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Anticipating instead of Preventing: Using the Potential of Crime Risk Assessment in Order to Minimize the Risks of Organized and Other Types of Crime

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Table of Contents

ANTICIPATING INSTEAD OF PREVENTING: USING THE POTENTIAL OF CRIME RISK ASSESSMENT IN ORDER TO MINIMIZE THE RISKS OF ORGANIZED AND OTHER TYPES OF CRIME

1. On the necessity of crime prevention

Crime prevention as an option in the control of crime is gaining momentum. A recent United Nations resolution states that "the prevention of crime through non-punitive measures is to be considered an important complement to the administration of criminal law" (ECOSOC, para. 1). The resolution further maintains that "the concept of crime prevention should not be limited to conventional forms of crime, including domestic violence, but should encompass new forms of crime, such as organized crime, terrorism, illegal trafficking in migrants, computer and cyber-crimes, environmental crime, corruption and illegal commerce related to the acquisition and development of weapons to mass destruction" (op. cit., para. 2). Furthermore, account should also be taken of "the growing internationalization of criminal activities and the relationship between the global economy, advanced technologies and national phenomena of crime" (op. cit., para. 3). It would thus be advisable always to consider any law reform programme in the context of a social activity involving the potential for crime from two angles - both that of the law enforcement and that of prevention.

There is wide consensus that it is not enough to control crime through reactive intervention and punitive means alone. The deterrent effect of coercion - whether we are thinking of individual or general deterrence - in the traditional sense of the concept does not always work very well in modern society (see, e.g. Ashworth, pp. 1097-1098). As Pease points out, "we should constantly remind ourselves that, in crime, we have a set of actions or omissions united only in their proscription by law" (Pease, p. 963). According to Pease, "because an action is a crime, this does not mean that the best way to control it is through the police and the courts. The behaviour itself must be understood, to determine where change could best be brought about" (op. cit., p. 963). Similarly, Graham and Bennett are of the opinion that "during the 1970s and 1980s there was a rapid loss of faith in the ability of the criminal justice system to reduce crime or criminality" (Graham & Bennett, p. 1). In sum, "crime, disorder and fear of crime have become major concerns for the government and many communities. Traditional responses to these concerns - such as more police and tougher penalties - are no longer sufficient as the benefits of intervening before crime is committed become more and more evident" (Glanfield, p. x). Consequently, and particularly with the concern over the increasing risk of transnational organized crime, great efforts to develop preventive strategies can be observed both nationally and internationally (see, e.g. Lely & van Toorn; European Union, Action Plan).

Various categorizations have been developed in order to describe approaches to crime prevention (see, e.g. Graham & Bennett, pp. 5-7). One well-known classification in this area is the following typology:
- 'Criminality prevention' (also called 'social' or 'offender oriented' crime prevention);
- 'Situational crime prevention'; and
- 'Community crime prevention' (op. cit., p. 7).

2. Organized crime: a problematic issue in terms of prevention

Situational and community prevention are applied, as a rule, in response to observed criminal activity[1]. Criminality prevention, on the other hand, aims at the socialization of potential offenders. Thus, criminality prevention targets risk groups and individuals before the initiation of criminal careers[2]. All this, however, reflects the preoccupation of societies, both national and international, primarily with traditional mass or conventional crime.

However, organized crime and other types of so-called modern crime, as listed in the ECOSOC resolution mentioned above - whether national or transnational in character - pose a problem in this respect. Profit-making could be understood to be the major goal of all kinds of criminal activities in this category - even gaining power can be seen just as a means of reaching that goal (cf. Arlacchi, p. 205) - if we put aside the cases of pure negligence (as is the case with some environmental crime) or mischievousness (as is the case with some computer and cybercrime/crackers). In addition, "developments that have made it possible to move goods, people and money through the global economy - and have traditionally been regarded by international political economy specialists as positive and benign in their effects - have facilitated the movement of 'dirty money', as well as the transportation of drugs, arms, illegal aliens, and nuclear material" (Godson & Williams, pp. 3 - 4). The result, according to Williams, is that "criminals, in effect, ignore or transcend borders in the pursuit of profit, but use variations in national laws, in the effectiveness of criminal justice systems, and in the efficiency and effectiveness of law enforcement bodies to minimize the risk that they will be apprehended or punished" (Williams, p. 2).

These facts make it rather difficult to develop workable prevention efforts to combat modern types of illegal acts within the classifications mentioned. Criminality prevention will rarely be relevant and viable in this context due to the nature of the offences, although, according to Godson and Williams "preventive educational programs in primary and secondary schools throughout the world - what specialists refer to as 'legal socialization' - might turn out to be an important ingredient in the overall global strategic mix", since "already some regions have created civic education programs to counter crime and corruption" (Godson & Williams, p. 34). They give as an example the city of Palermo in Italy, where 25 000 children every year attend an educational program designed to change the cultural norms that allow the Mafia to flourish.

As Arlacchi points out, "a number of studies have shown that we are faced with rational economic phenomena and well-structured 'industries'. Illegal markets have much in common with their legal counterparts" (Arlacchi, p. 204). Similarly, Williams claims that "indeed some of the major organizations that have emerged have more in common with major transnational corporations than they do with the old

[1] Examples in this respect are: (i) target hardening in respect of situational prevention, and (ii) global efforts to prevent laundering of illegal assets by means of cooperation with financial institutions - a type of community prevention.

