

Keynote Address

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I would like to take this opportunity to thank Queen Mary University of London, and the Renmin University in Beijing, for the kind invitation to give the keynote address, and to participate in a conference that is attended by so many leading experts in their field to discuss the impact of transnational crime. On a personal note, it is a pleasure to be an active member of the academic team at the Queen Mary Law School. It is also a pleasure to be reunited with friends from Renmin University. Your conference in Beijing in 2015, on the topic of Anti-corruption, was excellent, and your kindness and hospitality was outstanding. I have no doubt that this week's conference will be equally invaluable.

I am very fortunate to have enjoyed a career in law wearing two 'hats'. The first is that of a criminal law barrister in private practice for 40 years, and the second is that of a legal commentator. Over that period, most of my work has been concerned with serious crime including armed robbery, murder, drug trafficking, corruption, fraud, and money laundering. Although many of the crimes (alleged or proved) possessed strong domestic elements, many of them were also transnational in their execution or in their effect. The transnational elements have been particularly evidenced in case of drug trafficking, corruption and fraud. Over that period, I have also observed certain trends. At the beginning of my career, most cases of drug-smuggling involved cannabis that had been imported with varying degrees of sophistication. Some methods of concealment were elaborate. Other cases involved drug couriers in respect of whom the smell of herbal cannabis was so strong, and the packages of drugs (which had been strapped to their limbs) so bulky, that they were bound to be arrested on arrival!

The smuggling of drugs, such as cocaine and heroin, involved quantities that were relatively small when compared to the massive shipments that started to appear within the jurisdiction of the courts of the United Kingdom a few years later. A number of career armed robbers switched their activities from robbery to cross-border drug trafficking, fraud and money laundering, not least because the latter activities generated considerably greater income for significantly less risk of detection and prosecution. But, as a number of commentators have pointed out, the globalisation of markets and commerce, coupled with technological innovations (not least in the sphere of electronic communication), as well as the expansion of world-wide low-cost travel, has facilitated the ease with which transnational crimes can be committed.

Transnational crime has been met with transnational responses and initiatives of varying degrees of value and effectiveness.

In much of the literature, as well as in the course of presentations at conferences such as this one, that seek to address problems associated with transnational crime, there is a tendency to dwell on problems associated with so-called "organised crime" and then to use that protean descriptor as the centrepiece for developing policy and international action in respect of cross-border crimes.

For the reasons that I shall develop, I suggest that this approach is a mistake. I agree that it is politically and strategically expedient to speak in terms of "organised crime". This is because the expression is one that conjures up in the human mind, images of the Mafia, or US styled gangsters such as Al Capone and John Dillinger, or the London Kray twins. Such images and perceptions of what constitutes "organised crime" has – I suggest – eased the task of lawmakers and politicians to introduce laws that would otherwise be unpalatable, as being in the public interest. In my opinion, it is not a mere accident of history that in the United Kingdom, the first statutory regime to be enacted to confiscate the proceeds of crime (following conviction) was confined to the proceeds of drug trafficking – an activity that was often described as being particularly pernicious or "evil". That Act was passed in 1986.¹ Two years later, another confiscation regime was enacted in respect of other indictable crimes, albeit that this regime was somewhat 'softer' and less extensive in its reach.² Over time, the statutory confiscation regimes have been amended in a piecemeal way and then consolidated by way of the Proceeds of Crime Act 2002. The reach of POCA is considerable.

I suspect that a similar strategy has been employed by policymakers and by politicians operating at an international level when seeking to reach consensus for concerted global action to tackle transnational crime. As a result, much time has been expended discussing and seeking to define the expressions "organised crime" and "organised crime groups". Prof Mitsilegas, et al., in their excellent study in 2009 entitled "*The EU Role in Fighting Transnational Organised Crime*"³ explained that "one of the main difficulties in the EU strategy remains the criminalisation of participation in a criminal organisation" which, in turn, involves thorny issues in formulating a legal definition of an "organised crime group". Such definitions are – they rightly say – "very broad and highly flexible".

