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### **Specialized Corruption Investigations. Soft Law Controls**

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*Soft Law Controls*

# SPECIALIZED CORRUPTION INVESTIGATIONS

There is a risk that tools to combat corruption may actually create more corruption. Calls for the widespread use of undercover methods in international corruption investigations ignore the significant risk of corruption and human rights violations with these techniques. Preoccupied primarily with crafting international legal instruments the United Nations and its Convention Against Corruption<sup>1</sup> (UNCAC) has gravely overlooked the singular human dimensions that shape the outcome of specialized investigations. First, investigators in specialized undercover projects often undergo dynamic changes in personality, ethical norms and behaviour in the course of plying their craft. Second, criminal intelligence will not be shared among foreign international police organizations if a reputation for an uneven application of professional standards exists, or if integrity and trust has not been established through prior personal contacts with foreign police officers. What are the hidden problems with specialized undercover investigations? How have agencies in non-European countries dealt with these problems over the years? We explore these questions and argue that the EU is in a unique position to develop instruments of self-regulation to manage the risks of corruption by investigators, and to promote trust and strengthen values with new EU partners. This could serve as a model for implementing some of the more contentious Articles of the UNCAC.

## UNDERCOVER INVESTIGATIONS ARE RISKY

Specialized investigations are usually “before the fact”, complex, long term projects that make use of a gamut of methods ranging from surveillance, communication intercepts, controlled informants, and undercover techniques. These investigations can involve the gathering of information for strategic (intelligence) or tactical (prosecutorial) purposes. All undercover investigations involve deception involving misrepresentation, pretext, or guise. A key feature is to persuade people of the authen-

ticity of the government agent’s claim to a (false) identity, and to convince targeted persons that he or she can be trusted. This can involve the use of special techniques of questionable ethics and judgment. For example, an undercover federal agent develops an intimate relationship with the daughter of an international banker and money launderer in the hopes of being brought in as a confidante of the family. The ruse works and later more than 25 criminal associates are rounded up in a single raid at the couple’s wedding site. The daughter was unaware it was a charade.



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## VOCABULARY

**gamut:**  
*Skala, Palette*

**guise:**  
*Deckmantel*

**ruse:**  
*List*

**charade:**  
*Farce*

## VOCABULARY

**deviant:**  
von der Norm abweichend

**proactive:**  
initiativ

**to spur:**  
anspornen

**to coddle:**  
hegen, verwöhnen

**to engineer:**  
hier: aufbauen

**bounded:**  
begrenzt

**accountability:**  
Verantwortung

Elsewhere, to increase his credibility with a criminal motorcycle gang, another undercover officer picks up and eats dog excrement on the street to demonstrate an equally deviant character. In Florida, in order to increase his stature in the eyes of important Columbian traffickers an undercover customs agent secures a second mortgage on his home, buys a \$75,000 gold medallion which he wears around his neck to impress the targets at their next meeting. To this day he has not told his family of this.

***Undercover methods expand the imagination, encourage innovation, and get supervisors and agents alike to take risks and do stupid things.***

More importantly, these types of specialized investigations are intrusive, make deception and lying more broadly acceptable, exploit human frailties, impact unintentionally on innocent third parties (spouses, children, associates), violate the dignity of persons, and generally normalize deviant behavior within the investigation team.

Specialized investigations trigger live events which cannot be edited or restarted if they do not work the first time. Although a clear plan with identified targets and objectives exist at the start, the unpredictability of these charades makes it imperative that investigators be equally flexible and adaptable as they are disciplined. General procedures for managing the fluidity and complexity of these investigations can be promulgated but operational experience with a wide range of proactive investigations is the best guide in day to day decision making. Experience prepares investigators to recognize and manage risks as much as it gives them confidence to take risks and capitalize on opportunities. The “tacit” operational knowledge of an

experienced investigator cannot easily be made explicit. The experience base of an investigator contributes to success as much as it poses a risk of excess. Hard laws will not manage this risk. This experience base needs to be tapped and used to cultivate soft laws of self regulation.