[2] A corresponding typology can also be observed in the fields of sentencing and corrections. 'Incapacitative sentencing' can be seen as the counterpart of 'situational and community prevention', while 'rehabilitative sentencing', on the other hand, can be seen as the counterpart of 'criminality prevention' (Ashworth, pp. 1098 - 1099).

style mob" (Williams, p. 2). Community prevention and situational prevention might sometimes provide a feasible frame of reference, but in a great majority of cases they are not viable either. There are several reasons for this. First, as a rule the preventive efforts are not carried out but until at a fairly late stage, very often not before various interest groups have started demanding that something be done. It might not be easy to introduce a new measure, especially since these measures often hit legal and illegal activities alike. Business life, for example, is not necessarily happy with retroactive preventive measures imposed by policy makers. Such measures can easily be experienced as infringement and red tape. Second, more often than not the offenders are several steps ahead of the designers of the prevention strategies, which means that the policy makers in the field in question will have to be involved in a continuous struggle against time[3], since, as Mueller writes, "the ingenuity of transnational criminal organizers and organzations may outrun our contemporary efforts" (Mueller, p. 15). Lastly, successful prevention in this sector sometimes would call for the changing of deeply rooted behaviour patterns of entire populations (cf. the Palermo example quoted above).

3. A potential solution; anticipation /early awareness of crime risks

An optional approach to the dilemma might be to introduce preventive reactions as early as possible, for example by anticipating the potential risks of crime that a law reform might bring forth, instead of designing reparative preventive steps either in the course of implementing the agreed upon reform or during the law enforcement phase, as deemed necessary. Thus, what is needed is early awareness of the potential risks and a method of assessing their seriousness. Godson and Williams are of the opinion that "anticipating emerging crime threats provides opportunities for both preventive and preemptive actions that can have maximum impact, by allowing government and law enforcement agencies to be proactive rather than reactive" (Godson & Williams, p. 24)

In drafting any national or transnational legislative instrument dealing with financial matters[4], the potential crime risks should be considered. This is because, firstly, profit-making is inherently connected with any economic activity (as already noted), and secondly, seeking loopholes in legislative structures in order to gain economic benefits seems to be a basic instinct in modern society. Transnational instruments of this type should, furthermore, take into account that "some criminal organizations have structured their operations so that only minor crimes are committed in any single national juris-

[3] Sometimes, on the other hand, new technical inventions may in a very short time revolutionize the ways and means of prevention targeting a profit crime category. As a matter of fact, technical innovations may lead to law reforms while the case is very seldom vice versa, which means that this type of situational crime prevention will not be of any significant utility in this sector in the foreseeable future.

[4] There are, naturally, exceptions to be worked out on a case by case basis - it is for example quite difficult to maintain that legislation regulating dispute settlement in business life, nationally or internationally, by arbitration as such must consider crime risks even though great financial interests might be at stake. It is quite another issue that a certain part of the assets in dispute might have previously originated through shady business transactions.

diction. The totality of their activities may be spread across a number of national jursidictions and specific actions (such as investing cash in legitimate businessess, or losing money at gambling establishments) may not be crimes. In some cases, crime must be considered not as a single act, but as *participation in a process*" (op. cit., p. 31, italics by the authors).

4. A particular concern: law reform outside of the crime sector

The potential crime risks are not, as a rule, given serious consideration in law reform projects, unless clearly defined features of criminal behaviour are known to intersect with legally acceptable activities. This is particularly true of reform work primarily involving experts outside the sphere of crime prevention and criminal justice, but also to some degree within the crime prevention and criminal justice community. Checking relevant parts of draft legislation more often for provisions that may open up or facilitate opportunities for crime might significantly facilitate the minimizing of potential crime risks, since "knowing one's 'enemy' is (...) important" (Lely & van Toorn, p. 7). Consultations with, and the advice of, law enforcers might be a good starting point in this respect. Obviously, it is not very often the people involved in law enforcement field work - police officers and the like - are consulted at an early stage of a law reform project, if the scope of the reform is outside the field of their expressed competence. And at the same time those people are, as a rule, the real experts on the potential crime risks involved, regardless of whether the draft legislation deals with public procurement, regional subsidies or consumer issues. Pooling the best resources of both parties, the practitioners and the planners of reforms, might perhaps result in an optimum mix in this respect.

4.1 Examples of crime risk categories of particular relevance in this context

It is not viable at this stage to produce a complete list of all of the potential crime risk categories that should be considered when a law reform project of the type refered to here is initiated. The potential crime risk categories attached to any particular reform activity must be scrutinized on a case by case basis. It is, however, feasible already now to present a summary overview of a few of these risk categories that can be observed time after time in this context.

4.1.1 Money laundering

Money laundering must be seen as an overall threat in this respect, as a challenge for shady businessmen. The main type of laundering which can be envisaged here is the investment of assets gained by illegal means in legitimate business in order to launder them, without further thought to actually using the business to engage in competition (on this, see below under 4.1.3).

4.1.2 Corruption

Also corruption should be conceived as an overall threat, always potentially present when profit-making operations are regulated by legislative efforts. Two of the various categories of corruption defined by van Duyne (van Duyne, pp. 5-16) are highly relevant in this context, namely (i) public/private sector corruption, i.e. corruption between a private person or corporation and an official, and (ii) private sector/political corruption, i.e. corruption between the private sector and the hold-

ers of political office.[5]

4.1.3 Purposeful infiltration of legal business

Two categories of somewhat dubious business manipulations are of interest here. One category is investment in a legitimate business of means already laundered elsewhere either in order to strengthen the image of a business operating within the limits of law, or in order to weaken the position of competitors. The other category is premeditated attempts to profit by taking over a financially sound company and emptying it of assets.

4.1.4 Falsification of documents

Last but not least, production and presentation of false documents might be combined with the other three crime risk categories listed here. This illegal activity should, however, also be regarded as having a role as an independent offence as such. The purpose of the perpetrator in such a case is simply to make an attempt to profit in a competitive market under the disguise of false pretences.

