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A historical perspective

The conceptualisation of transnational organised crime



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What is Organised Crime? Which concept is behind? And how has the concept itself been shaped along the years? These are the questions addressed in the article to which the author is trying to give an answer. A historical perspective for the past but a challenge for the future. In a very dynamic, yet flexible fashion, a wording used worldwide with different meanings will be displayed to the reader in the right perspective.

SHAPING THE CONCEPT

The term transnational organised crime has a history that probably dates back to the existence itself of sovereign states and their coexistence within the international arena, but it has a more recent history that can be traced back to the early 1900s.¹

From the early 1970s there have been a significant number of publications produced on the concept and definition of organised crime and its transnational dimension. More recently, an extensive international and legal framework has been developed for combating organised crime.²

Socio-economic and political developments have called for consistent and coordinated approaches to organised crime and the United States has been pioneering in this respect. In the early 1970s the US acknowledged that certain crimes were unique and could not be easily categorised. Also, some crimes or kinds of criminal behaviour could not be fought by a single country but required a joint effort. This initiated the debate about which approach to take and paved the way to new international legislation.

It also became clear that the differentiating factors between these and traditional crimes would need to be identified and categorised. One distinctive factor was identified, for example, with respect to terrorism. In comparison to other more

traditional crimes, its ultimate aim is not to gain financial reward but to achieve ideological or political objectives. The same goes for the broad category of financial crimes which, by their own nature and because of the generally higher social level of the perpetrators, were not perceived as felonies by the wider public but rather misconduct or non-ethical behaviour, regardless of the extreme damage they caused to societies. High-tech crime was also making an early appearance and brought with it issues of definition and jurisdiction. Another significant factor identified was the “foreign element” of the crime, for example a citizen from your country committing crimes abroad or a foreigner committing crimes in your country. A further important aspect was the negative impact that the crime would have on international public order and whether the crime was considered to be violating human rights (eg war crimes, crimes against humanity, genocide, aggression, torture, terrorism).³

Definition of these factors meant that politicians and legal practitioners were then able to make an initial separation between ordinary and more serious crimes, plus the discovery of mafia-type organisations all over the world reinforced the willingness of states to define transnational organised crime and to draw clear boundaries as regards the definition. The aim was

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legal practitioner
Rechtsanwalt

to make international police cooperation more effective against the emerging threat of what would be known as transnational organised crime.

The increasing effects of globalisation and abolition of state borders were to be some of the biggest challenges.

The globalisation⁴ process had been identified by some researchers as a fundamental social and economic force driving the development and sophistication of criminal groups operating in international markets. This was due to the lack of standard legislation between different countries which prevented proper law enforcement solutions, especially with the lack of borders between states.⁵ This has been seen as a particularly relevant problem in Europe due to the abolition of several internal borders and border controls, the establishment of a single market with the free movement of people, goods, services and capital, the progressive integration of Eastern into Western Europe, the transition of previously centrally-controlled to market economies and the expansion of the Schengen area towards the east.⁶

The development of the transnational dimension of organised crime therefore emerged as a logical consequence and another of the constituent elements for defining this new category of crimes. It took some time before it could happen but additional constitutive elements had to be identified before any attempt at categorisation could be proposed.

In a world characterised by globalisation and the interdependence of business, criminals could easily establish working relationships and carry out their felonies almost undisturbed, whilst taking advantage of the lack of borders between some countries. While criminals could freely move

from one place to another and carry on their affairs irrespective of the national legislations, the police and judiciary remained confined within the boundaries of their national borders.

WORKING TOWARDS A UN DEFINITION

In the period spanning the 1920s and 1930s, the United States faced an unexpected rise in crime that featured new characteristics compared to those experienced in the past. Criminal groups demonstrated particularly aggressive and threatening behaviour which risked destabilising society. In addition to the indigenous criminals, the Italian mafia (Cosa Nostra) was identified as being amongst the most dangerous – even if not exclusive – criminal organisations that was rapidly penetrating American social fabric.⁷

From then on, and for some decades, the US authorities started a series of initiatives aimed at curbing such phenomena and passed several emergency laws which reinforced the powers of the police and made their action more effective and successful. All governmental administration which followed continued to develop accurate policies to counter the emerging threat. Organised crime was seen as a kind of new unlawful society living within the boundaries of the legal institutional sovereign powers. Organised crime was understood to be an association of criminals structured with clear hierarchies and basically a conspiracy against the state with the aim to illegally obtain economic or other material benefits to the detriment of legitimate society.