Informants and other cooperating sources are often essential for entry into a targeted group. Sources are but one type of “third parties” in an investigation that require special handling and consideration. Sources have to be controlled, but they also have to be spurred, coddled, stroked, made to feel important – all the while they are being deceived and distanced from the objectives of the investigation. Good investigators can easily manipulate innocent third parties into believing them for the sake of the investigation. A team’s ability to manipulate interpersonal relations, socially engineer trust, beliefs, expectations, and perceptions for the purpose of an investigation – all under the authority of an institutional warrant – is a capacity that needs to be bounded by special internal controls and external oversight.

**RESEARCH BASED EVIDENCE**

Inadequate screening of team members, ambitious team leaders, improper training, and poor supervision, accountability and oversight – all are well known contributors to operational, discipline, and human resource problems in specialized investigations. Some of the risks in undercover teams have been documented as psychiatric disturbance in the agents themselves<sup>2</sup>, as disturbing neurological changes in personal identity<sup>3</sup>, as occupational maladjustment once the operation is terminated<sup>4</sup>, as manipulative and exploitative tendencies by ambitious undercover managers<sup>5</sup>, as violating employee liberties justified under the banner of investigating internal corruption<sup>6</sup>, as actual corruption by under-

cover investigators themselves<sup>7</sup>, as threats to a violation of civil and human rights<sup>8</sup>, and to an undermining of citizen values of privacy and freedom by police who belong to these teams<sup>9</sup>. If these potential problems are not always successfully managed by a single team in a modern police force, is it wise to expose untried international police partners to them without a risk management plan in place?

### **DIRECT EXPERIENCE WITH UNDERCOVER PROBLEMS**

In the mid 1980s when Belgium, France (Paris), Germany, the Netherlands and Norway developed an interest in undercover investigations, they created an informal International Working Group. They modeled many of their selection and training best practices on those developed by the Royal Canadian Mounted Police (RCMP). But investigators in some of these countries could not really appreciate the real measure of the socio-sub-cultural, performance, and other problems the RCMP experience had documented.

***The RCMP experience warned that when an officer is “borrowed” from another jurisdiction to act as an undercover, supervisors tend to personally exploit this resource beyond reasonable limits.***

Or, if a covert officer needs to be relocated for security reasons, special provisions need to be in place to ensure a long term occupational adjustment. And, warnings about how the socialization of police into the criminal world would challenge their values and normative ways of thinking were heard but went by unheeded. In spite of these cautions and the good intentions of running a disciplined unit this was not

sufficient to avert the abuse of police agents or their eventual involvement in criminal activity in some of these countries. In the Netherlands, for example, an undercover unit was shut down because of this kind of serious mis-behaviour. The unique social and human factors that are the singular catalysts of the dynamics in undercover teams have been described in empirical research and have successfully predicted operational outcomes. Will every new undercover unit or partnership have to experience these on their own before accepting that they apply to them also? Human factors are central to understanding investigative failures. But the example set by the UNCAC does not help investigators new to undercover methods recognize this.

### **THE UNCAC’S SINGULAR FOCUS ON HARD LAW**

The United Nations, while excelling in bringing parties together on international agreements, has little experience and a weak track record when it comes to implementing accords for others, or indeed for managing its own problems of internal corruption.<sup>10</sup> With the UNCAC the hard law mind-set continues this tradition by ignoring the impact such agreements can have on states whose institutions are not adequately prepared to deal with the human consequences of bringing into effect its Articles. The Convention seems more aligned with a perfunctory mechanistic model of human beings – one resembling the logical model for directing employees that was fashionable nearly 100 years ago. In that Taylorism approach, people were objects solely at the service of improving efficiency and productivity.

In the Convention persons are considered primarily as tools for giving effect to laws. It makes little room for persons as active agents and at times wrongly dismisses the

### **VOCABULARY**

***unheeded:***  
*unbeachtet*

***accords:***  
*Übereinkunft*

***perfunctory:***  
*oberflächlich*

## VOCABULARY

*touts:**hier: hinausposaunen**propensity:**Neigung*

individual or “person” perspective. For example, in the preamble to the Convention the text *touts* the virtues of integrity (five times), and of honesty and honor (three times). But these virtues are not presented as mutable personal qualities capable of inspiring and directing lives at any moment. Rather, they are spoken of as abstract concepts and end states as if they described elements of a system rather than a property of a person. Also, in the Convention the terms “prevention” and “education and training” are used a total of 17 times, but again in the narratives these refer primarily to the correct performance of technical aspects of public functions, not to the socialization of persons for strengthening honesty and integrity, or to help in exercising ethical judgment. Also, it is generally accepted that there are important differences in the way people are raised and made up biologically. That is, some people are more conscientious than others, some have a reputation for being thoughtless and undisciplined, and because of these internal dispositions they are believed to be more or less predisposed to misconduct and corruption than others. This way of thinking about human beings is dismissed entirely by Article 7.1 (b) of the Convention.