5. Assessing organized crime risks in the context of legislative reforms; presentation of a potential method for anticipation

There is, however, no guarantee that just bringing together the best expertise will automatically lead to the paying of attention to all potential crime risks encompassed in a law reform project. In addition, also on the methodological side we must visualize an approach that is, as far as possible, fool-proof. It is often sensible to look for that kind of approach outside the discipline in question. A methodological tool that has already been developed and widely used in environmental planning and policy making might offer a suitable solution. The Environmental Impact Assessment (EIA) is one such instrument. The EIA seeks to bring to light "the impacts of various actions and their options which may significantly affect the natural, built-up and social environment" (Leskinen, Salminen & Turtiainen, p. VII). After the need of a EIA process has been established, the following operational steps should be covered, according to the model:
(1) examining the objectives of the proposed project and alternatives to it,
(2) identifying the impacts and delineating the impact options,
(3) retrieving and presenting the baseline data,
(4) predicting the impacts, interpreting and evaluating the weight of them,
(5) developing ways and means to mitigate or ameliorate adverse impacts,
(6) comparing alternatives,
(7) elaborating a draft EIA report,
(8) reviewing the draft report,
(9) preparing a final EIA report,
(10) making of a decision, and
(11) monitoring the impacts and auditing the success of the whole procedure[6] (Morris & Therivel, pp. 4 - 6).

Quite obviously the EIA model as such is not directly suitable as a tool in a totally different setting, for assessing crime risks in the field of legislative efforts with particular attention to law reforms that open

[5] Also "private sector corruption" as defined by van Duyne might in some cases qualify as corruption (he mentions "bidding manipulation" as an example) in the sense given to the term in this article, although as he himself points out: "strictly speaking this is not corruption but bid-rigging" (van Duyne, p. 12).

[6] For a more detailed overview of the EIA process, please see Annex I.

up a potential for making a profit. A modified version must be designed in order to make it possible to utilize the method in full in this new milieu.

First and foremost, it must be kept in mind that the reliability of the baseline data will be at a considerably lower level than is the case in the environmental context. Instead of reliance on quantitative data alone - in the form of numerical, statistical information - the weight must be on the intelligence type of information, i.e. primarily on qualitative data, which consists of anecdotal and documentary material combined with some figures[7]. The problem is that this approach may easily lead us to question the validity of the impacts identified if we are not extremely cautious in verifying our data.

Having noted these words of warning we can now seek to modify the EIA model for the purposes of crime risk assessment. The main point to keep in mind is that all the crucial components of the procedure - the objectives, the impact options, the baseline data, the evaluation of the weight of the impacts, the mitigation/amelioration of adverse impacts, the monitoring of the impacts after the decision making, and the auditing of the outcome - must be considered. When developing an instrument for Crime Risk Assessment (CRA) the following steps of the EIA process should, as a minimum, be followed *mutatis mutandis* (after the self-evident establishment of a need for a CRA process):

(i) The examination of the objectives of the proposed legal reform project;

(ii) The identification of its adverse impacts, i.e. of crime risks connected with the proposed reform;

(iii) The retrieval and the presentation of the baseline data (noting the cautions referred to above);

(iv) The interpretation and the evaluation of the weight of the adverse impacts; developing ways and means of mitigating the problem, including suggestions for monitoring the impacts and auditing the success of the programme; and

(v) The merger of the conclusions emanating from the CRA process with the text of the law reform before a final decision is taken.

So far this model is only a hypothetical one. In the following, an attempt is made to utilize the CRA approach in analyzing three cases of legal reform programmes with financial implications. The cases chosen as examples represent a diminishing scale of *direct* involvement in the drafting of the programmes by criminal justice experts and practitioners.

6. Three case studies

In this section the applicability of the CRA process is tested on three real-life cases of transnational law reforms that have opened up a major potential for making a profit. The aim here is to make an attempt to explore, first, what kinds of crime risk categories are associated with the reforms, and, second, whether indeed anticipation and early awareness: (i) have helped in avoiding or minimizing crime

[7] It is not possible to envisage relevant and reliable quantitative indicators pointing to acts of modern crime - data on the activities of the law enforcement and judicial authorities do not give us reliable information about this type of criminality. Indicators must be seen as products of observations. Data in this field simply do not meet this condition.

risks in the first case, (ii) might have helped in avoiding or minimizing crime risks in the second case, and (iii) might help in avoiding or minimizing crime risks in the last case.

6.1 Basel convention on the control of transboundary movements of hazardous wastes and their disposal

The text of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal was negotiated by the states parties at the end of the 1980s and finalized at the beginning of the 1990s. The convention entered into force on 5 May 1992 (cf. United Nations Environment Programme1989).

¤ The objectives of the convention are *to protect, by strict control, human health and the environment against the adverse effects which may result from the generation and management of hazardous wastes and other wastes, and to enhance the control of transboundary movement of hazardous wastes and other wastes, thus creating incentives for their environmentally sound management and for the reduction of the volume of such transboundary movement*. The simple idea is that the less hazardous waste and other waste are produced, and the less they are transported with potentially risky consequences, the better the environment for all forms of life upon Earth.

¤ The reform as such was instituted in order to minimize the adverse impacts of a human activity - that of hazardous waste production - by means of regulating the transboundary movements of, in the first place, hazardous waste, and, in particular, illegal traffic in hazardous wastes (see United Nations Environment Programme 1993, part I, para. 6). This is supposed to be achieved by not permitting the export of hazardous wastes and other wastes if the state of import does not consent in writing to the specific import, in the case where that state has not prohibited the import of such wastes. The states parties shall designate or establish one or more competent authorities and one focal point to facilitate the implementation of the Convention (United Nations Environment Programme 1989, art. 5, para. 1). A state party shall further not permit any export to or import from a non-party state (op. cit., art. 4. para. 5). The risk for the production and presentation of false documents in this context is noted (op. cit., art. 9, para. 1 (c & d)). Other adverse impacts, i.e. other potential crime risks, apparently were not considered. Money laundering and purposeful infiltration of legal businesses are not perhaps relevant this time in this respect[8]. Nonetheless, the potential for corruption as a separate crime risk category should perhaps also have been notified in the convention.

