

# CRIMINALISTICS AND CRIMINAL JUSTICE ASPECTS OF PROVING AND SOLVING CRIMINAL OFFENCES

by Johann Wagner\*

SUMMARY: 1. Transnational Organised Crime (TOC). – 2. Is Organised Crime the Same as Mafia? – 3. What is Organised Crime? – 4. Classic Areas of TOC. – 5. Relevant Offence Fields and Legal Foundations. – 6. Ethnic Organised Crime Groups and Their Offence Fields. – 7. Conclusions.

## 1. Transnational Organised Crime (TOC)

Organised forms of crime are to be found in nearly all countries around the world, and from the criminals' point of view, they are extremely lucrative industries with an estimated turnover of about one trillion US dollars annually. According to the economic reports from 2012, the southern Italian syndicates alone generated sales of approximately 140 billion euros and that despite the negative effects of economic and financial crises<sup>1</sup>. The organised crime (OC) groups and individual criminals operating in the EU are highly diverse. They range from large 'traditional' OC groups to smaller groups and loose networks supported by individual criminals, who are hired and collaborate on an *ad hoc* basis. Approximately more than 5,000 OC groups operating on an international level are currently under investigation in the EU<sup>2</sup>. This figure does not necessarily reflect an overall increase in TOC activities in the EU compared to 2013, when Europol reported on the activities of 3,600 internationally operating OC groups in the EU. This increase is primarily a reflection of a much-improved intelligence picture. The increase also points to the emergence of smaller criminal networks, especially in criminal markets that are highly dependent on the Internet as part of their *modi operandi* or business model. Overall, the number of TOC groups operating internationally highlights the substantial scope and potential impact of serious and organised crime on the EU.

The progressing globalisation of economic and financial systems, rapid developments in communications and cyberspace<sup>3</sup>, as well as the dynamic political and economic integration processes in Europe, accompanied by a multitude of crises and the greatest wave of irregular migration since the Second World War, will inevitably affect the interior and exterior security situation. No other profession has such a good international network of organised structures in the area of cross-border criminality. In addition to the global systems of economy and finance, another field has developed, namely organised forms of crime. These organisms sometimes have more economic power than a state that has to abide by such structures reluctantly, which is at least a natural defensive attitude of the normal population. The countries of origin of organised forms of crime are usually

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<sup>1</sup> R. WIRTSCHAFT, *Organisierte Kriminalität boomt – Mafia is the largest bank in Italy*, 2012, <http://www.n-tv.de/wirtschaft/Mafia-ist-groesste-Bank-Italiens-article5179561.html>

<sup>2</sup> Europol, *EU Serious and Organised Crime Threat Assessment – Crime in the age of technology*, 2017, p. 14.

<sup>3</sup> R. LACKES, M. SIEPERMANN, *Cyberspace*, in *Gabler Wirttschaftlexikon*, 2014, online on Internet: "Cyberspace (also called virtual space) is a non-real world that can only be used by a computer. In the real sense Cyberspace refers to a computer-generated three-dimensional world, also called Virtual Reality", <http://wirtschaftslexikon.gabler.de/Archiv/75127/cyberspace-v9.html>

characterised by a weak political system and very often coupled with an inadequately developed and functioning legal system in which the rule of law is only partially implemented or not at all.

As a result, legal, social and society norms are pushed back and replaced by violence and the right of the strongest, coupled with an unrestrained pursuit of profit and power. Crime structures adapt almost without any problems to the economic and social framework conditions of the respective country. The combined absence of rule of law and non-enforcement of monopoly of power by a state, together with the ability of criminal groups to completely isolate themselves from society, provide the perfect breeding ground for infiltration into a society and thus guarantee the success of their criminal actions<sup>4</sup>. These developments initially have a local origin and can develop rapidly in the country and then in a cross-border context. For this reason, it can be unequivocally ascertained that organised forms of crime appear not only in the national context but are also operating predominantly across borders<sup>5</sup>. On the one hand, the steady increase in cross-border passenger and freight traffic allows only selective controls. On the other hand, the elimination of stationary border controls within the *Schengen* area promotes these developments and minimises the risk of discovery. Corresponding numbers of cases within the continually increasing cross-border passenger and goods transport system are documented in the *Eurostat* passenger transport statistics<sup>6</sup>.

