




J O I N T

INVESTIGATION

TEAMS

The future requires international cooperation in
combating transnational organized crime

B Y R O X A N A B U L A N C E A



In an increasingly globalized world, transnational organized crime (TOC) represents a serious threat to individual states, as well as regional and international security. Reports suggest it is getting worse every year. According to a 2013 U.S. Congressional Research Service report on terrorism and transnational crime, “criminal syndicates appear to be growing in size, scope and ambition” and “the potential confluence of criminal and terrorist actors, skills, resources, and violent tactics” concerns not only the United States, but the international security community. According to Europol’s 2013 Serious and Organised Crime Threat Assessment, TOC is becoming a greater challenge year by year as many groups become increasingly networked and more heterogeneous and no longer defined by nationality or ethnicity.

TOC gained international attention when the long arm of Mafia-type organizations began impacting countries other than their own. In the past two decades, transnational crimes have diversified beyond Mafia syndicates, and while the world economy has globalized at a fast pace, so have illicit activities. Poised to make a profit and exploit every legal loophole, TOC groups spot opportunities — like the migrant crisis or technological developments and vulnerabilities in cyberspace — and use them to their advantage.

Even though there is no official legal definition for TOC, the 2000 United Nations Convention against Transnational Organized Crime (UNTOC) provided a concept by combining three definitions: “organized

criminal group,” “serious crime” and “transnational in nature.” The resulting concept is broad and covers all possible profit-motivated serious criminal activities with international implications. The broad wording in the UNTOC resulted when delegations were unable to agree on a definition of organized crime. Some parties wanted to describe specific patterns and typical activities of organized criminals. This would have left us confined to a limited enumeration of illegal behaviors, whereas the concept the parties compromised on covers a wider variety of transnational crimes. The UNTOC is a pioneer in international cooperation in criminal matters and remains important because it is widely ratified throughout the world — in 187 states. It is the first international convention to frame mutual legal assistance (Article 18) and address joint investigations (Article 19), which opened the door for stronger provisions of this kind in the future such as EU law on mutual legal assistance, and joint investigation tools and teams.

Unfortunately, 16 years into the UNTOC, member states still have not integrated some of its provisions into domestic legislation, and it is still underused legally in international mutual assistance. Reasons for this include: the lack of universally accepted definitions for specific crimes, lack of uniform implementation of its provisions in different countries, and the preference for regional or bilateral mutual legal assistance treaties, which can offer more value in terms of what can be achieved or exchanged via mutual legal assistance.



THE GROWING NEED FOR COOPERATION

When it comes to countering TOC, international cooperation ranges from informal to judicial. For the purposes of criminal investigations, states can exchange information informally through liaison officers, police networks, financial intelligence units, borders and customs networks, or they can exchange evidence formally by means of mutual legal assistance requests, on the basis of bilateral or multilateral treaties such as EU conventions or the UNTOC.

Many mechanisms have been put in place to help states exchange information that could serve in national investigations, but much of this cooperation is geared to the financial dimension of crime — the seizure of proceeds. Other dimensions are still not sufficiently served, such as the prosecution and conviction of criminals across borders or the facilitation of information for prevention and intelligence-led policing.

States themselves remain sovereign when conducting investigations and prosecutions through their national authorities and are reluctant to pass on information, much less engage in real-time joint investigations internationally. Generally, when nations share a perception that a serious transnational crime is mutually threatening, they are more willing to share or relinquish control over certain criminal matters. If two additional conditions are also met — mutual trust and legality — then the path for successful international cooperation is paved.

The European Union, lately faced with a number of transnational organized threats, is creating legal instruments and mechanisms to foster cooperation within a unified legal framework. The EU also has the advantage that its initiatives are legally binding for member states, which is not the case for other regional initiatives.

The European Mutual Legal Assistance (MLA) Convention from 2000, widely used throughout the EU, brought direct cooperation between judicial authorities and provided useful provisions on the spontaneous exchange of information, the use of special investigation techniques, joint investigation teams, interrogation hearings by videoconference and the temporary transfer for interrogation of people held in custody. Additionally, the convention is being progressively replaced in Europe by an even more modern tool: the Mutual Recognition of Judicial Decisions, the process by which a legal instrument, such as a European Arrest Warrant or a European Investigation order issued by a judicial authority in one country, has the same legal value across all EU states and is mandatory and enforceable in any EU country.