We can look (briefly) at a couple of examples:

(i) In 2011, the UK Government published a definition of "Organised Crime" in its strategy document entitled: "*Local to Global, Reducing the Risk from Organised Crime*", which states:

"Organised crime involves individuals, normally working with others, with the capacity and capability to commit serious crime on a continuing basis, which includes elements of planning, control and coordination, and benefits those involved. The motivation is often, but not always, financial gain. Some types of organised crime, such as organised child sexual exploitation, have other motivations." (HM Government, 2011)

(ii) The United Kingdom's National Crime Agency has given their definitions of "organised crime" and an "organised crime group":

"Organised crime can be defined as serious crime planned, coordinated and conducted by people working together on a continuing basis. Their motivation is often, but not always, financial gain. Organised criminals working together for a particular criminal activity or activities are called an organised crime group."

¹ The Drug Trafficking Offences Act 1986.

² The Criminal Justice Act 1988, Part VI.

³ Amandine Scherrer, Centre d'Etudes sur les Conflits; Antoine Mégie, Université de Versailles-Saint Quentin; Valsamis Mitsilegas, Queen Mary University of London; February 2009 PE 410.678; the study was requested by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs.

Have the institutions of the European Union been more successful at defining “organised crime”? Article 9, of the *2008 Framework Decision ‘on the fight against organised crime’*, states:⁴

‘criminal organisation’ means a structured association, established over a period of time, of more than two persons acting in concert with a view to committing offences which are punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty, to obtain, directly or indirectly, a financial or other material benefit’; ...

‘structured association’ means an association that is not randomly formed for the immediate commission of an offence, nor does it need to have formally defined roles for its members, continuity of its membership, or a developed structure.

Interestingly, the United Kingdom’s *Serious Crime Act 2015* has created an offence (in force, 3rd May 2015⁵) of “participating in activities of an organised crime group” (section 45).⁶ The expression “organised crime group” is defined by section 45(6) as follows:

“Organised crime group” means a group that—

- (a) has as its purpose, or as one of its purposes, the carrying on of criminal activities, and
- (b) consists of three or more persons who act, or agree to act, together to further that purpose.

How often this offence will be charged in practice remains to be seen. It is highly debateable whether such an offence was required because the United Kingdom has long had a statutory offence of conspiracy, involving two or more persons, to commit one or more offences.

I suggest that the exercise of seeking to define the expression “organised crime” is a waste of time because a workable definition will always be elusive. Furthermore, dwelling on the notion of “organised crime” is misplaced and misconceived. The focus need only be on the commission of “crime” – whether committed domestically or transnationally.

Of course, there are well-organised criminal crime groups that are headed and managed, by

⁴ Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime

⁵ SI 2015 No. 820.

⁶ “(1) A person who participates in the criminal activities of an organised crime group commits an offence.

(2) For this purpose, a person participates in the criminal activities of an organised crime group if the person takes part in any activities that the person knows or reasonably suspects—(a) are criminal activities of an organised crime group, or (b) will help an organised crime group to carry on criminal activities.

(3) “Criminal activities” are activities within subsection (4) or (5) that are carried on with a view to obtaining (directly or indirectly) any gain or benefit.

(4) Activities are within this subsection if (a) they are carried on in England or Wales, and (b) they constitute an offence in England and Wales punishable on conviction on indictment with imprisonment for a term of 7 years or more.

(5) Activities are within this subsection if (a) they are carried on outside England and Wales, (b) they constitute an offence under the law in force of the country where they are carried on, and (c) they would constitute an offence in England and Wales of the kind mentioned in subsection (4)(b) if the activities were carried on in England and Wales.”

highly intelligent operatives. But the plain truth is that most crime is *disorganised* and carried out by persons who are often reckless risk-takers, who operate individually or in small groups, and who blunder their way into being apprehended, convicted, and imprisoned.