Much faster than most states with their law enforcement and investigative authorities, these criminal structures are able to take advantage of the speed at which the international market operates and all kinds of technical advances in state-of-the-art communication technologies. These criminal groups often form complex business-oriented alliances and linkages, strengthened by agreements that serve to influence the decision-making processes in politics, society and the economy in a transnational manner. Other significant characteristics of these criminal structures are their fundamental rejection of state monopolies, intimidation and scaremongering of dissenters, as well as a hierarchical system coupled with the conditioned behaviour of the members, based on their own code of conduct with the possibility of sanctioning in cases of non-compliance. In its entirety, three recurring causes are observed: poverty, regulation<sup>7</sup> and greed<sup>8</sup>.

“*We want to be tough on crime, but equally tough on its causes*”<sup>9</sup>, according to Blair<sup>10</sup>, it would certainly be possible to find ways of relieving and developing positive changes in order to combat poverty and normative constraints. However, the endeavour to change

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<sup>4</sup> G. EMPEROR, *Kriminologie*. “In order to record the organised crime, the Federal Criminal Police Office has developed a comprehensive system of indicators, which clearly highlights the description elements of the planning, preparation and implementation of the criminal acts as well as the exploitation of the prey. The following indicators point to the forms of organised crime: [...] a long-term consolidation of a plurality of persons as a profit-oriented solidarity of interests, with a high degree of exchangeability of their members and systematic foreclosure to the outside [...]”, 1996, p.410. H.D. SCHWIND, *Kriminologie: Eine praxisorientierte Einführung mit Beispielen*, “the total foreclosure to the outside (silence against law enforcement authorities)”, 2010, p. 624.

<sup>5</sup> M. SOINÉ, *Strukturen der Organisierten Kriminalität in Europa – aus der Sicht des Bundesnachrichtendienstes*, in G. GEHL (ed.), *Europa im Griff der organisierten Kriminalität?*, 2006, p.9.

<sup>6</sup> Eurostat, *Passenger transport statistics provide information on a range of passenger transport modes, such as road, rail, air and maritime transport*, 2016, [https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Passenger\\_transport\\_statistics&oldid=317881](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Passenger_transport_statistics&oldid=317881).

<sup>7</sup> In this case, regulation should be understood as an instrument for overseeing and at the same time suppressing the society by means of normative constraints.

<sup>8</sup> D. SOUTHWELL, *Die Geschichte des Organisierten Verbrechens*, 2007, p. 9.

<sup>9</sup> *Ibid.*

<sup>10</sup> T. BLAIR, *Leader's speech*, in *British Political Speech*, 1995, <http://www.britishpoliticalspeech.org/speech-archive.htm?speech=201>.

the characteristic trait of greed is a whole different concept and one that is far more difficult to achieve.

The detection and investigation, structural analysis and consequent combating of transnational OC groups present huge challenges for national law enforcement agencies and intelligence services, which ideally should cooperate closely. This phenomenon must be combated by all available means according to the rule of law, in order to continue to guarantee the free democratic constitution in Germany and the democracies of the other EU member states<sup>11</sup>.

## 2. Is organised crime the same as Mafia?

Organised forms of crime are often equated with the expression *Mafia*; but this is inappropriate. The colloquially manifested concept of *Mafia* cannot be equated with organised crime and is not correct in this respect, since organised crime is, from a holistic viewpoint, a heterogeneous and not a monolithic structure<sup>12</sup>. Rather, the respective organised crime groups have resulted independently in different countries with their respective forms of governance, in different epochs, cultures and structures with different names and traditions<sup>13</sup>. However, no other coalition of an organised crime group is more famous than that of the Italian *Mafia*, although this term does not exist in a real sense<sup>14</sup>. Technically speaking, *Mafia* stands for the emergence of criminal groups in Sicily, which continue to commit serious crimes in organised forms and procedures. However, in order to understand the origins of the *Mafia*, one must know and understand the cultural, sociological and political developments of Sicily<sup>15</sup>. A possible historical explanation can be derived from the long-standing foreign domination by the dynasty of the Bourbons, according to which nationalist groups in the south of Italy wrote the saying: "*M.a.F.l.a. - Morte alla Francia, Italia anela!*" (The death of France is longing for Italy)<sup>16</sup>, or

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<sup>11</sup>E. THURICH, *Pocket politik. Demokratie in Deutschland*, 2011. P. THIELBÖRGER, *Free and Democratic Order – the designation for the highest fundamental values of democracy in Germany*, 2011, "the Constitution uses twice the concept of a free and democratic order [Art. 18, Art. 21 (2) GG]. This refers to the democratic order in Germany in which democratic principles [Art. 20 GG] and supreme basic values, which are inviolable. Above all, the dignity of the individual person [Art. 1 GG]. In German democracy freedom and equality prevail over the law. A dictatorship is excluded. In regular general elections, the people themselves determine who should rule it. It has the choice between competing parties. Those who receive the majority of electors will then be governed - but only for a certain period of time. For democracy is only rule on time. A party that is once at the helm must also be able to be descended", <http://www.bpb.dxe/nachschlagen/lexika/pocket-politik/16414/freiheitliche-demokratische-grundordnung>.