Mutual Recognition is a new step in extraterritorial jurisdiction, helping to overcome the difficulties stemming from the diversity of judicial systems in EU countries in fighting crime that crosses borders and jurisdictions. This practice should be emulated, if possible, by countries outside the EU since not all international cooperation tools are as prompt. For example, Interpol's Red notice does not have the mandatory force of the European Arrest Warrant. If the authorities in one country find the wanted person and are willing to enforce the notice and notify the requesting country through Interpol, only then can a formal request for extradition be advanced.

LESSONS LEARNED AND FUTURE DEVELOPMENTS

Southeast European Law Enforcement Center (SELEC)

SELEC is a regional law enforcement cooperation center designed to assist member states at the operational level by exchanging information and intelligence, as well as by facilitating regional operations in transborder cases. SELEC brings together 12 EU and non-EU countries from Southeast Europe to prevent and combat serious transnational and organized crime.

The SELEC network is composed of liaison officers from the police and customs authorities of member states. They are posted at SELEC headquarters in Bucharest, Romania, and are in permanent contact with 12 national focal points established in each member state. SELEC provides information exchanges, organizes meetings and facilitates joint operations within the framework of eight task forces addressing TOC and terrorism. Even though states can be reluctant to share sensitive information from their investigations, they recognize the best way to build trust and coordinate efforts is to bring investigators together informally. SELEC organizes meetings in TOC cases that often lead to successful joint investigations and operations, conducted not as formal joint teams but rather as parties that lead parallel or mirror investigations in their respective countries. Criminals are to be prosecuted and tried at the national level following the respective investigations, or subject to extradition to face trial or sentencing in the other state.

EU Joint Investigation Teams (JIT) and legal frameworks

A European JIT is a formal instrument of international cooperation in criminal matters that takes cooperation within the EU beyond traditional mutual legal assistance. As mentioned earlier, the forerunner for the current JIT legal framework was the UNTOC. However, while the UNTOC description is considered weak, the EU JIT is much more clearly defined. It is an international team of judges, prosecutors or law enforcement authorities established for a fixed period and for a specific purpose by way of a written agreement between the states involved, to carry out criminal investigations in one or more of those states.

The legal framework for setting up JITs between EU member states can be found in two legally binding documents: the 2000 Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union-2000 MLA Convention (Article 13) and the Framework Decision on Joint Investigation Teams from 2002. The second legal basis was adopted because of slow progress toward ratifying the MLA Convention, which has created problems when choosing a basis for setting up a JIT. While the provisions of a convention can be applied directly in member states, states are asked to create a domestic legal basis for the establishment of JITs. The situation was clarified once a sufficient number of states ratified the convention and it entered into force in 2005, but this did not mean that JITs became a popular tool quickly. It took years and a number of efforts and incentives to prompt the establishment of JITs, such as providing states with the possibility of organizing operational meetings at Europol, applying for funding from Eurojust, offering certain useful tools online such as a Guide to EU Member States' Legislation on JITs, a manual



Eurojust President Michele Coninx attends a news conference during an international meeting of anti-terror magistrates in Paris in April 2015. Eurojust finances Joint Investigative Teams.

An Interpol “Red Notice,” such as this one for the arrest of a British national accused of terrorism, is an international arrest warrant used to aid in the extradition of criminals. GETTY IMAGES

on setting up a JIT, a Model Agreement for Setting up a JIT, a secure email network and annual meetings for the informal Network of National Experts on JITs where they can discuss best practices and ways forward.

Since 2011, the JIT Network has had its own secretariat at Eurojust that provides support and funding to states setting up JITs. In 2013, Eurojust managed two funding projects based on European Commission grants under the Prevention of and Fight Against Crime Program-ISEC. After 2013, Eurojust continued to finance the activities of joint investigation teams from its regular budget. In 2014, 650,000 euros were budgeted for JITs, and this budget slot has increased since, reaching a million euros. Since January 2014, costs incurred by third states can also be covered.