***Although it acknowledges people’s vulnerability to corruption the authors of the Convention refused to see this as a propensity within the person.***

Instead, vulnerability in the Convention’s narratives is explicitly located externally – in the job or in the position itself. And furthermore, to mitigate a public servant’s risk of corruption, the Article continues, the recommended solution is to change the environment – remove the person or rotate

the employee to other positions where the temptation is less. This may be appropriate in circumstances where lost talent can be inexpensively replaced, but an efficient and cost saving behavioural risk management approach that seeks to find or to shape a good fit between character traits that resist corruption and the opportunities provided on the job is totally ignored.

The assertion that operational matters of the UNCAC are to be dealt with at the implementation phase by the Conference of the States Parties to the United Nations Convention against Corruption is not measuring up at this time. The first Conference held in Amman in 2006 and the second in 2007 in Indonesia, where recent self assessment checklists were to guide the work of the Conference, both neglected to attend to the risks of uncontrolled international cooperation in specialized investigations. Fortunately, the EU approach to regulatory systems, though also heavily grounded in formal law, allows for the creation of soft law instruments for controlling the risks of international joint investigations, and for preparing states who wish to enter into these partnerships to manage risks.

#### **CROSS BORDER INVESTIGATIONS IN EUROPE**

The legal perspective, as seen in the Plan of Action to fight organized crime, the Schengen Agreement (1985), the Treaty of Amsterdam (1997), the Vienna Plan of Action (1998), and the Convention on Mutual Assistance in Criminal Matters (2000)<sup>11</sup> approach the question of cross border specialized investigations in two ways. The first is from the larger perspective of harmonizing laws behind broader criminal justice institutions, and the second is from the perspective of who has operational powers and procedures for setting up joint investigative teams.

These two perspectives in the European Union are driven primarily by the framework of a supranational organization seeking a common European Constitution<sup>12</sup>, and in this regard, Europol and Eurojust are the EU institutions of intergovernmental cooperation (third pillar) for putting into effect police and judicial cross border cooperation in criminal matters. Interestingly, conducting corruption investigations across borders is not the sole province of criminal law and the third pillar of the EU. The European Anti-Fraud Office, OLAF, while itself not a police or a criminal investigative agency, works on the economic side (first pillar) of the EU.

***It seeks to protect the EU's finances by conducting fraud investigations.***

It does so under the umbrella and authority of an administrative body, ensuring its investigations to remain outside of the realm and authority of the third pillar and criminal law<sup>13</sup>. This allowance reminds us that in a similar vein, international cooperation on corruption investigations using specialized methods can also be facilitated and managed by administrative measures and thus need not remain as the sole province of criminal law.<sup>14</sup>

Some scholars writing in the area of joint police investigations in Europe have suggested that a solid groundwork for crafting police control measures has already been laid. Shalken and Pronk, for example, indicate that a framework for setting up, putting into effect, authorizing investigative acts, and for the use of information collected by a joint investigations team is already in place. The question they ask now is, "is it possible to develop common standards for joint investigations?"<sup>15</sup> Peter Tak has pressed this point further in stating that on the operational side of spe-

cialized investigations it is not the issues of sovereignty or differences in criminal procedure that are creating operational difficulties.<sup>16</sup> He observes that when investigators are educated about the relevant laws of other countries and have an opportunity to apply their imaginative talents within a foreign framework, these criminal law differences no longer present obstacles to effecting international investigations. Thus, while innovation and adaptability have already made their way into shaping effective operations at the international level, managing the risks of these operations through proactive thinking should now be the next initiative.