<sup>12</sup> M. SOINE, *op. cit.*, p. 13.

<sup>13</sup>D. SOUTHWELL, *op. cit.*, p. 8.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.* Retrospective Summary.

"Over long periods of time, self-proclaimed and non-state-legitimate structures exerted power relations on society, almost as in the exertion of the state's power monopoly. In the 19<sup>th</sup> century large landowners took over this role and equipped their workers with weapons to protect their interests, in order to violently counteract the misery and the competing rebellion. These armed men then very quickly learned to take advantage of the power given to them in order to extort their sacrifices and make financial profit from them. The decisive step towards the *Mafia* was carried out until the second half of the 19<sup>th</sup> century, since the Italian central government, which was then responsible, was unable in enforcing an effective state control over Sicily. The landowners and their armed subordinates gained so consequently more and more influence and control in the region, society and structures such as church, government and newspaper publishers. This is how the organisation of the *Mafia* came about as part of this development process, just as it is known to a large extent today. Nevertheless, a clear definition of the term *Mafia* cannot be derived so easily since there are quite different description approaches".

<sup>16</sup> O. BOSSERT, *Cosa Nostra – Die Geschichte der Mafia*, in *KrimLEX*, 2006,

comparatively “*M.a.F.l.a. - Morte Ai Francesi, Invasori, Assassini!*” (Death to the French, Invaders, Murderers!)<sup>17</sup>. Further references are also found in the Sicilian dialectic. Here, *Mafia* is equated with boldness or boastfulness, but the word presumably derives from the Arabic word ‘*mahyah*’, which has roughly the same meaning<sup>18</sup>.

*Mafia*-like structures are viewed from the outside as strictly isolated and familial constructs and are bound both territorially and thematically. Southwell describes the myth ‘*Mafia*’ as a consolidated part of Italian culture, such that the general viewer gets the impression that this is part of the national cultural heritage<sup>19</sup>. Organised forms of crime emerged independently of one another in terms of time and territory, and they developed individually in different cultures and political systems. In all of these developments similar or even identical patterns can be observed, such as a clear hierarchy, a strong seclusion to the outside, a code for their members, a strong potential for violence, operating within an indeterminate time period, no cooperation with state authorities, as well as greed and profit striving coupled with the re-investment of criminally generated profits. There were, for example, organised forms of criminality in the former Soviet Union, which, were little known at all, due to the partitioning of the Communist system. These criminals, called ‘thieves in the law’, organised themselves in syndicates and were active almost in all criminal areas, which promised financial profit<sup>20</sup>. After the fall of the Iron Curtain and the dissolution of the former Soviet Union, the almost limitless possibilities of expansion were immediately recognised, and there was nothing to hinder an extension to the West and the extension of the thematic areas. The ‘thieves in the law’ have always enjoyed great respect in the Russian-speaking population, and they are forbidden to cooperate with government authorities, found a family or even carry out a regular job.

As a second example, the *Yakuza* is said to be a group of criminals and criminal family clans in Japan<sup>21</sup>. They are among the oldest and most established criminal organisations in the world<sup>22</sup>. The influence of this TOC group extends to all areas of Japanese politics, in commerce, industry, banks, media, all social classes, not least based on the binding compliance and practice of old rituals.

Further examples of powerful and influential TOC groups are:

- *La Cosa Nostra* USA, *Medellin* cartel in North, Central and South America
- Chinese *Mafia - Triads* in Asia
- Albanian *Mafia*, Russian *Mafia*, and others in Europe

The political developments and the dramatic changes that have taken place during the last 20 years have led to the emergence of new, internationally-operating structures, such

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[http://www.krimlex.de/artikel.php?BUCHSTABE=M&KL\\_ID=118](http://www.krimlex.de/artikel.php?BUCHSTABE=M&KL_ID=118)

<sup>17</sup> S. RUNCIMAN, Universal Encyclopaedia - Revolt of the citizens of Palermo against the rule of Karl I of Naples-Sicily (from the house of Anjou), which on Easter Monday broke out into Vespers in 1282 and spread throughout Sicily, 1976, [http://universal\\_lexikon.deacademic.com/301913/Sizilianische\\_Vesper](http://universal_lexikon.deacademic.com/301913/Sizilianische_Vesper)

<sup>18</sup> Schüler-Wahrig, *Foreign words dictionary*, 2008, p. 228.