JITs are typically set up between EU member states, but they can also be set up with third states — meaning countries outside of the EU — provided that a legal basis exists in the form of: an international legal instrument such as a bilateral agreement (e.g., Agreement on Mutual Legal Assistance between the European Union and the United States of America), a multilateral agreement (e.g., UNTOC, the Naples II Convention, Police Cooperation Convention for Southeast Europe, Council of Europe Conventions), or national legislation (e.g., Code of Criminal Procedure).

ESTABLISHING A JIT

Requests to establish a JIT often come from a member state for an investigation on a transnational case, but Eurojust and Eurojust can also support national judicial and law enforcement authorities in preliminary discussions and encourage the establishment of a JIT when these two agencies realize that two or more states are working on the same targets/crimes. Eurojust often assists member states in transnational investigations through its Analysis Work

Files (AWFs) on counterterrorism and serious organized crime and their respective Focal Points focusing on specific crimes. AWFs are part of the information processing system for factual information (hard data) and intelligence (soft data), and they often help find missing links in cross-border EU investigations. By collecting, cross-checking and analyzing the information, Eurojust can establish whether another member state has relevant information or even an ongoing investigation on the same targets. In such a case, Eurojust will most likely propose that the member states form a JIT.

More often, states themselves initiate setting up a JIT when they identify a transnational dimension in their investigations without even calling for support from Eurojust or Eurojust. For some member states, the path to forming a JIT is slower because the initial request must be sent to another state in the form of a letter rogatory, and only then, depending on the willingness of the authorities in the other state to expand their investigations, can discussions on forming a JIT begin. Unfortunately, waiting for another state to respond can take months.

For other states, forming a JIT is a rapid and easy process because they will have the agreement signed electronically in days. This is sometimes a matter of excellent bilateral or multilateral relations, which are also mirrored in their cooperation in criminal matters.

As opposed to letters rogatory/mutual legal assistance requests — in which the requesting state must have an ongoing investigation, but the requested state does not and is only required to execute the requests — JITs can only be established if both states conduct activities contributing to the international joint investigation. If, initially, one of the states does not have an ongoing investigation, the purpose of a JIT is to initiate one. According to the JIT manual, “it is recommended that these authorities meet to discuss the matter at the earliest opportunity before a formal proposal and agreement is made.” This is the best way to jointly plan and decide on the way forward.

HOW A JIT WORKS

According to the MLA Convention, Article 13, EU member states will, by means of an agreement, appoint investigators and magistrates to act as JIT members, as well as a leader. The team is set up in the member state in which investigations are expected to be predominantly carried out, and the JIT leader will be from that state. Members of the JIT that are from member states other than the state in which the team operates are “seconded” to the team.

The provisions of the MLA Convention, therefore, enable officials from different jurisdictions to operate together, either in the same location or at a distance, but communication must be in real time. There is no requirement that members of a JIT must work outside their home countries, even if the JIT is permanently based in another country. It is sometimes better to have team members conducting the investigation on their own territory, but they must share all information and evidence with all parties. That is one of the greatest advantages of a JIT: All parties have access to useful information and know where the investigation is headed.

The parties should agree from the beginning on an operational action plan. This is a flexible document, either included in the agreement or written in an annex, that establishes a practical approach on how to achieve the JIT’s purpose. The parties also discuss who will prosecute and try offenders.

The proposed period during which the JIT is operational is recorded in the agreement and can be extended by mutual consent.

ADVANTAGES OF USING A JIT

JITs enable direct gathering and exchange of information and evidence between parties. They also allow parties to exchange requests for investigative measures or coercive measures on the spot, without needing to resort to traditional mutual legal assistance.

According to Article 13 of the MLA Convention, JIT seconded members are entitled to be present when investigative measures such as house searches, interviews or computer searches are conducted in the member state in which the team operates. Furthermore, seconded members may be entrusted by the team leader to take certain investigative measures themselves, if approved by the competent authorities of both states and these do not conflict with national procedures.

