"UNODC Regional Centre efforts and challenges in facilitating the recovery of the proceeds of corruption and Transnational Organized Crime in South-East Asian countries"

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I INTRODUCTION

The globalization process enhanced by the ease of travel and unprecedented technological developments in the recent years has had a dramatic impact on many aspects of life and society most of them for the better. However, the related growth of transnational organized crime and the response of the international community to it, has created a variety of new challenges in relation to the actions of law enforcement authorities and judiciaries whose main role is to ensure security of the States, the persons and the public as well as legally acquired private property in all organized societies.

Today law enforcement and judiciaries face a new challenge: the investigation, prosecution and adjudication of corruption and TOC[1] cannot be efficiently conducted within the legal framework of national boundaries. And ironically, sovereignty, a fundamental principle under international law which grounds the relations of states, has become a major tool in the armory of organized crime.

There can be no illusions about international cooperation in criminal matters. The criminals are far more skilled in using national borders to protect themselves and the evidence and profits of their crime from detection than law enforcement is in overcoming the barriers of sovereignty, in pursuing them.

[1] TOC Transnational Organized Crime

The purpose of this paper is to provide a brief overview of the vision and strategy offered under UNODC/RC Regional Programme Framework for the South-East Asia and Pacific region as it relates to the implementation of international cooperation between the judiciary, prosecutors and other law enforcement authorities with a specific focus on the recovery of the proceeds of Corruption in the region. The intent is to give a brief "comparative snapshot" of where we have been, where we are and the future challenges that South-East Asia and the Pacific region face.

International cooperation in criminal matters encompasses many measures including extradition, mutual assistance, transfer of sentenced prisoners, transfer of proceedings, and cooperation in the restraint, forfeiture and since the entry into force of the UNCAC[1] in 2005 the repatriation of proceeds of crime to the countries they were stolen from.

This paper will focus on three of the most common aspects of international cooperation, those which most directly impact on the work of prosecutors - extradition, mutual assistance and cooperation in the restraint forfeiture and return of proceeds of crime.

II Where we have been

It cannot be disputed that organized crime which is most of the time facilitated by corruption began its operations across borders long ago and that comparatively state agencies took a long time to start getting better organized to address this issue. The very first agencies to realize the importance of the phenomenon and the risks it posed to modern societies were law enforcement agencies and more precisely the police forces in charge of the investigations into serious crime. Therefore it is no surprise that Interpol was established as soon as 1923 and has since then developed to become the current global network of police investigators with its headquarters in Lyon (France).

However, despite its efficiency the Interpol network needed to be supported by international conventions containing legal provisions governing international cooperation. The first conventions to come into force were the drug Conventions of 1961, 1971 and 1988. Art.37 of the single convention

[1] UNCAC United Nations Convention against Corruption

on narcotic drugs and art.22 of the convention on psychotropic substances stipulates that:

“Any drugs, psychotropic substances and equipment used in or intended for the commission of any of the offences, referred to in article 36, shall be liable to seizure and confiscation”

However the international community only decided in 1988 with the entry into force of the 1988 Convention against illicit traffic in narcotic drugs and psychotropic substances, to establish a mechanism to facilitate international cooperation in criminal matters among member States.

Fifteen more years were necessary for the entry into force of the 2003 convention on TOC which complemented the framework by adding under art.13 provisions on international cooperation for purposes of confiscation and under art.14 provisions governing the disposal confiscated proceeds of crime or property.

Finally the UNCAC convention which came into force in 2005 completed the whole framework of international cooperation by adding legal mechanisms such as Mechanisms for recovery of property through international cooperation in confiscation (Art 54) and posed under article 57 the return of confiscated assets to their prior legitimate owners in the State of origin. Article 58 of the UNCAC provides for the establishment of Financial Intelligence Units in order to better control suspicious financial transactions and fight money laundering.

The above described evolution clearly evidences that before 2005 there was no comprehensive international legal framework to address organized crime and corruption in their various manifestations. Additionally States would categorize offences where organized criminals had long understood that criminal activities were much more efficient when combined together: for example the passive corruption of public servants to facilitate fraud, money laundering or any illicit traffic.

Thus, before the establishment of the international legal framework criminals would take advantage of the barriers of sovereignty to shield themselves and the evidence of their crimes from detection. Organizations which orchestrated transnational crime and which then dispersed and concealed the proceeds of their illicit activities the world over, had no regard for national borders. In fact, by structuring their organizations to span

borders, they were better able to protect their interests and operations. They were positioned to take advantage of the differences between legal systems, the clash of bureaucracies, the lack of ethics of some public officials, the protection of sovereignty, and, at many times, the complete incapacity of nations to work together to overcome their differences.