Unfortunately, the counter-organised crime policies put in place and applied in the US⁸ until the 1960s/1970s mainly concentrated on repressive rather than preventive measures.⁹ This choice did not prove as effective as it was hoped, even though

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felony
Verbrechen

fabric
Gewebe, Gefüge

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to enhance
erhöhen, steigern

major
größer, bedeutender

illicit
unerlaubt

to allude
anspielen, hinweisen

white collar criminal
Wirtschaftskrimineller

there were a number of concrete results achieved by the police against some organised crime syndicates.

The US administration applied the hard line against organised crime within national boundaries, however it also started to consider the need to embrace foreign policy and enhance international cooperation. Main topics on their agenda were improved international police cooperation and the harmonisation of criminal justice systems, even though the export of US anti-organised crime policies to other countries was seen as the best way to share the knowledge gained through decades of law enforcement and judicial activities against organised crime.

Researchers often list a number of recognised steps towards the conceptualisation of transnational organised crime which may be considered milestones in the history of this phenomenon until the signature of one of the most significant legal instruments ever produced in this field: the Palermo Convention or United Nations Convention against Transnational Organized Crime (UNTOC), signed in the Italian city of Palermo (Sicily) in December 2000.

Noteworthy sources¹⁰ mention, amongst others, the main steps that led to the finalisation of the Palermo Convention:

- A conference of high-level American law enforcement and intelligence officers was held in Washington DC in September 1994, where organised crime was recognised as a global phenomenon and the world's fastest growing business, representing a major international security challenge;
- The World Ministerial Conference on Organized Transnational Crime was held in Naples (Italy) in November 1994 under the auspices of the United Nations, where concepts previously expressed have been consolidated. The

meeting concluded that, in order to effectively fight transnational organised crime, enhanced international law enforcement cooperation was needed. The conference paved the way to the development of a UN Convention against Transnational Organized Crime.

Further literature on this topic¹¹ provides a more accurate analysis of the milestones reached during the definition of the term "transnational organised crime".

At the beginning of the 1970s the expression transnational crime seems to have become quite familiar in connection with multinational economic activity and the illicit conduct of multinational companies.

Following the Fourth UN Survey of Crime Trends and Operations of Criminal Justice Systems¹², transnational organised crime was again among the topics under discussion at a UN Congress in 1975.¹³ On this occasion organised crime was associated directly with corrupt public officials and business people, alluding to the network of possible illicit relationships of these actors.¹⁴ The activity of white collar criminals emerged at this symposium.¹⁵

In 1995, it was again the United Nations which proposed the categorisation of 18 types of crimes whose features included the "transnational" dimension. On this occasion the lack of a clear definition called for coordinated action.

At its Summit in Halifax (Canada)¹⁶ in 1995, the G8 brought together the Lyon Group of Senior Experts on Transnational Organized Crime. As a significant contribution to the work of the Summit, the group produced 40 Recommendations which were adopted in the following year.

During the conferences held by the G8 in 1996 and onwards, topics relating to particular fields of transnational organised crime were discussed with a view to adopting countermeasures. Topics on the agenda were terrorism, high-tech crime and the

misuse of the internet for criminal purposes, particularly for the sexual exploitation of children.

In December 2000 the Palermo Convention was signed and the procedures for ratification and implementation were started. In accordance with Article 38, the Palermo Convention entered into force on 29th September 2003, on the 90th day after the date of deposit of the 40th instrument of ratification, acceptance, approval or accession.

THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME (UNTOC) – THE PALERMO CONVENTION

The Palermo Convention is undoubtedly one of the most relevant and acknowledged legal instruments currently in existence for the conceptualisation of transnational organised crime. Among the 176 participating countries, 150 to date have ratified, accepted, approved, acceded or succeeded it.