In many cases, offenders have been detected and convicted by incriminating text messages made and left on their mobile telephones, or they have committed a fraud that involved creating companies which, within a matter of weeks, traded in sums of money so fantastic as to be impossible to achieve by lawful means. In many cases, documentation is generated that is manifestly false. The carrying of vast sums of cash, in notes, that have been crammed into suitcases and carried across borders, should – I suggest - signal to customs authorities that crime may have generated such sums of money.

In a recent case, benzocaine, lidocaine, as well as various other scheduled chemicals, were imported on such a large scale (in excess of 2.5 metric tonnes) that the criminal participants were almost inevitably going to come to the attention of UK law enforcement agencies (as they did) notwithstanding that the conspiracies to produce and to supply illegal drugs ran (or were allowed to run for legitimate operational reasons) for many months.

Furthermore, one person, using a computer terminal in the United Kingdom, can cause havoc by his or her offending conduct that affects a number of jurisdictions. This week, we came to learn of a form of extortion known colloquially as “sextortion” by which victims are tricked by a so-called internet “friend” into recording via an internet social-messaging service, sexual images of themselves. Victims are then confronted with a demand to pay money, or face the prospect of the recording being made public. Such a crime can be committed by a group of persons or by an individual sitting at home.

Accordingly, I suggest that what should be kept in focus are those forms of conduct that ought to be internationally recognised as being “criminal” - regardless of whether the execution of that conduct is “organised” or not.

Clearly not all criminal actions are equally serious, and thus it will often be necessary – in the interest of expediency - to prioritise law enforcement actions.

Naturally, my observations are influenced – correctly or otherwise – by personal in-court experiences. In cases of fraud that are tried in the UK, but where overt acts were carried out in several jurisdictions, it is important that the parties to the proceedings – and, in particular, the court – should have access to all relevant information that is obtained and held by foreign law-enforcement agencies and prosecuting authorities. *Letters of Request* for assistance may be duly served on foreign agencies, but there will come a point when a criminal trial cannot be further delayed or postponed until the information or evidence that had been requested, arrives. Such delay may or may not adversely affect the outcome of criminal proceedings so as to cause injustice (i.e. to any or all of the parties to the proceedings, or in respect of the wider public interest). There may be cases where the defendant is prejudiced by the lack of information that he or she requires in order to support a defence to the charge.

I do not for a moment underestimate the difficulties and impediments that exist in seeking to achieve consensus between countries whose legal rules, legal systems, cultural traditions and

values, are (or may be) markedly different. However, I fear that the problems will be compounded by what I see as a trend that is based on a misplaced understanding of what the notion of 'sovereignty' actually entails, in the context of a world in which persons, organisations, and nations, are wired together. This is what Geoff Mulgen has styled "*connexity*" (in a book entitled, "*How to Live in a Connected World*"⁷) albeit that he was writing from a socio-economic perspective, and not in the context of law enforcement.

Nevertheless, the fact remains that, as individuals, we are more or less dependent on each other, and this holds true for organisations and nations. To give but one example, the United Kingdom and the European Union have faced an influx of chemical psychoactive compounds which have been imported largely from China. In 2014 and 2015, China took action in respect of over 100 such chemical compounds in order to prevent their harmful use domestically and globally. In September of this year, the drug enforcement agencies of the *United States of America* and *China* met to discuss further measures to enhance joint drug investigations and cooperation.