¤ In general, baseline data (to say nothing of statistics) on breaches against the stipulations of the Convention are not very systematic, although national focal points of the states which have ratified the Convention are supposed to report all incidents to the Secretariat. However, no comprehensive statistics in this category are available[9], only anecdotal documentation on some of the cases reported to the Secretariat of the Convention. Thus, for example in the document by the Secretariat on illegal traffic, presented to the fourth meeting of the Conference of the Parties to the Basel Convention, con-

[8] At the national level, however, both these crime risk categories should in some cases be given a high relevance - in Italy, for example, the 'ecomafia' is considered a highly serious threat in this field (see, e.g., Legambiente).

[9] It is, naturally, quite possible that the Secretariat of the Convention elaborates internal statistical tables on the incidents on an annual basis, but access to these files is not necessarily open.

vened in October 1997, three incidents were reported in detail. In addition, it is stated that "on a few other occasions, the Secretatiat, through various sources including the Governments of Contracting Parties, has been informed of cases of illegal traffic. In all of these cases, the Secretariat immediately contacted all States concerned, asking for clarification and offering assistance" (United Nations Environment Programme 1997, pp. 1-3). The problem of illegal conduct seems to exist, but, apparently, it is not a serious one.

This view is confirmed by a study produced for the research workshop organized at the Ninth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, in 1995 (United Nations 1995b). Experts from eleven member states were requested to describe, *inter alia*, recent cases of transboundary pollution involving traffic in hazardous waste (UNICRI). Optimally, each national expert ought to have described three examples: (i) one case where the legal instruments available in the country were fully utilized or effective implementation took place, (ii) one case where the system failed, and (iii) one case being identified as environmentally harmful and likely to be dealt with by new strategies for better environmental protection. As a matter of fact, six national experts were able to report cases, on the whole, but not a single expert was able to report a case from all of the categories listed[10]. On the other hand, data on the frequency of incidents are not the most important knowledge in this field. It is equally vital to know for example that "the disposal of harmful waste in African countries became a common phenomenon in the eighties (...) because of the low level of environmental protection laws, and the abject powerty of these nations, the developed countries have, within the last decade, embarked upon 'toxic waste trade' or 'illegal dumping of toxic wastes' in poor debt-strapped developing countries" (op. cit., p. 171).
The question of false documents is mentioned *passim* in a few of the cases described, but no systematic information is provided on this aspect. No information whatsoever is provided on corruption as a preliminary step in trafficking in hazardous waste.

¤ The international community, quite apparently, has taken a very serious view of the threat caused by trafficking in hazardous waste, as demonstrated by the efforts to develop and implement the Basel Convention. Also the traffic in false documents has been considered in earnest as a side issue. On the other hand, in this context perhaps more anticipatory weight should be attached to corruption as a separate potential crime risk category, since it is quite conceivable that trafficking in hazardous waste has been facilitated by bribing favourably inclined national officials. This must be seen as a real threat in all those regions of the world where corruption has become endemic, and can be considered an inherent element of the cultural structure.

6.2 Directives on public procurement within the European Union/ European Community

The second case to be analyzed is a cluster of related European Community (the predecessor to the European Union) directives in the field of public procurement

[10] In fact, the number of experts reporting separate cases is only five, since two experts from neighboring countries reported one and the same case.

(93/37/EEC on public building contracts; 93/36/EEC on public procurement of goods; 92/50/EEC on public procurement of services; 93/38/EEC on procurement in the fields of water and energy management, traffic and telecommunications).

¤ The common objectives of all four directives may be summarized as follows: *To guarantee a sufficient level of competitive tenders and to harmonize the procedure concerning public procurement in the member states, all in order to promote the four freedoms: free movement of capital, goods, persons and services, respectively*. The member states are thus obliged to follow certain bidding procedures every time the bid price exceeds a certain amount of money (in ECUs), as expressed in the directives.

¤ The adverse impacts of the reform, i.e. the potential crime risks, were apparently not analyzed in detail when the directives were being drafted. The final text of the directives gives as reasons for excluding a bidder only factors that may have a negative impact on the exercise of the trade - bankrupcy, adjudication in a case involving an illegal act connected with the exercise of one's profession, serious fault in the course of business activity, failure to settle the imposed taxes or social security fees - or serious culpability in providing incorrect information in the context of the bidding procedure. On the other hand, actual illegal operations, i.e. purposeful infiltration of legal business, involving crimes of bribery and falsification of documents, are not considered at all. The texts of the directives also do not contain any reference to the main root of the criminal purpose that may be involved, the necessity to invest laundered money. Attention should also be paid separately to bribery or corruption as a phenomenon in its own right, preferably in two configurations. First, there is the risk of gaining favours by means of offering bribes to the representatives of the relevant national authorities. Second, in case a contract has been obtained by means of corruption, the unsuccessful competitors in the bid should receive some form of satisfaction.

¤ In this case, as might be expected, the baseline data are totally circumventive, since no quantitative information on the size of this particular problem in the member states is available. It is not known: (i) whether money laundering and purposeful infiltration are frequent phenomena in this field, (ii) what amounts of money are moved illegally, or (iii) what portion of suspected offences are reported to the competent authorities.[11] At the same time, it is a well-established fact that these offences exist. Godson and Williams state that "criminal organizations try to dominate licit industries such as construction and waste disposal" and add that "legitimate entrepreneurs find it difficult to operate profitably in an environment in which criminal organizations are active, but criminal enterprises are flourishing in a world of global business" (Godson & Williams, op. cit., pp. 7 - 8).