The Convention provides for a definition of transnational organised crime through the combination of more than one article. An extract of the most relevant part is provided below:

It goes without saying that the Member States (MS) of the European Union have also been invited to adopt the Palermo Convention – an instrument with worldwide applicability. To date almost all EU MS have ratified the UNTOC; only the Czech Republic, Greece and Ireland have not yet adopted the Convention. The European Community signed the Palermo Convention on 12th December 2000 and ratified it on 21st May 2004.

For those EU countries that adopted the Palermo Convention (see table, p. 76) since it entered into force on 29th September 2003, cooperation based on the principles in the UNTOC has already taken effect.

Article 1. Statement of purpose

The purpose of this Convention is to promote cooperation to prevent and combat transnational organised crime more effectively.

Article 2. Use of terms

For the purposes of this Convention:

- (a) "Organised criminal group" shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit;
- (b) "Serious crime" shall mean conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty;
- (c) "Structured group" shall mean a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure;

Article 3. Scope of application

1. This Convention shall apply, except as otherwise stated herein, to the prevention, investigation and prosecution of:
 - (a) The offences established in accordance with articles 5, 6, 8 and 23 of this Convention; and
 - (b) Serious crime as defined in article 2 of this Convention; where the offence is transnational in nature and involves an organised criminal group.
2. For the purpose of paragraph 1 of this article, an offence is transnational in nature if:
 - (a) It is committed in more than one State;
 - (b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;
 - (c) It is committed in one State but involves an organised criminal group that engages in criminal activities in more than one State; or
 - (d) It is committed in one State but has substantial effects in another State.

THE EU RESPONSE TO TRANSNATIONAL ORGANISED CRIME

The fight against transnational organised crime on the EU level and the conceptualisation of the term have developed in parallel. In Europe the amount of legislation embracing both transnational organised crime and international police cooperation in criminal matters is extremely significant. Among the complex jungle of legal instruments and regulatory acts it is worth singling out those legal tools particularly relevant to judicial and police cooperation in EU criminal matters. First and foremost

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*to single out
herausgreifen*

Quelle: UNTOC

EU Member States which adopted the Palermo Convention

Austria
 Belgium
 Bulgaria
 Cyprus
 Czech Republic
 Denmark
 Estonia
 European Community
 Finland
 France
 Germany
 Greece
 Hungary
 Ireland
 Italy
 Latvia
 Lithuania
 Luxembourg
 Malta
 Netherlands
 Poland
 Portugal
 Romania
 Slovakia
 Slovenia
 Spain
 Sweden
 United Kingdom

prevention and control of organised crime: a European Union strategy for the beginning of the new millennium,²⁰ which basically re-proposes and broadens the Action Plan of 1997 by listing 39 recommendations together with clear milestones, prioritisation mechanisms and evaluations. The Tampere multiannual program for justice and home affairs (1999–2004) and The Hague Program (2005–2009) complete the picture together with the Convention establishing Europol – the European law enforcement agency.

Apart from the above, a considerable number of legal instruments has been produced to effectively fight organised crime²¹, by a variety of partnerships and alliances. These include a multitude of treaties, conventions and other similar tools which represent the work carried out by the United Nations, the European Union, the Council of Europe (CoE)²², the Organisation for Economic Co-operation and Development (OECD), etc.

The conceptualisation of the term, though, has been formalised in very few legal acts with binding power. The reason why such tools have been agreed upon, despite their non-mandatory nature, will be explored in connection with Europol.

The European law enforcement agency officially took up its functions on 1st July 1999 and was conceived as the European office for handling criminal intelligence through operational and strategic analysis. One of the main products of Europol was the EU Organised Crime Report (OCR) which, after the recommendation from The Hague Program, was replaced by the EU Organised Crime Threat Assessment (OCTA) from 2006.