III Where we are in South-East Asia and Pacific region.

Lack of cooperation in recovery of stolen public assets

Since the mid-1990s the General Assembly of the United Nations, through multiple resolutions, has expressed serious concern about the problems and threats posed by corruption to the stability and security of societies. Corruption attacks the foundation of democratic institutions, corrodes government institutions and starves the economy.

The UN Convention against Corruption (UNCAC) provides a powerful tool to strengthen anti-corruption programmes in the region. However, the main challenge is thus to turn the Convention from a mere legal framework into an effective tool for the rule of law.

At present, many countries in the region tend to focus only on the investigation and conviction of corruption.

Specific provisions of the UNCAC tackle the bribery of national public officials and the criminalization of the obstruction to justice. The provisions on asset recovery – the first of their kind – require Member States to return assets obtained through corruption to the country from which they were stolen. This is a major breakthrough. Judiciaries in countries where corrupt elites have looted billions of dollars are now empowered to implement these innovative provisions to recover the proceeds of crime. Yet they are being called upon to act with little or no prior training. Given the magnitude of corruption and the amounts at stake, there is a serious risk of improper influence and possible misconduct as well as bribery within the judiciary itself.

Appropriate national legislation and institutional capacity to deal with proceeds of other forms of organized crime is also lacking in the region.

While progress is being achieved through the establishment of national **Financial Intelligence Units**, participation in regional mechanisms for the enhancement of anti-money laundering and anti-corruption capacity still needs to be strengthened via engagement with relevant international regulatory bodies. This is of particular importance in relation to countries in post-conflict situations.

Money laundering

East Asia and the Pacific remain vulnerable to **money laundering**.

Given the relatively weak financial and economic monitoring and control systems present in some countries in the region, it is often difficult to follow money trails – which are an essential element for the investigation of this form of crime.

While many jurisdictions are working to adopt AML[1] laws, the level of effective implementation remains very low. Countries require expertise to develop their respective AML systems and UNODC is well placed to deliver such assistance. There are a number of key areas that could benefit from a regional approach to capacity building of AML systems. Two such areas are: (i) training and development of investigators, prosecutors, judges and customs officials in relation to identification, investigation and prosecution of money laundering and the confiscation of criminal assets; and (ii) the development of mechanisms for more effective international cooperation in money laundering investigation and prosecution of money laundering cases.

Therefore UNODC's main role will be to support partner countries to meet the requirements of the UNCAC, through providing technical support to translate the provisions of the convention into sustainable institutions and procedures. In other words, the idea is to shift the type of assistance and activities delivered in the region into technical support to operational agencies in charge of fighting corruption and recover the proceeds of crime.

[1] AML Anti Money Laundering

Lack of independent and fair justice systems

By its very nature, transnational organized crime actively weakens the sovereignty of the State itself. If sovereignty is defined as a monopoly on the use of force and the ability to establish an effective legal framework to govern this use of force, transnational organized crime groups tend to chip away at the state's very foundations. Not only do transnational organized crime groups use their resources to set up parallel sources of power, they also undermine the very legitimacy of the legal regime. By cooperating with each other to respond to the threats from organized crime, Member States both reduce the threat to their sovereignty and strengthen the basis of legitimate international cooperation.

As a region, East Asia and the Pacific has the lowest ratification level of the international crime and drug conventions. This is a fundamental problem in terms of addressing UNODC's mandates at the national and regional levels. It is part of UNODC's normative mandate to encourage the countries of the region to ratify the crime, drugs and terrorism conventions.

The Drug-Free ASEAN 2015 Status and Recommendations report notes that the regional mutual legal assistance (MLA) framework established by ASEAN is impeded by a lack of national legislation. The report specifically states that, "While some bilateral MLA agreements in the region show promise, the challenge is to find operational solutions for wider implementation."[1] Until the use of MLA and other legal tools becomes the status quo, a divided "patchwork approach" of agreements will prevent greater success.

For justice systems to be effective in countering organized crime, an evidence-based approach is required. There is a need to raise awareness of the value of physical evidence, as well as its forensic examination and the need to preserve its integrity, from the crime scene to the courtroom. For this reason, enhancing forensic capacity and the exchange of experiences and data in the region through improved national and regional networking is essential.

[1] Drug-Free ASEAN 2015, "Achieving a Drug-Free ASEAN 2015 – Status and Recommendations".

IV What future challenge for UNODC/Regional Centre in the region?