In respect of money laundering the Transcrime research group claims that "a specific and widely-used method to launder the proceeds of crime is investment in licit activities, such as the construction business" (Adamoli et al., p. 21). As to the purposeful infiltration of legal business, this is one of the eighteen categories of transnational crime identified by the

[11] Resources permitting it is naturally possible to conduct a survey requesting that the competent national enforcement authorities provide the existing data on these phenomena.

United Nations Secretariat in its efforts to assess the prevalence and extent of those crimes, as part of the Fourth United Nations Survey of Crime Trends and Operations of Criminal Justice Systems (United Nations 1995a; see also Mueller).[12]

Last but not least, the use of false documents as a separate category of illegal activity should be discussed. The falsification or forging of documents is most often seen as a crime *per se*, or as a preparatory phase in a fraud case, for example in the case of maritime frauds. Abhyankar asserts that this type of offences "are really documentary frauds which, of course, involve the use of false or forged documents used to deceive" (Abhyankar, p. 3), while Mueller and Adler speak about marine insurance frauds. They write that "where landlubbing insurance investigators can measure tire track marks, survey body damage, and inspect the insured object, or what is left of it, marine insurance investigators normally can rely only on circumstantial evidence. It is that which makes marine insurance fraud such an attaractive business" (Mueller & Adler, p. 193). But as often presentation of false or forged documents should be seen as a preliminary stage in the purposeful infiltration of legal business, although "evidence about means and methods is sporadic", which means that "we do not know how many of the businesses which we are frequenting daily have been infiltrated or are actually owned by transnational organized crime groups" (Mueller, p. 6).

¤ For this reason, the evaluation of the seriousness of the problem, and of suggestions for the mitigation of the problem, must be based on qualitative estimates. At the time the EC directives were issued the Dutch government expressed its concern over the growing incidence of: (i) the use of legal entities by criminal organizations, and (ii) the access of criminal organizations to government contracts, licences and subsidies (Lely & van Toorn, p. 1). The outcomes of this concern were, first, a study project and, second, the Public Administration (Probity in Decision-Making) Bill in the Netherlands. The aim of the Bill is to prevent the awarding of public contracts to tenderers who intend to implement the contract *inter alia* for the purpose of committing offences. Given the difficulty of producing direct evidence of intent in such cases, the determining factor will be the *likelihood* (my italics) of the tenderer having such intent (Reimer 1998a, p. 2).

In the Bill the following criteria for assessing the likelihood are identified: (i) the connection between the person concerned and offences that have already been committed, or his or her connection to offences which, on the grounds of facts or circumstances, can reasonably be expected to be committed in the future, and (ii) the nature of those offences. An agency will be set up with the aim of having a tenderer screened to establish whether or not he or she has a criminal record. The agency will be authorized to consult closed sources, such as judicial, police and tax department files and files of social insurance bodies, as well as open sources, such as commercial registers and land registers. The contracting authority will, on the basis of a report, decide whether a tenderer is to be

[12] Infiltration of legal business, however, was not noted as a punishable offence in any of the EU member states which responded to the survey, and no data whatsoever could be provided. Many of the instruments used in this kind of activity, however - falsification of documents, accounting offences, etc. - are as such independent criminal code offences in a majority, if not all, of the member states, as already noted in section 4.1.4.

whether a tenderer is to be excluded from the procurement procedure. The facts on which the decision is based must be specified, and, before reaching a final decision, the contracting authority is required to hear the tenderer in question. A tenderer may appeal to a court against the decision (op. cit., pp. 3-4).

Obviously, the Dutch approach in terms of constructing a structure to minimize all the potentially harmful impacts connected with the EC public procurement directives is the line of action that the European Community should have taken when drafting these legislative instruments. One of the reasons for this oversight is quite evidently that the drafters did not have sufficient awareness of illegalities as an inherent problem in this context. This is all the more problematic, since in a recent Dutch study on, *inter alia*, administrative measures of the public authorities against criminal legal persons it was found that in most of the eight member states surveyed data from official registers are used to investigate irregularities within business or to investigate the bona fides, integrity, or solvency of contracting partners of the public authorities. In Italy, for example, the audits take place within the framework of the so-called anti-mafia cautions contained in Law No. 55/1990 and Decree Lgs. No. 490/1994. Further plans exist to reform the legislation is such a way that more detailed information could be obtained on the financial aspects of the people actually running companies. The audits are, however, limited to Italian entities (T.M.C. Asser Instituut, pp. 33 - 92).

¤ It can thus be seen that fairly detailed knowledge about anticipatory tools to mitigate the potential crime risks already exist. In addition to the ideas presented above the Dutch study lists other forms of preventive measures: (i) the use of financial and technical selection criteria in the case of procurement, (ii) controls over the use of sub-contractors, both prior to and during the course of the contract, and (iii) the use of contractual obligations and guarantees (op. cit., pp. 89 - 90). Ways and means of monitoring the impacts of these potential preventive tools should be devised, in case any of them is found useful in the future. One particular problem associated with this kind of law reform involving a transnational scope, must, however, be solved before it is possible to proceed with more substantial reform measures. A compromise regarding adverse views on cooperative prevention efforts must be reached at an early phase of a reform programme.

6.3. Draft treaty on the Multilateral Agreement on Investment

The third case study concerns an international instrument currently under preparation. The case analysed is the Multilateral Agreement on Investment, known by its acronym MAI. The latest information is that the preparative process has been postponed within the auspices of the OECD due to adverse views among the participating states (cf. “Update on the MAI“; see also “The sinking of the MAI“). All the same, there is information that "many governments are favoring the World Trade Organization (WTO) as the preferred location for an MAI-like agreement. Even though there is no consensus on this approach there is a good likelihood that investment will be placed on the WTO 'millenium round agenda'" (“Update on the MAI“, p. 1). It is thus opportune to analyse what are the intentions of the proponents of this reform in terms of potential adverse impacts.