<sup>19</sup> D. SOUTHWELL, *op.cit.*, p. 12.

<sup>20</sup> *Ibid.*, “Thieves in law – Russian: воры в законе – worry w sakone”, p. 146.

<sup>21</sup> *Ibid.* “*Ya-Ku-Za*” is originally a dialectical term for the number combination 8-9-3, a series of numbers from a Japanese card game, which is the epitome of worthlessness. Thus, it is to be understood that the *Yakuza* proudly consider themselves the ‘worthless’ of the society and take out people who have been expelled from Japanese society. Characteristics for the *Yakuza* are extensive tattoos, as well as often missing fingertips, which *Yakuza* members have to separate themselves in case of misconduct. The more fingers are missing, the more wrongs are internally condemned, p. 90.

<sup>22</sup> *Ibid* p .92.

as the successor states of the former Soviet Union, South East Europe and North Africa, as shown by Libya's example<sup>23</sup>.

### 3. What is Organised Crime?

Actions described in today's juridical understanding as, organised forms of criminal machinations, can be traced back to human history by means of their patterns. People have always agreed to pursue their goals through the use of force or other unlawful procedures. The description of organised crime was decisively influenced by different developments of the individual societies, as well as a differentiated legal, economic and sociological view from the respective political systems<sup>24</sup>. As a result, today a variety of organised crime definitions have been developed, sometimes brief and concise, but conversely sometimes very detailed and extensive. An immediate and comprehensive response to a possible questionnaire, asking ultimately, what organised crime is, appears initially to be relatively simple, but becomes more difficult and complex on closer inspection. The term organised crime is very comprehensive and complex and difficult to grasp in a uniform definition. This is, *inter alia*, in the sense that the Member States have not been able to reach an agreement on an EU-wide or globally unified definition of this concept and is used accordingly. The reasons for the different developments are that organised crime structures have developed over long periods of time in different political and legal systems with special regional and cultural influences<sup>25</sup>. This, at the same time, is an explanation for why the individual countries have different characteristics in the descriptions of organised crime compared to the definitions of international organisations. A first attempt by experts to put organised forms of criminality into words dates back to 1968 in Germany. In the journal "Criminalistics", a specialised magazine for criminal science and practice, a German detective superintendent asked the question: "*Nip things in the bud - but how?*"<sup>26</sup>. On the basis of his statements related to the example of combating French criminals who were active at this time in Germany, it was noted that there would be no organised criminality in its literal meaning in Germany.

In 1973, a study was published commissioned by the Council of Europe to analyse the relevant aspects of organised crime and the possibility of professional crimes in Europe at that time<sup>27</sup>. This work focused mainly on the specific situation in Germany and the Netherlands. A main conclusion was that there were great differences between the conventional levels of understanding with regard to organised crime (compared to the Sicilian-Italian *Mafia* and the American *Cosa Nostra*) both in qualitative and quantitative terms. It was described for the first time as the notion of a general European 'criminal industry' with simultaneous negation of organised crime<sup>28</sup>. This new term was used to describe a criminality form that was largely commercial and widely used, and it also pointed out that this 'criminal industry' had reached new dimensions and the actors

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<sup>23</sup> M. SOINÉ, *op.cit.*, examples are the Sicilian *Mafia*, the Neapolitan *Camorra*, the *Ndrangheta*, the American *Cosa Nostra*, the Chinese triads such as *Kung Lock*, *Wo Hop To*, *Sun Yee On*, 14K, p. 9.

<sup>24</sup> T. JÄGER, Thomas (2013): *Transnationale Organisierte Kriminalität*, 2013, <http://www.bpb.de/apuz/168912/transnationale-organisierte-kriminalitaet?p=all>

<sup>25</sup> *Ibid.*

<sup>26</sup> A. LUCZAK, *Organisierte Kriminalität im internationalen Kontext: Konzeption und Verfahren in England, den Niederlanden und Deutschland*, 2004, p. 188.

<sup>27</sup> H.J. KERNER, *Professionelles und organisiertes Verbrechen. Versuch einer Bestandsaufnahme und Bericht über neuere Entwicklungstendenzen in der Bundesrepublik Deutschland und in den Niederlanden*, 1973.