**INTERNATIONAL SPECIALIZED INVESTIGATIONS: REGULATING THROUGH "SOFT LAW"**

A comprehensive approach to managing the risks of joint undercover investigations would combine a values-based with a compliance based approach to governance.<sup>17</sup> Interpol's Global Standards for Combating Corruption in Police organizations provides a solid framework for conceptualizing what is needed.<sup>18</sup> Likewise, a police audit program for specialized investigations that combines both approaches has already been tried and used by a number of modern police organizations in their fight against errant police conduct.<sup>19</sup> Investigators should call upon existing uniform guidelines for the selection, training, and supervision of all specialized investigators in all EU countries who intend to participate in cross border joint investigations. But we are dealing with countries that bring with them into an investigation the occupational and social habits of a past political and cultural ethos and the provisions of selection, training and supervision are no longer enough. There is a large "free space" of unregulated behaviour and decision making in specialized investiga-

tions. This free space should be occupied by internal administrative rules, policies and procedures, and by codified ethical guidelines for critical decision making around errant actions and undisciplined conduct that only experienced investigators can talk about. Where can experienced investigators in Europe concerned with an uncontrolled enlargement of international investigations find a legal framework for managing the ambitions of the next generation of less experienced international specialized investigators?

The EU encourages groups and stakeholders to develop among and for themselves alternative instruments of control. Described by Linda Senden and termed “soft law”, these include co-regulation, self-regulation, guidelines, recommendations, codes of conduct, or sectoral agreements. They aim to allow groups to put together their own self-regulatory codes to govern their own affairs.<sup>20</sup>

***Although non-enforceable and non-binding, these instruments do have legitimacy and legal consequences.***

Where the large screen of hard law is insufficient to stop uncontrolled discretionary decision making, then internal guidelines and soft law would shore up these vulnerabilities. There are experienced investigators willing to share their tacit knowledge for the sake of safeguarding the integrity of international joint undercover corruption investigations. Only they, who have made exploitation and manipulation of others a career, know where the provisions of hard law or ECHR<sup>21</sup> can be breached in daily practice. Only they can provide the detail of the major fault lines and vulnerability cracks in hard law that is needed to formulate internal control guidelines.

This proposal is likely to meet with resistance at first. First, investigators on the ground will claim that the flexibility needed to craft successful proactive and specialized investigations is already sufficiently encumbered by rules and legislation, and that, in any case, the courts are the final arbiters of any overindulgence of imagination on their part. Second, investigators will defend the status quo by laying claim to already having a morally upright character, to good intentions, to a fervent sense of duty, and to supposed good judgment, and that there is no need for new rules to prevent errors of conduct in a few people. But the evidence indicates the contrary. Good intentions and a fervent sense of duty do not protect individuals from misconduct. Furthermore, the excesses of the FBI in the ABSCAM investigation<sup>22</sup>, the research on the personality of undercover agents<sup>23</sup>, and other critical analyses of police integrity<sup>24</sup> clearly show that claims of good character, even in elite police organizations, are not sufficient to offset the risks created by the special dynamics of undercover projects and specialized investigations.

In conclusion, (1) a prior relationship founded on trust is needed to facilitate international criminal investigations, and (2) common ethical and behavioural codes of conduct for high risk investigations are needed. In the absence of personal knowledge of the reliability of foreign investigators, all partners should receive uniform training on ethical principles, operational procedures, and risk management strategies. The risks of collaborating with untried partners can begin to be managed by ensuring that all players abide by the same set of internal rules to contain activity within normative parameters. Whilst this may be an overly ambitious goal for the global implementation of the UNCAC at this time, it is not beyond the reach of EU nations in their cross border investigations.