¤ The objectives of the MAI are as

follows: *To provide an environment for international investors, with uniform rules on both market access and legal security. The aim is to eliminate barriers and distortions to investment flows, to promote a more efficient allocation of economic resources, and thereby to achieve higher economic growth, more jobs and increased living standards*. Thus, the main goal seems to be to create an investment climate that places all investors in one and the same position, notwithstanding national and other regulations, except for measures to protect essential national security interests and for any measures of participating countries that do not conform to the MAI obligations[13] (cf. "the MAI; frequently asked questions and answers", section 3).

¤ At the outset the arrangement, if designed according to the guidelines made explicit by the objectives, does not seem to give any reason for concern insofar as build-in crime risks are the point. Nor are any such risks taken into account in the drafting documents. The MAI is supposed to be an instrument to produce equal investment conditions for all investors globally (no position is taken in this context on whether the MAI as such is expedient for all the partners or not). Comprehensive multilateral rules for investment are considered necessary, since:

~ Investors need long-term stability of rules and procedures;
~ Investors need protection of existing investments;
~ Governments recognise that a liberal investment regime is critical to attracting foreign investment;
~ Governments appreciate that restrictions and discriminatory measures distort investment flows with detrimental effects on economic development and efficiency, and create a potential source of international friction;
~ The greater the role of investment in the global economy, the more important it becomes to have a framework to address potential frictions (op. cit.).

And, all the same, there should be early awareness of the fact that the quite categorical freedom of transnational investments will also attract money perhaps not earned by entirely honest means. Transcrime, the research group on transnational organized crime already cited above, reports that "criminal groups are frequently compared to legal businesses (...); both of them diversify their investments among different fields in order to increase profits, and they seek to expand into new markets" (Adamoli et al., p. 18). One quite clear-cut item is thus the investment of illegally gained assets with the purpose of laundering them or the investment of already laundered money. Walker, who examined the illegal money flows in and through Australia, makes an attempt in his report to establish the impact money laundering has on the economy of the country as a whole. He points out that "money launderers will be very keen to purchase an asset such as a business or some real estate, because possession of the cash is potentially incriminating while possession of the business or the land enables them to build apparently legitimate wealth" and contin-

[13] Such as most-favoured nation treatment and performance requirements, i.e. conditions governments apply to the conduct of private business or to the use of public funds as an incentive for business or investment; the scope of country-specific exceptions must, at the same time, be acceptable to other parties to the agreement (op. cit., section 5).

ues that "they (the launderers) need not be too discriminating in the price they pay. They will outbid other potential buyers with more realistic and honest reasons for buying, not caring if they pay more than the true worth of the purchase" (Walker, p. 37).

Corruption is the second potential risk factor that should be considered by the MAI drafters. Transparency International prepares annual global surveys of the level of corruption, producing lists of indices ranking countries according to the perception that business people have of their "cleanness" (cf. Transparency International). Not a single country comes off quite clean on this list, and so early awareness as regards corruption is a must.[14] Williams alleges that "where regulations are relatively lax or poorly implemented in critical sectors such as finance and banking, this is an invitation for criminal organzations to move into the state and exploit the lacuna. In some cases, states even exploit these differences to attract dirty money by making clear that their financial sector does not observe 'due diligence' in any serious way" (Williams, p. 9).

¤ Again, although no baseline data on the prevalence of the illegal activities discussed here - money laundering and corruption - are available in the sense we customarily give to the concept, there exists a wealth of qualitative information associated with the phenomena we are interested in. Transparency International, for example, has been able to establish, in its Corruption Perception Index, "an empirical link (..) between the level of corruption and foreign direct investment" (Transparency International, p. 3). An axiom to be kept in mind in this context is that "low levels of transparency encourage high levels of corruption" (Godson & Williams, p. 5). As to money laundering, it seems appropriate to quote South: "One of the best ways to run a criminal enterprise is to have a legal foundation" (South, p.1). Walker, in his Australian money laundering report, claims that "while there are no conclusive data on how the totality of laundered money is invested, it is likely that much of it is invested in dwelling properties" (Walker, p. 36). Godson and Williams, on the other hand, are of the opinion that "the banking sector and industries such as construction and waste disposal have become favorite targets for criminal activity" (Godson & Williams, p. 20). Thus, the option of transnationally invested laundered money should not be excluded. It is a real threat not to be ignored in the MAI context.

[14] There is one more feature of the MAI structure, which, although not a potential crime risk as such, must be taken into account when the future direction of the MAI is debated. This factor is the strong push for investor protection. Thus, if an investor feels that he or she is being met with unreasonable and discriminatory measures by the host state, due for example to suspicions of money laundering, the investor would be able to submit the dispute for resolution either to a competent court or to an administrative tribunal for arbitration. The forms of relief in a successful case - from the point of view of the investor - would be for example pecuniary compensation or restitution in kind (cf. MAI dispute settlement). Potentially, it might be possible, in case of an investor who is laundering money, that the investor brings legal claims against the host government, and is adjudicated monetary compensation if the host government is unable to prove that the aim was to invest laundered money. Similarly, the MAI proposal to require compensation for expropriation or other government action which reduce the value of an investment might lead to legal indemnification to a dishonest investor.

¤ The problem in considering ways and means to mitigate crime risks is an ambiguous one. On one side, general adherence to law would seem to call for the kind of preventive measures - screening procedures with access to all relevant databases, contractual obligations and guarantees - described in connection with the previous case study on procurement. There is, on the other side, an additional dimension which makes the preventive efforts in this particular sector of illegal profit-making somewhat complicated. The MAI draft documents do not seem to call for a national control authority, as contrasted with the EC directives on procurement with each of them listing competent authorities country by country.[15] Without such national focal points, the coordination of preventive efforts, particularly anticipatory ones, might become arduous. And, naturally, continuous monitoring of the impact of the enforcement activities is necessary in order to ascertain that positive effects are attained. This procedure might be facilitated by giving adherence to the "Forty Recommendations" of the Financial Action Task Force (FATF) (see Financial Action Task Force). The FATF, however, had not been contacted at all during the MAI drafting process as of mid-September 1998 (Carlson).