<sup>28</sup> A. LUCZAK, *op.cit.*, p. 188.

involved had developed new work practices. In the following years, these discussions were pushed forward mainly by officials from the Federal Criminal Police Office and the association of German Criminal Officers. One of the first results of this discussion process, a special documentation on the 'development of modern strategies to combat organised crime' was published in 1975<sup>29</sup>. From this period onwards, it became clear that these organised forms of crime constituted an urgent threat to the internal security of the Federal Republic of Germany if appropriate countermeasures were not immediately taken. In the following years, both the intensity of the discussions held and the number of new discussants increased. In 1988, a first attempt at an empirical investigation carried out by the detectives *Rebscher* and *Vahlenkamp*, produced an up-to-date picture of the current situation with recognisable trends of development in the area of organised crime in Germany<sup>30</sup>. On the basis of their investigations and skilful interviews, the two experts came to the conclusion that the phenomenon of 'organised crime' in the USA could scarcely be compared with organised crime in Germany. Two basic structural forms were presented as a major result of this work:

- networks of offenders and/or groups of criminals with the aim of establishing purpose-based alliances, and
- independent groups of offenders.

In the 1990s, further empirical studies followed, of which the results were mainly based on the interviews of experts, and progressively a consensus was built that the state and society as a whole are at risk. In these discourses, the aspects of TOC and a Europe with permeable borders were then successively linked. A process of consciousness development began, that the existing border controls and their mechanisms were classified as inadequate, but on the other hand would offer a considerable potential for security-related issues. This was, so to speak, the starting point that stationary and mobile border controls were recognised as strategically important elements in combating cross-border crime. Almost automatically, the key words such as *Mafia*, drug trafficking, protection racket, weapon smuggling, trafficking in human beings and prostitution, but also rocker gangs and bet syndicates are associated with TOC. These are, however, only sub-areas of TOC and their various appearances and they do not explain the fundamental individual characteristics therein. This impression is strengthened by a broad social acceptance of the terms, such as '*Russian Mafia*' or '*drug Mafia*'.

This makes it difficult for the impartial viewer to identify a clearly defined and recognisable phenomenon of this type of crime. Thus, the term 'organised crime' has to be described only in its characteristic elements and components, in order to prevent the risk of misinterpretation.

In three basic statements, von Lampe describes the nature of organised crime as follows:

1. Organised crime, such as the official German definition, is essentially the planned commission of criminal offences.
2. According to a different view, criminal acts are not primarily organised, just the people committing them.
3. According to a third view, the central moment of organised crime is the exertion of power, either by criminals alone or in an alliance of criminals and social elites<sup>31</sup>.

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<sup>29</sup> H.P. JANSEN, *Zentrale Ermittlungsdienststellen als organisatorische Voraussetzung für die wirksame Bekämpfung krimineller Gruppen*, in BUND DEUTSCHER KRIMINALBEAMTER (eds.), *Entwicklung neuzeitlicher Strategien zur Bekämpfung des organisierten Verbrechens*, 1975, pp.71-83.

<sup>30</sup> A. LUCZAK, *op.cit.*, p. 190.

<sup>31</sup>K. VON LAMPE, (2013): *Was ist organisierte Kriminalität?*, in *Aus Politik und Zeitgeschichte*, 63.

According to the first point and the general and specific features of the German definition of the conceptuality of organised crime, the criminal area of gang crime also shows similar, or even the same, facts and characteristic features<sup>32</sup>. These include, *inter alia*, the description of a group of offenders, the proceedings of division of labour and planning. However, regarding organised crime the element of co-operation has no time boundaries, whereas in the case of gang crime, it is aligned to a specific period of time and thus limited. It is irrelevant if the period for the commission of criminal offences is not clearly defined.

The term 'gang' presupposes the amalgamation of at least three persons, who have joined with the intention of committing in the future and for an uncertain duration an unspecified number of serious crimes of the type of offence referred to in the criminal code. A particular 'strong individual commitment to the gang' or 'taking actions in an overarching interest' is not necessary<sup>33</sup>.

Regarding Lampe's second point, criminals are organised in a group to commit crimes. Thus, the term organised crime is intended to explain the form that criminal organisations take, in that they are groups with defined and recognisable structures. The Federal Bureau of Investigation (FBI) defines organised crime as "[...] *any group having some manner of a formalised structure and whose primary objective is to obtain money through illegal activities. Such groups maintain their position through the use of actual or threatened violence, corrupt public officials, graft, or extortion, and generally have a significant impact on the people in their locales, region, or the country as a whole*"<sup>34</sup>.

