The UN Convention Against Transnational Organized Crime and its Ambiguities

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PAULO PEREIRA, OCT 25 2013

Transnational crime has emerged in recent years as an important security issue on the international agenda, presenting considerable challenges to policy makers, researchers and agents combating these crimes. Governmental and academic actors have focused their discussions on the answer to the question “what is transnational crime?” with the belief that a more accurate and objective definition of the phenomenon would have a more effective impact. So, like many other categories of social sciences, defining “transnational crime” has become a constant challenge.

The UN, in 2000, through the Convention against Transnational Organized Crime, tried to find an institutional response to this dilemma to solve the obstacle posed by the difficulty of a common definition across countries. It meticulously detailed every aspect of the category: “crime”, “organized”, “transnational” and its derivations or complements, such as “structured group”, “property”, “serious crimes”, “confiscation” among many others. This multilateral instrument proposed building an accepted homogeneous and global category for identifying and combating cross-border crime. From this first step of international recognition of a common threat, there should have followed an introjection of the parameters elaborated by the Convention in national laws and practices of law enforcement in each of the State parties.

However, despite of the effort made by most of the member countries of the UN and the ratification of the Convention, the controversies over the definition and fight against transnational crime have continued over the past few years, even among the signatory countries themselves. The major criticism regarding the definition proposed by the UN is its underlying universal moral principles and consequently its inability to grasp the specific local and regional crime context, as well as its disregard for the ambiguities between the lawful and legitimate, in addition to its apolitical and undisputed claim.

The text of the Convention, adopted by the General Assembly in 2000 and in force since 2003, is seen by the UN as the main reference for the contemporary fight against illegal cross-border activities. Besides the convention there are three additional protocols that focus on specific topics: the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; the Protocol against the Smuggling of Migrants by Land, Sea and Air; and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition.

There are two important aspects concerning the convention and its protocols. The first is that this document became a landmark on the subject once it recognizes the issue as a homeland security threat and also as an international security threat, besides establishing a common assessment that the fight against these activities can only be effectively addressed through international cooperation between the countries subjected to this threat.

The second important aspect concerns the fact that the states that have signed and ratified the text of the Convention to adopt various measures against transnational organized crime, including its criminalization in national legislation and law enforcement procedures related to the accusation, trial, sanctions, jurisdiction, extradition, as well as forms of mutual legal assistance, joint investigations, protection of witnesses and victims. Prevention measures focusing on

economic development assistance and technical support were also part of their final draft (UNODC, 2004). Thus, the convention of 2000 should be seen as an effort to promote the interests of UN law enforcement toward internationalization of social norms and ethical standards (ANDREAS; NADELMANN, 2006:173).

The convention, however, despite a clear effort to define transnational crime and how to combat it, leaves many important aspects of the theme unanswered or, more importantly, with broad and ambiguous answers. This reveals the difficulty of preparing a text acceptable to 125 countries at the time, especially dealing with a subject as complex as transnational crime. It's important to highlight two aspects in this regard: the first concerns the scope of the convention; the second concerns the definition of transnational organized crime itself. In other words it's possible to say that the breadth of the convention does not have clear boundaries and the concept of transnational organized crime is not well defined (DUYNE; NELEMANS, 2012:43).

The scope of the convention is extremely broad regard to what intend to criminalize internationally. The expected efforts for the prevention, investigation and prosecution cover four types of offenses: participation in a criminal organization (Article 5); involvement in money laundering (Article 6), corruption (Article 8) or obstruction of justice (Article 23). Each of these references can cover a wide variety of illegal practices. The interpretation of what is to be effectively addressed will depend on various circumstances and social contexts in which the countries are inserted. With respect to, for example, corruption, given the complexity of the subject, even though it was included in the agreement, the understanding was that a specific convention would be required only to deal with this theme (VLASSIS, 2005:143). Another example of the breadth of the proposed agreement concerns the foreseen prevention of all these crimes, which is extremely lax (VLASSIS, 2005:146), besides being difficult to be assumed by the countries as an obligation because of the lack of parameters for its enforcement.

The current definition, proposed by the convention of transnational organized crime is still controversial. It is separated into two parts: the first concerns the definition of "organized crime" and the second the definition of "transnational". Regarding the first, the convention dictates that organized criminal groups:

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 (UNODC, 2004:5).

This definition opens up a universe of ambiguities and questions. What is a structured group? How long is "a period of time"? How to evaluate "serious crimes"? This is just to name some of the more immediate problems. The answers are vague. The convention states that a structured group is a group formed in a "not random" way and that "even though its members have not formally defined roles, there is no continuity of its membership and that it does not have a developed structure." These are characterizations that instead of restricting the possibilities of identifying such groups expand it, since all of its parameters are essentially interpretative and not objective. This may lead us to clear contradictions, once the structured group does not need to have defined roles, continuity in its composition or a developed structure it can, finally, simply not have a structure (DUYNE; NELEMANS, 2013:43).

The notion of "serious crimes" is another complicated definition. The convention defines it as a "conduct that constitutes an offense punishable by a maximum deprivation of liberty of at least four years or a more severe punishment" (UNODC, 2004:5). In the Brazilian case the simplest crimes against property have been put under this category. A pick-pocketing act can get from one to four years in prison, according to the country's penal code and it is obvious that this kind of act is far from being a "serious crime".

Finally, according to the convention (UNODC, 2004:6), a transnational offense occurs 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 organized 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.

Once again, it is important to question these parameters. How to characterize, if not interpretatively, "substantial" or "substantial effects"? Thus, the effort made by the convention to specify the characteristics of transnational organized crime in order to provide a standard and therefore a legal reference for countries, lacks clarity and objectivity.

Here's an example given by Duyne And Nelemans (2013:44) that exposes some possible conclusions from the role definition of transnational organized crime made by the 2000 Convention.

Three regular female shoplifters (no developed structure, no defined roles) could qualify as an organized criminal group depending on what it meant by 'regular' in terms of period of time. (…) This group is not formed spontaneously in order to go shoplifting immediately, but the ladies talked it over during the evening (…) and made a plan of which shops to visit. Of course, this is not yet 'transnational organized crime'. But we can easily expand the example by imagining that the ladies are from Maastricht and are shoplifting in the nearby tows of Aachen and Liège: then article 3-1(b) and 2 apply.

Of course this example is an exaggeration, but it exposes the problems with the definition proposed. Depending on the circumstances, this definition could lead to policies of mass incarceration in some countries even not addressing the main problem of transnational organized crime. On the other hand, these deficiencies allow countries to promote a variable introjection and thus very few homogeneous parameters proposed by the Convention.

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Paulo Pereira *is a lecturer in International Relations at Pontifícia Universidade Católica de São Paulo (PUC-SP), Brazil. He is also coordenating a research on transnational crime in South America financed by the Brazilian National Council for Scientific and Technological Development*

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About the author:

Paulo Pereira is a lecturer in International Relations at Pontifícia Universidade Católica de São Paulo (PUC-SP), Brazil. He is also coordenating a research on transnational crime in South America financed by the Brazilian National Council for Scientific and Technological Development.