7. Lessons learned; why potential crime risks are considered only partially or not at all in law reform work that creates the potential for profit-making

The cases studied here are fairly typical of law reforms with transnationally binding effect. The transnational angle was chosen intentionally in order to shed light on the complicated aspects of bringing about a reform with profit-making implications - the transnational angle complications would not have been observed if only cases on the national level had been studied. What then are the main factors that have contributed to the overlooking of the anticipatory perspective in this type of reform? To start with, it must be noted that "like insurrectionists, members of transnational criminal organizations are largely indistinguishable from civilian populations. Their activities undermine the fibers of society - its economic and financial structure, its polity, and its physical security - but do so in ways that only becomes apparent when the process is well-advanced and therefore more difficult to counter" (Godson & Williams, p. 7).

Furthermore, one of the basic factors common to any reform project in this category, whether national or transnational, certainly is the educational and working life background of the law reform drafters. As a rule, they will not have had experience in law enforcement activities involving crimes for profit. They will also not have necessarily studied criminology, perhaps not even criminal law. Thus, the entire idea of early awareness as regards the potential of crime risks might be quite alien to them. If it is not possible to arrange the law reform project team so that it includes an expert on crime issues, one suggestion for remedying the situation is that at least an external expert on crime issues should be consulted already at an early phase of the reform project. Another observation in this respect is that "unless there is agreement on what the international community is trying to achieve, the prospects for an effective strategy are negligible. Law enforcement personnel tend to focus less on strategy than on

[15] Cf. for example the EC Directive on public procurement of goods (93/36/EEC), art. 21, para. 2.

reactive, parochial responses, especially on arrests of a few leaders of organized crime groups" (op. cit., p. 25).

The transnational scope of the law reform projects is apt to complicate even more the already otherwise difficult promotion of these projects. We have seen that one of the most important prerequisites for successful prevention of illegal profit making is access by the competent authority to relevant data. Also, to quote Godson and Williams, "since transnational criminal organizations are often network based, it is important to create parallel cross-border networks of law enforcement officers who also develop a relationship of trust with one other, and can therefore exchange tactical and operational information with a high degree of confidence" (op. cit., p. 30). The current practice in terms of protection of privacy and data security is, on the national level and even more on the international level, that they are strictly regulated, for example in the Council of Europe member states by the "Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data" (Council of Europe). Sometimes even at the national level legitimate information needs are obstructed with the plea that privacy issues will be at stake, and the problems are multiplied when transnational information needs are discussed. A case in point is for example the European Union Convention on Europol. Eighteen of the 47 articles regulate different aspects of information processing - protection of privacy, obligation to provide information, national supervisory authority, etc. (see European Union, 1995, art. 7 - 23, 25). The European Union is also examining initiatives aiming at a high level of harmonisation of data protection provisions (European Union, 1998).

The transnational scope affects the elaboration of the projects also through demands for harmonization and uniformity - a national partner to a transnational agreement is not always allowed to implement nationally measures that are stricter than the ones prescribed in the agreement.[16] A good example of this is the Dutch effort, cited above, to screen the tenderers more closely than what is prescribed in the EC Directives. The Dutch Government informed the European Commission about the project and about the relation of the project to the criteria laid down by the Directives. In its reaction the Commission agreed with the instruments of the planned law reform in general. The Commission, however, stressed that new grounds for exclusion and qualitative selection cannot be created within the Bill, as long as these do not fit within the existing system of the Directives (Reimer 1998a, p. 3). A procedure resulting in the acceptance of a lowest common denominator formulation of the details of a reform thus, as a rule, is the outcome of the whole.

It is also possible that the evidence concerning crime risks associated with law reform projects involving profit-making, at the national level and even more so at the transnational level, must be really strong so that the anticipatory approach could materialize. But, as we have seen, the lack of baseline data very often is apt to result in a major obstacle in this respect. One suggestion put forth by Godson and Williams is that "the kind of competitive intelligence that is now so pervasive in the

[16] Thus, the European Union stipulates that the national legislation of the member states must not deviate from the principle guaranteeing the four freedoms - free movement of capital, people, products and services, respectively - within the Union.

business world could usefully be applied to criminal enterprises. Such an approach would highlight both strengths and weaknesses, as well as opportunities and constraints. Insofar as the rise of transnational criminal organizations can be understood in terms of opportunities, incentives and pressures, and resources, then constricting opportunities, removing pressures and incentives, and degrading resources would go some way towards halting or even reversing the momentum of growth and development currently enjoyed by criminals" (Godson & Williams, p. 2).

As to the preventive measures concerning the particular crime categories dealt with in this analysis - money laundering, corruption, security of documents and purposeful infiltration of legal business - the following tools should perhaps be given precedence:

* *Money laundering matters* - the minimum precaution in the drafting of all relevant legislative texts of the type discussed in this paper should be the application, where appropriate, of the Forty Recommendations of the Financial Action Task Force (see Financial Action Task Force);

* *Corruption and bribery* - the minimum precaution in the drafting of all relevant legislative texts of the type discussed in this paper should be the application, where appropriate, of the recommendations for national integrity systems developed by Transparency International (see Pope);

* *Security of documents* - the minimum precaution in the drafting of all relevant legislative texts of the type discussed in this paper should be a requirement, where practicable, that the latest cryptographic technology is utilized in order to help to prove the origin of the information contained in the documents, and in order to help to verify whether information has been altered;

* *Purposeful infiltration of legal business* - the minimum precaution in the drafting of all relevant legislative texts of the type discussed in this paper should be the adaption, where appropriate, of the screening and other control mechanisms under development in connection with the Dutch Public Administration (Probity in Decision-Making) programme (see section 6.2. above).

