.).

⁵⁶ E.P. Thompson, *Whigs and Hunters* (1975) at p. 20 et seq.

Even though this will be less apparent, hegemony is also a topic with the second example. When regulating transnational bribery hegemony could have two faces.

First, it took the US 20 (or, if you start counting in 1989 with the OECD Initiative, eight) years to convince its 'major trading partners' that bribery was bad for business and harmed competitors on world markets just as much as the local administration. Even if peer pressure sometimes adopted unscrupulous methods,⁵⁷ this process cannot, however, be booked as a pure case of political dominance, since the OECD members let themselves gradually be convinced. Furthermore, they created a body of rules that does not merely replicate the US legislation (in fact, ratification and implementation of the OECD Convention in the US caused some unforeseen difficulties).

Secondly, the programme shows its truly hegemonic side towards countries *outside* the OECD. Not only has the topic of transnational corruption primarily been picked up in the context of globalization with a view to obtaining access to new markets, the industrialized world also expects concurrent action by traditional 'recipient' countries. Since multinational enterprises are developing policies against bribery they demand 'extortion' to be tabled by international *fora*. Especially the World Bank is picking up the issue with its policy of conditionality. At the risk of simplifying, the policy reads 'loans against good governance reforms'.⁵⁸

It would, however, be an illusion to believe that the move from traditional nation state towards international negotiation of standards could be effected outside the power relations of foreign policy: It is an alternative to the otherwise cruder forms of external relations. The actual topic raised under the heading of hegemony is whether it is possible to safeguard democratic rights under such conditions. In a formal sense they are maintained in the forms of harmonization discussed here: All changes (including the moves towards supranationality in the EU) are dependent upon international law and ratification as well as national implementation legislation. It does, however, make a difference if the contents of national laws are pre-defined by international peer pressure and supranational bodies. It raises the more general question of how to think 'democracy beyond borders'⁵⁹ and especially the issue of democratic structures in international organizations.

⁵⁷ *In extremis* exposing ones 'trading partners' publicly as condoning corruption abroad.

⁵⁸ For details on the new World Bank policy against corruption: The World Bank, *Helping Countries to Combat Corruption, The Role of the World Bank* (Washington, September 1997). Critical Eigen and Pieth, in *Korruption im internationalen Geschäftsverkehr* (Pieth and Eigen (eds.) (Frankfurt, Basel 1999) at p. 5.

⁵⁹ Anthony McGrew (ed.), *The Transformation of Democracy?* (London 1997).

F. Summary and Outlook

I. *There is No Way Back*

It is a fact that the growing internationalization of economic relations, the new quality reached by economic globalization, erodes the impact of national law and the reach of parliamentary democracy. It also has to be taken for granted that territorially based institutions of criminal justice may be out manoeuvred by internationally operating criminals. Furthermore, it should not astonish that the more sophisticated crime entrepreneurs (be they 'organized criminals' or 'corporate criminals') increasingly take advantage of the open markets and modern technologies.

Criminal law will, however, also in future continue to be organized primarily on a territorial basis and mutual legal assistance (in a wide sense) will remain an essential means of co-operation. In fact, fighting transnational crime will depend to a considerable extent on the ability of countries to respond in a reasonable timeframe to mutual legal assistance requests. If countries care to maintain their special domains of protectionism (e.g. strong professional privileges) they have to make sure that they shall not be abused as 'islands of disintegrity'. Internationalization of crime has raised the question of harmonization of criminal law, both as a condition for co-operation and beyond as a basis for collective or even supranational action.

As a traditional core prerogative of sovereignty criminal justice, however, remains an unlikely candidate for unification. Where such ideas have been muted, in the unique setting of growing supranationality and specific interests, protecting the collective budget, the response has been at best ambiguous.

And yet, in a wider geographical setting, criminal law is increasingly used to regulate economic transactions internationally, be it as a supplement or even a substitute for prudential and civil law remedies. Examples have been given in the area of controlling the markets of specific substances and the financial sector as well as in the prevention of corruption. Sometimes it seems internationally more convenient to enact harmonized criminal law than to go into the detail of regulating complex business interactions, at the risk of reducing state reaction to mere symbolic intervention.

II. *'Ultima Ratio' and Alternatives*

This use of criminal law is, however, heavily criticized, since it not only tends to be expansive, frequently international draughtsmen depart from such long accepted principles as precision and legality (cf. by deliberately using vague notions of drug trafficking, money laundering, organized crime etc.). Furthermore, the principle of culpability is no longer untouchable: a whole series of international treaties and soft law instruments requires the introduction of (criminal) corporate liability.

The critique needs to be taken seriously, even if *ultima ratio* does not preclude the use of criminal law against new serious threats (like environmental risks) or

introducing new concepts of liability, such as the responsibility of legal persons. Its main role is to remind 'bureaucrats' and 'international experts' to test alternatives to criminal law before over criminalizing. In many instances such alternatives may more easily be internationalized, whereas criminal law can only be applied extraterritorially in severe cases.

III. Living with Hegemony?

The other main critique, the current international production of criminal law is facing, has been the reproach of hegemony and the circumvention of democratic control: it is true that so far harmonization of criminal law depended upon strong advocacy usually linked to crucial economic interest. However, international negotiations on criminalization typically take place in a community of unequal powers: it is up to those who want to protect their interests against hegemony to forge alliances and to develop strategies against being overpowered. Of course this may pose formidable difficulties for those countries at the 'periphery'.

That even this may not be impossible has, however, been demonstrated by an alliance of NGO's recruiting the help of the French Government in stopping (at least temporarily) the enactment of the 'Multilateral Agreement on Investment' of the OECD. Furthermore, international texts, even if initiated by one or a powerful group of countries, regularly take on a life of their own, especially if they institutionalize either a follow-up or a judicial procedure. They can also be used against the interests of the 'sponsors'. Finally, especially the technique of 'functional equivalency' mentioned above, allows countries to explain their traditional domestic approach in the international forum and it may expect respectful treatment in a participant's group as long as the results achieved by its law are comparable with those of their peers.

IV. Democratic Accountability

It has been called a paradoxon⁶⁰ that in a time when more countries than ever profess to be representative democracies, and real progress towards democratization has been observed in many areas of the world, national democracy may mean less and less, because the 'real decisions' are taken elsewhere, by such institutions as the World Bank/IMF or by multinational enterprises. This image is mirrored in some recent moves towards harmonization of law: national Parliaments are faced with texts their governments have signed after intergovernmental negotiations and frequently there is little or no room for alterations or reservations. The choice is only to stay outside the international consensus.⁶¹ This will, however, not be a position

⁶⁰ Anthony McGrew, *supra* note 59.

⁶¹ E.g. Switzerland has so far not ratified the 1988 Vienna Convention on Illicit Trafficking in Drugs and may only do so with some essential reservations.

which is sustainable throughout in the long run. Is the concept of democracy, so far linked, to exclusive control over territory and to the nation state, at all applicable internationally?

This is of course a large topic in and of itself. For our purposes we may register that an extensive discussion has picked up: several approaches, ranging from attempts to internationalize traditional values of democracy in international organizations to radical communitarian visions of 'democracy beyond borders' have been suggested. Whereas, in the context of the EU, institutional ways of raising democratic legitimation seem at hand, in a wider setting especially the role of civil society in international negotiations needs to be further explored. This further demonstrates the crucial role of academics in fostering the dialogue between civil society and the international agencies of law production.⁶²

⁶² See Ulrich Beck (ed.), *Politik der Globalisierung* (Frankfurt 1998).