At its meeting of 29th/30th November 1993, the Council of the European Union agreed on setting up a common mechanism for the collection and systematic analysis of information on international

is the Treaty on the establishment of the European Union, currently in its consolidated version, embracing the Maastricht Treaty, the Amsterdam Treaty and the Nice Treaty. Also worth mentioning¹⁷ are the Action Plan to Combat Organized Crime¹⁸, adopted by the Council on 28th April 1997, containing 15 political guidelines and 30 concrete recommendations as part of a coherent strategy in the fight against organised crime; the Vienna Action Plan¹⁹ of the Council and the Commission on how best to implement the provision of the Treaty of Amsterdam in the areas of freedom, security and justice, adopted by the Council on 3rd December 1998; and the Millennium Strategy – The

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criminal intelligence
kriminalistische
Informationsstellen

organised crime. Such a mechanism was used for the collection and processing of information with a view to producing an annual Europol organised crime report. This course of action was formalised in the document known as ENFOPOL 35 of 21st April 2007.

In point “IV – Characteristics of organised crime” of the above-mentioned document, a list of organised crime elements was elaborated with the objective of assisting Member States in preparing their National Situation Reports. At least six of the following characteristics had to be present for a given criminal group to be considered an organised criminal group, four of which were essential: numbers 1, 3, 5 and 11:

1. Collaboration of more than two people,
2. each having their own appointed tasks,
3. for a prolonged or indefinite period of time,
4. using some form of discipline and control,
5. suspected of having committed serious criminal offences,
6. operating at international level,
7. using violence or other means suitable for intimidation,
8. using commercial or businesslike structures,
9. engaging in money laundering,
10. exerting influence on politics, the media, public administration, judicial authorities or business,
11. determined by the pursuit of profit and/or power.

ENFOPOL 35 of 21st April 2007 cannot therefore be considered a document providing a real definition of transnational organised crime but rather a reporting system for the Member States of the European Union who, in their national criminal law, could have one or more definitions of organised crime, or even none.²³

On 21st December 1998 the Council adopted the Joint Action 98/733/JHA, ma-

king it a criminal offence to participate in a criminal organisation in the Member States of the European Union. This document envisages the criminal nature of participating in a criminal organisation as described in ENFOPOL 35.

Both documents have been jointly considered in the debate on transnational organised crime on the European level and, even if not meant to represent a definition on EU level, in the last decade they have been de facto considered as such by Member States.

THE EU COUNCIL FRAMEWORK DECISION ON TRANSNATIONAL ORGANISED CRIME

On 19th January 2005 the Commission published a Proposal for a Council Framework Decision on the fight against organised crime, where the reasons behind it were extensively explained. Then in CRIMORG 80 of 10th May 2006 the Council published the outcome of their proceedings on this proposal.

After adoption of the various initiatives and agreement on proposed reservations, the Council Framework Decision on the fight against organised crime (2008/841/JHA) of 24th October 2008 was published in the Official Journal of the European Union.²⁴ This legal instrument aimed at replacing the Joint Action 98/733/JHA of 21st December 1988.

The Council Framework Decision makes clear reference to the Hague Program. One of its objectives is to improve the joint powers of the Union and the Member States for the purpose, amongst others, of combating transnational organised crime. Reference is also made to point 3.3.2 of the Hague Program where it is noted that the approximation of substantive criminal law serves the purpose of facilitating mutual recognition of judgments, judicial decisions, police and judicial cooperation in

VOCABULARY

*to engage in
betreiben*

*reservation
Vorbehalt*

*substantive criminal law
materielles Strafrecht*

**Article 1
Definitions**

For the purposes of this Framework Decision:

1. "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,
2. "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.

**Article 2
Offences relating to participation in a criminal organisation**

Each Member State shall take the necessary measures to ensure that one or both of the following types of conduct related to a criminal organisation are regarded as offences:

- (a) conduct by any person who, with intent and with knowledge of either the aim and general activity of the criminal organisation or its intention to commit the offences in question, actively takes part in the organisation's criminal activities, including the provision of information or material means, the recruitment of new members and all forms of financing of its activities, knowing that such participation will contribute to the achievement of the organisation's criminal activities,
- (b) conduct by any person consisting in an agreement with one or more persons that an activity should be pursued, which if carried out, would amount to the commission of offences referred to in Article 1, even if that person does not take part in the actual execution of the activity.