JITs make it possible for members to use special investigative techniques such as undercover investigations or the interception of telecommunications outside national jurisdictions. According to Article 14 of the MLA Convention, officers from member states can assist one another in covert investigations. Article 18 allows JITs to funnel requests between states for the interception and immediate transmission of telecommunications, or the interception, recording and subsequent transmission of recordings of telecommunications.

JITs can also be set up with countries from outside the EU. States can request financing from Eurojust for travel and accommodation, interpretation and translation. Eurojust can loan equipment such as mobile phones, laptops, mobile printers and scanners.

The length of time for a JIT varies. The time agreed upon in the beginning can be extended, which is often necessary in long, complex investigations such as those related to TOC.

Parties will agree on which state will conduct the prosecution and trial for those specific crimes, which prevents competition of parallel/mirror investigations regarding who convicts the criminals and requests extradition.

To address problems uniformly, some member states have developed bilateral model agreements to be used with frequent JIT partners. The French Ministry of Justice, for instance, has signed bilateral agreements with Spain, Germany, Slovenia, Romania, the Netherlands, Belgium, Bulgaria and Cyprus. States are using this tool more frequently on the basis of trust and good bilateral interstate relations, without reporting it or requesting assistance at a central EU level.

ENHANCING THE USE OF JITS

According to the "Conclusions of the Eleventh Annual Meeting of National Experts on JITs 2015," JITs have been used increasingly during the past few years to address TOC, but there is room for improvement.

During this meeting, the Bureau for Euroregional Cooperation, a multinational structure established in Maastricht to support judicial cooperation in the border area of the Netherlands, Germany and Belgium, suggested the creation of a logbook to record evidence exchanged via JITs and the working methods used, which triggered debates on whether permanent JITs should be established to combat crime in border areas.

Considering the transnational threats the EU is facing at its borders, perhaps it should consider setting up fusion centers with JIT-like functions not only in border areas, but wherever necessary to tackle specific transnational crimes and terrorism.

Another long awaited improvement would be finding a way to incentivize member states to report back to Eurojust on when and how they resorted to a JIT. The JIT Secretariat has developed an evaluation form that practitioners can download online, complete and return to Eurojust, which would enable it to assess the performance of the JIT, legal issues or practical difficulties. This type of feedback would be analyzed by the JIT Secretariat for statistics and provide a basis for suggestions on development of these tools. However, it is not mandatory that states report to Eurojust on every JIT, and often they do not fill in this form, providing no feedback on the efficiency of this tool.

Grants for JITs should be more heavily promoted, and Eurojust should find ways to simplify procedures for states to access funding. Currently, there are several calls for funding each year, and states can request money, up to 50,000 euros per application. JIT members must complete considerable paperwork following many formal requirements. They must provide in advance from which specific entity they need financial support. This requirement is discouraging because it is difficult for JIT members to predict precisely the course of an investigation. Easier access to grants would enhance the use of JITs by member states and even nonmember states. Financial constraints should not hinder the operational needs of a JIT.

According to Eurojust’s Annual Report 2015, issued

April 4, 2016, judicial cooperation within the EU has indeed intensified. Eurojust supported 120 JITs in 2015, 46 of which were new, and provided financial support to 68 more. The first JIT with the European Anti-Fraud Office was formed, and an increase in the involvement of third states was noted. In total, 11 JITs involving third states were supported by Eurojust, seven of which were established in 2015.

However, we should remember that the need for multilateral cooperation between EU states and between the EU and third-party states is more necessary now than ever. Some transnational threats the EU faces right now, such as migrant smuggling, cyber attacks and terrorism, require international cooperation. There must be intensified multilateral cooperation and willingness to share information and evidence, such as that typical of the JIT working model. It should be noted that France was the first European country that willingly shared all its relevant information and intelligence with Europol in the wake of the Paris attacks. Unfortunately, this happened after — not before — this tragedy took place. Afterward, France received support from Europol through the Taskforce Fraternelle, comprising up to 60 dedicated support officers. Acknowledging the need to counter terrorism, as of January 2016, Europol has pooled resources and pre-existing tools to establish a dedicated European Counter Terrorism Center.