If one considers where we have been and where we have come in cooperation matters in the last fifty years, there is much reason to be optimistic. There should be no doubt, that with the continued efforts of the world community, its effectiveness in combating transnational crime will continue to increase, as will the security of our global village. International cooperation in criminal matters is made possible through the use of a series of legal specifically designed tools to overcome the barriers of sovereignty and allow the international community to "fight back".

The "Towards AsiaJust" initiative

International cooperation in criminal matters has on a practical level come of age. Most of the regions in the world have developed formal networks of judicial institutions using secure on-line forums in order to legally extend the mechanisms of international cooperation when investigative measures become coercive.

Such is the case in North America with the establishment of the Organiation of American States (OAS), in Europe with EuroJust and its affiliated judicial network (EJN) or in South America with the Ibero-American Assistance network (Iber-Red).

However the South-East Asia and Pacific region does not have any network of the kind. Given that situation, UNODC/RC – after discussing the needs of the States parties with their representatives – has endeavored to develop a new programme called "Towards AsiaJust" which has a strong focus on the recovery of the proceeds of the crime.

Essentially, The "Towards AsiaJust" programme is developed along the idea that UNODC, because of its neutral status and mandate, is the most appropriate organization to support the efforts of criminal justice systems in East Asia and the Pacific to respond to TOC and corruption with a more

effective form of "transnational organized criminal justice scheme " than the one that is in place at the moment.

“The Towards AsiaJust” programme has been developed under the supervision of UNODC Representative for East Asia and the Pacific by senior members of the judiciary formerly in charge of transnational serious crime who are now seconded by their respective countries to UNODC Regional Centre in Bangkok. Prior to that, criminal trends and needs assessments have been conducted by UNODC/RC with the authorities in charge of criminal issues in several countries of the region.

The result is that "Towards AsiaJust" has been conceptualized as a programme meant to operate with already existing entities such as the networks of Prosecutors, special investigative teams, central authorities in charge of Mutual Legal assistance, recovery and return of stolen assets and Extradition procedures as well as other highly specialized professionals.

The main objective of the programme is to put in place an operational “modus operandi” among the various players in charge of combating Transnational Organized Crime and corruption in the region, starting with inter-agency cooperation both at the domestic level and cross border levels based on a clear understanding of the differences in the different criminal systems in force in the region.

Therefore, through measurable elements, the programme aims to shift the balance of power between criminal organized groups and institutionalized state bodies in charge of the security of the State, the persons and the property.

To reach that aim, the “Towards AsiaJust” Programme provides the logical framework and necessary steps to transform a region lacking judicial independence, integrity and organizational capacity to address Transnational Crime. It aims to respond to Transnational Organized Crime in a region composed of strong independent judiciaries that have demonstrated the political will to form a transnational organized justice scheme.

While the ratification and implementation of the UN Conventions remain a vital priority, “Towards AsiaJust” will go beyond mere ratification to utilize the provisions of the UN Conventions in a context that perceives international cooperation as a necessary and inherently beneficial asset, instead of as a burden.

The programme is a product of empirical and practical evidence that demands the formation of an organized justice scheme founded on the criminal provisions of the UN Conventions to realistically and intelligently respond to highly-organized, intelligence-driven international criminal groups.

It aims at making the illegal activities of criminal syndicates significantly more difficult through enforcement of legal mechanisms by competent agencies acting in synergy in member states that are ready to waive unnecessary obstacles when security is at stake. It also aims at making technically possible the implementation of the chapter V of the UNCAC and more specifically the return of the proceeds of the crime to their legitimate owners in their country of origin.

For that purpose it will be built upon, and eventually encompass, the regional capacity established by Interpol[1], ASEANAPOL[1], ASLOM[1], ARTIP[1], FIU[1], HSU[1], SAARC[1], SOMTC[1] and the central authorities for Mutual Legal Assistance and extradition where they exist.

V Conclusion

More and more successful prosecution, particularly of drug economic Crime and money laundering cases, is dependent upon the assistance and cooperation of other states. The return of the proceeds of crime to the country of origin indisputably cannot be operated without international cooperation.

UNODC/RC hopes that the result will be that the rare case where assistance from another country was necessary to gather evidence or locate and return an accused or the proceeds of crime to the country of origin will no longer be rare.

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[1] INTERPOL International Criminal Police Organization
ASEANPOL ASEAN Chiefs of Police
ASLOM ASEAN Senior Law Officials Meeting
ARTIP Asia Regional Trafficking in Persons (Project)
FIU Finance Intelligence Unit
HSU Heads of Specialist Trafficking Units
SAARC South Asian Association for Regional Cooperation
SOMTC ASEAN Senior Officials Meeting on Transnational Crime