**Article 3
Penalties**

1. Each Member State shall take the necessary measures to ensure that:
 - (a) the offence referred to in Article 2(a) is punishable by a maximum term of imprisonment of at least between two and five years or
 - (b) the offence referred to in Article 2(b) is punishable by the same maximum term of imprisonment as the offence at which the agreement is aimed, or by a maximum term of imprisonment of at least between two and five years.
2. Each Member State shall take the necessary measures to ensure that the fact that offences referred to in Article 2, as determined by this Member State, have been committed within the framework of a criminal organisation, may be regarded as an aggravating circumstance.

Also mentioned in the introductory chapter is that the European Union should build on the important work done by international organisations, in particular the United Nations Convention against Transnational Organized Crime (Palermo Convention), which was concluded, on behalf of the European Community, by Council Decision 2004/579/EC of 29th April 2004. This is clear evidence of the efforts within the EU to approximate legislation.

The deadline for implementation of the Framework Decision into the respective national law of the signatories is 11th May 2010. An extract of the most significant articles of this Council Framework Decision is given below:

THE CHALLENGE OF TRANS-NATIONAL ORGANISED CRIME

Legal practitioners are often taught that the concept of "crime" has no objective in reality but it is rather an artificial construct of the criminal law; in some respects the term "transnational organised crime" should basically follow the same principle. The latter though has led to misinterpretations and inconsistencies in the everyday colloquial understanding.²⁵ Despite this, the term transnational organised crime has been generally accepted by criminologists around the world even in the absence of clear boundaries of the expression.²⁶ This means that the need for a unique or at least consistent definition of transnational organised crime has its relevancy.

Some sources refer to the failure of international policymakers to provide a clear definition of transnational organised crime on EU level and an overly-general meaning of the 11 criteria system.²⁷ But the current instruments available definitely show consistent features. The Palermo Convention is a valid international legal instrument, also for the EU Member States. In December 2008 the European

criminal matters. The definition of offences within a criminal organisation should therefore be approximated in the Member States. Thus, the Framework Decision was meant to encompass crimes that are typically committed in a criminal organisation and should provide for the imposition of penalties corresponding to the seriousness of those offences.

VOCABULARY

imposition of penalties
Verhängung von Strafen

signatory
Unterzeichner, Signatarmacht

Union delivered a Council Framework Decision which seems to be valuable for several reasons, not least for the efforts carried out to approximate legislation, but also with regards to the Palermo Convention.

Actually the differences between the two are not very significant. Maybe the problem lies in the form chosen by the EU policymakers to provide for a Council Framework Decision instead of a Council Decision, which would have been more effective in the implementation process by the Member States. As a matter of fact, with the entry into force of the Treaty of Amsterdam, Framework Decisions (and also Decisions) have been introduced as new instruments under Title VI of the EU Treaty (Police and Judicial Cooperation in Criminal Matters). More binding and more authoritative, they actually serve to make action under the reorganised “third pillar” more effective. According to Article 34 TEU, Framework Decisions are adopted for the purpose of approximation of

the laws and regulations of the Member States. Proposals are made on the initiative of the Commission or a Member State and they have to be adopted unanimously. They are binding for the Member States as to the result to be achieved but leave the choice of form and methods to the national authorities. They do not entail direct effect which, at the moment, seems to be the most problematic aspect of the overall exercise.

The aim of this paper was to shed light on the jungle of existing legal instruments and regulatory acts on the subject of transnational organised crime. Hopefully this objective has been met. For a better idea of the effect of international legislation on EU Member States, one will have to wait some time. It will be interesting to assess the level of implementation of the Framework Decision into national law and to observe how MS will act when confronted with the opportunities offered by the Palermo Convention.

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to entail
zur Folge haben

to assess
abschätzen

¹ Woodiwiss, M. (2003). *Transnational organised crime, The global reach of an American concept*, in: Edwards, A./Gill, P. *Transnational Organised Crime – Perspectives on global security*, Routledge.