8. Ideas for further exploration of the issue

Two issues seem to need further exploration within the scope of law drafting activities of the type discussed in this text. One is the question of the amount of the evidence that is necessary, as discussed above. Would it suffice to establish a link - no matter how weak, taking into consideration the problem of the lack of baseline data, on one side, and the Dutch attempts to establish the likelihood of criminal intent as a criterion for disqualification of dishonest bidders, on the other - between the potential crime risks and the phenomenon that the planned reform is supposed to regulate? If not, what should be the minimun prerequisites for anticipative reactions? How should we take into account the pressure tactics (such as lobbying) of potential targets of a reform, those who could profit from loopholes in the measures?

Another issue in the anticipatory process that requires more careful examination is the screening phase in the procedure to establish whether or not a candidate is qualified. What kinds of precautions ought to be observed in the context of screening in terms of privacy protection or of mandates for the competent authorities? And what could be the mechanisms for designing screening options in a transnational context?

The potential risks of crime brought about by the current tendency of globalization should perhaps also be discussed more thoroughly, particularly in the light of what diminishing public surveillance in the financial sphere might mean in terms of increasing crime opportunities. The growing globalization of business and financial transactions (legal and illegal ones alike) makes it increasingly problematic to target crime prevention methods by means of traditional methods alone. New ways and means for anticipatory approaches should be explored.

Lastly, efforts should perhaps be devoted to finding out whether the CRA as a methodological tool is capable of anticipating potential crime risks more generally, in association with a wider sphere of illegal activities. Of particular interest in this respect should, for example, be the potential for computer and cybercrime, environmental crime, and different forms of economic crime. Also, testing the applicability of the CRA approach in the framework of more conventional illegal activities in the property crime category should be given serious thought. And, above all, "carefully and sharply delineated threat assessments are required to facilitate prescription and to underpin policy" (Godson & Williams, p. 17), since "more aggressive measures to decapitate the leadership of criminal enterprises, undermine the integrity of their organizations, and strip them of their assets are needed" (op. cit., p. 25), keeping in mind that "since money is the foundation of most criminal enterprises, denying the the ability to move and use money as they please is a key objective for the international community" (op. cit., p. 29). This is confirmed by Mueller who writes that "ultimately - and all of the world's isolationists to the contrary notwithstanding - we need a certain globalization of law enforcement and criminal justice efforts in order to deal with globe-threatening criminal activities" (Mueller, p. 15).

9. Concluding remarks

The cases studied in this paper prove fairly indisputably that the potential for crime risks is always present when considering legislative efforts that open up the possibility of making a profit. Consequently, the crime risk aspect should always be given serious thought when a law reform project is planned. In other words, it would seem that advance readiness is more cost effective than retroactive preventive efforts, and may also somewhat lower the initial costs. Thus, in order to make the most of the existing preventive capacity an early awareness perspective should always be incorporated in the drafting of legislation, resulting in an anticipatory approach. It is not, however, suggested that all aspects of life should be given normative frameworks - that would impede the realisation of human rights and civil liberties even more effectively than any threat posed by organized crime. Nonetheless, if early awareness of criminal opportunities can be established, and if, in addition, a relatively modest cost of acting preemptively can be foreseen, then it is high time for action by the policymakers.

To recapitulate, in respect of reforming legislation that opens up the possibility of making a profit the anticipatory approach will best be achieved, both nationally and transnationally, by means of: (i) incorporating the efforts of all relevant partners in the reform work, (ii) securing the best available external expertise, and (iii) assessing the potential crime risks associated with the reform utilizing, for example, the Crime Risk Assessment (CRA) method.

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Annex I

THE BASIC FEATURES OF THE ENVIRONMENTAL IMPACT ASSESSMENT (EIA)

This brief overview is based on *"Methods of EIA"* by Morris, P. & Therivel, R. (eds.) (UCL Press: London, 1995, pp. 4-6). The various phases of EIA are as follows:

(i) A preliminary review in order to decide whether to carry out an EIA (screening), with a view to the potential consequences of the adverse impacts on the natural, built-up and social environment of the proposed project;

(ii) A study to examine the objectives of the proposed project and alternatives to it (scoping), always taking into account also the so-called 'zero alternative', i.e. continuing along the present line of action;

(iii) Selection of relevant parameters for describing the environmental components, and for identifying and observing the impacts, including the direct, indirect, aggregate and synergetic impacts, to the extent the interest groups involved find necessary;

(iv) Delineation of the impact options; a more thorough assessment should be given of those options that the parties involved regard as the most significant;

(v) Retrieval, analysis and presentation of baseline data, attaching particular importance to describing the current status of those factors that are considered to be the most significant;

(vi) Comparison of the proposed project and alternatives, by organizing and presenting information in such a way that it is possible to utilize it in decision making;

(vii) Interpretation and evaluation of the weight of the impacts, with the aim of ascertaining probabilities and risks involved, also charting the geographical and social distribution, and the time-scale of the impacts;

(viii) Presentation of the ways and means of mitigating adverse impacts, by first establishing the acceptable risk levels and then presenting measures to bring adverse impacts down to those levels, while at the same time not neglecting to identify the unavoidable adverse impacts;

(ix) Elaboration of a draft EIA report for comment by all partners involved;

(x) Review of the draft EIA report by all partners involved;

(xi) Preparation of the final EIA report, taking into account the comments received;

(xii) Making of the actual decision, either as proposed in the original project plan, or as modified or rejected as the result of the EIA procedure;

(xiii) Monitoring of the impacts during and after the implementation;

(xiv) Auditing the project in order to compare the forecasted and materialized outcomes, in order to assess the functioning of the monitoring programme, and to gain experience with a view to future EIA processes.