Given the extent to which we are wired together, it may be asked what the means should be to enable transnational crime to be tackled effectively. If I was to answer that question, I am conscious of the fact that I would be stating a number of well-known, and much discussed, options. Accordingly, I'm going to confine myself to two or three propositions. The first is that it is important that states should not be overambitious in terms of what can realistically be achieved. Agreement upon the terms of an internationally binding criminal code is unrealistic. The most that we can hope for is a degree of harmonisation of legal rules in respect of some areas of conduct. I say "harmonisation", but I prefer the expression "approximation". That said, there is much that can be achieved on a case-by-case basis – by adopting and implementing a policy of police and judicial cooperation, joint investigations, sharing of information (subject to safeguards and protections), and the mutual recognition of judgments and court orders. This is, of course, a policy that is built on the existence of trust with regards to the legal systems of foreign states. The level of trust may *not* be solid or stable, but pragmatism must also play a part. Where one state responds to a request from another state for assistance, the former will undoubtedly hope that the assistance will be reciprocated as and when it is necessary to seek it.

In 2013, the government of the United Kingdom published its "*Serious and Organised Crime Strategy*". Leaving aside the rather predictable and self-evident statements that the overall strategy is to "*pursue*", "*prevent*", "*protect*", and to be "*prepared*", the government stated that many of its "most important allies against organised crime" are in Europe. The government also recognised that the European Union has a legislative framework for cooperation between its member states on serious and organised crime. As we know, that framework was developed and honed over many years, with major contributions having being made by the United Kingdom to that process. The framework has been usefully summarised by Prof Mitsilegas and his co-authors in their 2009 study on the role of the European Union.

Much has been achieved by the European Union with regards to (i) the harmonisation of legal

⁷ Harvard Business School Press, 1997.

rules, (ii) action against money laundering, (iii) the requirements for due diligence on the part of relevant persons; (iv) initiatives to tackle a range of serious crimes including drug trafficking and human trafficking, corruption, terrorism, and firearms controls.

The creation of agencies such as EUROPOL and EUROJUST is to be commended. Both agencies seek to promote and to strengthen police and judicial cooperation. Admittedly, there is much more that needs to be done – not least in terms of enhancing cooperation between nations and their agencies.

Given all that has been achieved, it is perhaps surprising (and a disappointment to me) that the United Kingdom has signalled its intention to withdraw from the European Union. My hunch is that many of those who voted in the Referendum to withdraw, have underestimated the legal and practical implications (and problems) associated with their decision insofar as it impacts on justice and home affairs issues. I may of course be proved wrong.

This conference is therefore timely. Unhappily, given other commitments, I may not be able to attend much of it. That, of course, is my loss. I can tell from the detailed programme that you will be discussing a wide range of very important and fascinating topics. I wish you all a very successful and fruitful conference.

Thank you very much.

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Postscript

Following the keynote address, a lively and useful discussion took place. The point was made that a distinction has been drawn by some academics between “organised crime” and crime that is “organised” (indeed, crime may be incompetently executed). It is the writer’s understanding that this notion of “organised crime” refers to ‘syndicate crime’, of a kind which Frank Hagan has stated “comprehends an organization which (a) uses force or threats of force, (b) profits from providing illicit services which are in public demand, and (c) assures immunity of operation through corruption”.⁸ Arguably, there might be other examples by which a group of persons is bound by shared purposes and opinions with regards to conduct which, if carried out, would constitute the commission of one or more criminal offences. The writer agrees that such a distinction can be made, but whilst this notion of “organised crime” is useful for the purposes of analysis and discussion, problems arise when endeavouring to translate it into legislation. In the interests of legal clarity and legal certainty, concepts that are sought to be enacted as legal rules, ought to be defined with as much precision as possible. This is not merely for the benefit of practitioners working in the criminal justice sphere, but also as a matter of fairness in respect of persons who are required to comply with the legislative regime.

⁸ Frank E. Hagan, “The Organized Crime Continuum: A further specification of a new conceptual model”, Graduate Program in Criminal Justice Administration, Mercyhurst College, Erie, Pennsylvania 16548 (adapted from a paper which was presented at the annual meeting of the Academy of Criminal Justice Sciences, Louisville, Ky., March 1982); Sage Publications.