² Vermeulen, G./Vander Beken, T. (2002). *Combating transnational organised crime*, Maklu/Antwerp.

³ Mantovani, F. (1979). *Diritto penale*, Padova.

⁴ Including political, economic, social and technological changes; the latter also includes the transport and communication sectors.

⁵ *Transcrime (1998). Processi di globalizzazione e criminalità organizzata transnazionale, relazione presentata al convegno: "la questione criminale nella società globale"*, 10–12 dicembre 1998, Napoli.

⁶ *Transcrime (1999). Organised crime and money laundering trends and counter-measures: a comparison between Western and Eastern Europe*, Tilburg/Netherlands.

⁷ *The Yakuza (Japan), Triads (China) and other groups also started emerging.*

⁸ Sánchez García de Paz, I. (2005). *La criminalidad Organizada*, Rústica/Cas-tellano.

⁹ *Racketeer Influenced and Corrupt Organisation Act (RICO) of 1961; Omnibus Crime Control and Safe Streets Act of 1968; Organised Crime Control Act of 1970; Crime Control Act of 1984; Anti-Drug Abuse Act of 1986; Money Laundering Control Act of 1986; Chemical Diversion and Trafficking Act of 1988, etc.*

¹⁰ Woodiwiss, M. (2003). *Transnational organised crime, The global reach of an American concept*, in: Edwards, A./Gill, P. *Transnational Organised Crime – Perspectives on global security*, Routledge.

- ¹¹ Ruggiero, V. (2001). *Fuzzy criminal actors: introduction, Crime, law and Social Change* (37), 177 ff.
- ¹² Mueller, G. O. W. (2001). *Transnational crime: definitions and concepts*, in: Williams, P./Vlassis, D. *Combating transnational crime*, New York.
- ¹³ Ruggiero, V. (2001). *Fuzzy criminal actors: introduction, Crime, law and Social Change* (37), 177 ff.
- ¹⁴ See also Mueller, G. O. W. (2001). *Transnational crime: definitions and concepts*, in: Williams, P./Vlassis, D. *Combating transnational crime*, New York.
- ¹⁵ Sutherlands, E. (1949). *White collar crime*, New York.
- ¹⁶ Vermeulen, G./Vander Beken, T. (2002). *International and legal framework for combating organised crime*, in: Vermeulen, G./Vander Beken, T. *Combating transnational organised crime*, Maklu/Antwerp.
- ¹⁷ Fijnaut, C. (2004). *Police cooperation and the Area of Freedom, Security and Justice*, in: Walker, N. (Ed.) *Europe's Area of Freedom Security and Justice*, Oxford.
- ¹⁸ OJ C 251 of 15 August 1997.
- ¹⁹ OJ C 19/1 of 23 January 1999.
- ²⁰ OJ C 124/00 of 3 May 2000.
- ²¹ Vermeulen, G./Vander Beken, T. (2002). *International and legal framework for combating organised crime*, in: Vermeulen, G./Vander Beken, T. *Combating transnational organised crime*, Maklu/Antwerp.
- ²² See in particular Recommendation Rec(2001)11 of the Committee of Ministers to Member States concerning guiding principles on the fight against organised crime, adopted on 19 September 2001.
- ²³ In the Italian Penal Code, Art. 416 refers to criminal organisations, while Art. 416-bis refers to mafia-like criminal organisations.
- ²⁴ OJ L 300/42 of 11 November 2008.
- ²⁵ Baker, E. (2003). *The legal regulation of transnational organised crime, opportunities and limitations*, in: Edwards, A./Gill, P. *Transnational Organised Crime – Perspectives on global security*, Routledge.
- ²⁶ Mueller, G. O. W. (2001). *Transnational crime: definitions and concepts*, in: Williams, P./Vlassis, D. *Combating transnational crime*, New York.
- ²⁷ Elvis, M. (2003). *Europe's response to transnational organised crime*, in: Edwards, A./Gill, P. *Transnational Organised Crime – Perspectives on global security*, Routledge.