**VOCABULARY**

***discretionary decision:***  
*Ermessensentscheidung*

***to shore up:***  
*abstützen, abfedern*

***overindulgence:***  
*übertriebene Nachsichtigkeit*

- <sup>1</sup> *United Nations Convention Against Corruption* (2003). *United Nations Office of Drugs and Crime, New York.*
- <sup>2</sup> Girodo, M. (1991). *Symptomatic reactions to undercover work, Journal of Nervous and Mental Disease.*
- <sup>3</sup> Girodo, M./Deck, T./Campbell, K. (2002). *Event related potentials reveal the effects of altering personal identity, in: NeuroReport, 13 (13), 1595–1598.*
- <sup>4</sup> Girodo, M./Deck, T./Morrison, M. (2002). *Dissociative type identity disturbances in undercover agents: Socio-cognitive factors behind false identity appearances and re-enactments, in: Social Behavior and Personality (30), 631–644.*
- <sup>5</sup> Girodo, M. (1998). *Machiavellian, bureaucratic, and transformational leadership styles in police managers: Preliminary findings of interpersonal ethics, in: Perceptual and Motor Skills (86), 419–427.*
- <sup>6</sup> Girodo, M. (1998). *Undercover probes of police corruption: Risk factors in proactive internal affairs investigations, in: Behavioral Sciences and the Law (16), 439–451.*
- <sup>7</sup> Girodo, M. (1997). *Drug corruption in undercover agents: Measuring the risk, in Behavioral Sciences and the Law (9), 361–370.*
- <sup>8</sup> Marx, G. T. (1986). *Undercover: police surveillance in America, University of California Press, Berkeley.*
- The threats undercover agents and their deceptive methods pose to human rights and democratic principles are in part founded on the excesses of secret intelligence agencies, civil underground movements and betrayed allegiances, and a history of oppressive police surveillance during the war and the Soviet era. Among the public there is also less clear understanding of how covert methods for law enforcement ends differ significantly from the activities of state intelligence agencies, and how they can be managed by internal regulations and controls.*
- <sup>9</sup> Fijnaut, C. (1995). *Undercover: police surveillance in comparative perspective, Norwell, MA, USA.*
- <sup>10</sup> Girodo, M. (2007). *Corruption and indiscipline in the United Nations, in: Banerjee, A./Sharma, K. (Eds.). Reinventing the United Nations, Prentice Hall, New Delhi, 259–277.*
- <sup>11</sup> *European Union Convention on Mutual Assistance in Criminal Matters (2000).*
- <sup>12</sup> Kaiafa-Gbandi, M. (2001). *The development towards harmonization within criminal law in the European Union – A citizen's perspective, in: Criminal Law and Criminal Justice (Vol. 9/4), 239–263.*
- <sup>13</sup> *This has created some human rights concerns in regards to OLAF's collection, storage and sharing of personal information on citizens on behalf of a supranational organization but it is not an insurmountable problem.*
- <sup>14</sup> *The latter is also recognized by the UNCAC in seeking to recover financial assets from corruption through civil rather than criminal law.*
- <sup>15</sup> Schalken, T./Pronk, M. (2002). *On joint investigation teams, Europol and the supervision of their joint actions, in: Criminal Law and Criminal Justice (Vol. 10/1), 70–82.*
- <sup>16</sup> Tak, P. (2000). *Bottlenecks in international police and judicial cooperation in the EU, in: European Journal of Crime, Criminal Law, and Criminal Justice 8 (4), 343–360.*
- <sup>17</sup> *World Bank Report (2000). Anti-corruption in Transition: A Contribution to the Policy Debate, 77–78.*
- <sup>18</sup> *Interpol Lyon (2003). Global Standards to Combat Corruption in Police Forces/ Services.*
- <sup>19</sup> Girodo, M. (2004). *BRASS: Strategies for strengthening police integrity, in: Bourdoux, G./Cumps, G. (Eds.). Policing, Ethics and Corruption, Brussels, 321–332. See also: Girodo, M. (2000). BRASS: Behaviour risk assessment and strategic systems: New tools for preventing corruption and reinforcing integrity, in: Pagon, M. (Ed.). Policing in Central and Eastern Europe: Ethics, integrity, and human rights, Slovenia, 707–720.*
- <sup>20</sup> Senden, L. (2005). *Soft law, self-regulation and co-regulation, in: European Law, Where do they meet? Electronic Journal of Comparative Law 9 (1).*
- <sup>21</sup> *European Convention on Human Rights (1950).*
- <sup>22</sup> Caplan, G. M. (1983) (Ed.). *Abscam ethics, Cambridge.*
- <sup>23</sup> Girodo, M. (1991b). *Personality, job stress, and mental health in undercover agents: a structural equation analysis, in: Journal of Social Behavior and Personality 6 (7), 375–390.*
- <sup>24</sup> Girodo, M. (1985). *Health and legal issues in undercover investigations: misrepresented evidence, in: Behavioral Sciences and the Law (3), 299–308.*
- <sup>25</sup> Delattre, E. (1989). *Character and cops: ethics in policing, Washington, D.C.*