This should be only the beginning. Given the universality of terrorism and the links between terrorism and organized crime, we cannot neglect sharing information internationally and cannot afford to make little use of the tools, such as JITs, that allow us to investigate together in real time.

THE WAY FORWARD

Considering the developments and convergence of transnational crimes, including terrorism, it is necessary to strengthen the means by which these crimes are punished. Criminals will always try to take advantage of differences in legal systems or lack of coordination and cooperation between states; therefore, states must overcome concerns about sovereignty, put aside their differences and work together.

Prerequisites of trust, legality and willingness to cooperate are not always met. Given numerous differences in legal traditions, it is recommended that a legal framework and mechanisms for cooperation in criminal matters be put in place to provide common ground. Keep in mind, however, that no matter how useful the international tools, cooperation can't exist without common interests and goals.

Conducting parallel investigations in two countries, under the coordination of an international center such as SELEC or Europol, is already a step forward from traditional mutual assistance, because national authorities can communicate and agree on how to conduct the investigations and in which direction they are headed. However, authorities will still prosecute and try the cases in their respective countries, which sometimes raises concerns of overlap and *ne bis in idem*, which is the right not to be tried or punished twice in criminal proceedings for the same offense, as provided by the Charter of Fundamental Rights of the EU (2000/C 364/01). If a person is prosecuted and then acquitted or convicted in one state, that person cannot be tried or punished again for the same crime within the EU.

A JIT helps avoid conducting two or more investigations in parallel in different states and is therefore less resource consuming. It expedites judicial procedures between states that may not have the same legal culture. However, sometimes national authorities are reluctant to engage in a JIT if there is no prospect that their country will be able to prosecute and try the case, for fear of wasting time and resources. That is the reason behind establishing a European Public Prosecutor's Office and a European Court to prosecute and try transnational crimes that affect several European states or even third states. This would incentivise states to contribute to joint investigations. The European Commission launched a proposal establishing a European Public Prosecutor's Office as an independent body, but discussions have been ongoing for years and progress is slow. Besides, the proposal would mandate EU-wide jurisdiction and authority for investigating and prosecuting only cases involving fraud against the EU budget, so there is no prospect of EU jurisdiction over other types of transnational crimes.

A JIT will provide a framework to decide who will prosecute and try joint cases on the basis of the initial agreement, without the need for additional mutual assistance requests. Advantages include collecting intelligence and evidence from all states involved, conducting joint investigative measures and smoothly transferring proceedings.

JITs have proven to be flexible and effective and are used increasingly within the EU each year, but gaining the involvement of non-EU states is a greater challenge. According to the 2014 JITs network conclusions, "practical experience in JITs involving non-EU states remains limited." Most JITs with non-EU states have so far been with Balkan states, but given the current transnational threats such as migrant smuggling and terrorism-related crimes, it is recommended that the EU strive to involve its neighbors to the south and southeast. Eurojust could provide assistance in drafting mutual legal assistance treaties between the EU and these states. Such treaties would provide a legal basis for EU countries to engage in JITs with such third states, but there also has to be will and interest for all sides involved. International cooperation teams and networks are needed to defeat criminal groups and networks.

Europol can also play a greater role in fostering cooperation between states that can lead to establishing JITs by negotiating operational agreements with countries from Europe's neighborhood, which would expedite intelligence and information exchanges, including personal data.

Europol's dedicated centers and task forces, designed to focus on emerging criminal threats or geographical criminal hot spots, have the potential to trigger intelligence action and international coordination, providing states with the information, common ground, motivation and support to establish JITs. They are the European Counter Terrorism Center, the European Migrant Smuggling Center, the Joint Operational Team targeting organized crime groups involved in migrant smuggling by boat across the Mediterranean Sea, the European Cyber Crime Center and the Joint Cybercrime Action Taskforce.

To reiterate, all EU efforts must be corroborated with measures taken by its neighbors to counter threats that stem from those countries. □