In his third point, *Lampe* describes power as the central element of organised crime. The exertion of power is ensured here on the one hand by threat of force or by the effective exercise of violence by individual criminals, or also by mutual interaction between individuals of social elites. In the first case *Lampe* speaks of illegal governance, respectively extra-legal governance<sup>35</sup>. It is about special manifestations in social classes, which cannot be regulated by state authorities in their competence to apply the monopoly of power, because the appropriate capacities for combating these criminal structures are not sufficient. This is highlighted by the fight against the drug cartels in Mexico, the production of opium and heroin in Afghanistan, or irregular migration from North Africa, mainly organised in the northern part of Libya. Another option would be that a state has little interest in regulating the legal grievances, whether for traditional reasons such as parts of society deliberately isolating themselves and rejecting the rule of law, or for reasons of considerations in terms of investments and returns (cost matrix)<sup>36</sup>.

In other constellations, TOC structures are finding an ideal breeding ground or shelter because the respective national legislation is not in alignment with the EU's neighbouring countries. For example, TOC groups use Switzerland as an international hub for cigarette smuggling to the detriment of EU member states. As a *modus operandi*, cigarettes under customs control are illegally removed from the transit procedure and subsequently smuggled into the EU member states declared as empty packaging. In 2013, the EC noted in its reports that the illegal tobacco trade is classified as a global threat and the EU is losing more than 10 billion euros

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Jahrgang, v. 38-39/2013, p. 3.

<sup>32</sup> Article 129 of the Criminal Code (*StGB*) - Formation of criminal associations. Section 7 - Offences against public order, <http://dejure.org/gesetze/StGB/129.html>

<sup>33</sup> Bundesgerichtshof, BGH GSt 1/00, Beschluss v. 22.03.2001, HRRS-Datenbank, Rn. X. Federal Supreme Court, BGH GSt 1/00, Decision of 22<sup>nd</sup> March 2001, HRRS-Data Base, Rn. X.

<sup>34</sup> Federal Bureau of Investigation, *Definition "organised crime"*, 2016.

<sup>35</sup> K. VON LAMPE, *op. cit.*

<sup>36</sup> R. ISAK, Redi, *Der Kanun in Albanien – Gewohnheitsrecht im modernen Staat?* Diploma thesis submitted at the University of Vienna, 2011, p. 37-39, <https://core.ac.uk/download/pdf/11594738.pdf>

annually due to non-paid taxes and duties<sup>37</sup>. As a consequence, the illegal cigarette trade is associated exclusively with organised crime groups. Despite the generation of billions of Euros of criminal profits, Switzerland plays down the role of international cigarette smuggling<sup>38</sup>. For example, the EU and Switzerland have been discussing for years the enforcement of relevant EU member states' judicial assistance agreements and the conduct of requested extraditions of criminals living in Switzerland, which are attributed to TOC in the field of international cigarette smuggling.

#### 4. Classic areas of TOC

The German definition in line with the joint guidelines of the Ministers of Justice and Home Affairs of the states on the cooperation in the prosecution of TOC (1990) is:

Organised crime is the planned commissioning of criminal offences through striving for profit and power, which are individually or in their entirety of considerable importance, if more than two parties work on a longer or indefinite duration:

- a) using commercial or business-like structures,
- b) by use of force or other means of intimidation, or
- c) influencing policy, the media, public administration, the judiciary or the economy<sup>39</sup>.

In the first part the definition describes the general characteristics and in the second part (a-c) the special characteristics of TOC. Thus, the investigative proceedings in the field of TOC are based on specific perpetrator characteristics and are not offence oriented. Furthermore, the definition does not include offences attributable to terrorism.

For differentiation: gang crime *versus* organised crime according to the German Criminal Code, Section 129 – Forming Criminal Organisations:

(1) Whosoever forms an organisation the aims or activities of which are directed at the commission of offences or whosoever participates in such an organisation as a member, recruits' members or supporters for it or supports it, shall be liable to imprisonment not exceeding five years or a fine. [...] <sup>40</sup>.

TOC uses almost every criminal field offered to them that promises high profit margins, which are listed as criminal offences in the German Code of Criminal Procedure

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<sup>37</sup> COM(2013) 324 final, *Stepping up the fight against cigarette smuggling and other forms of illicit trade in tobacco products - A comprehensive EU Strategy*, 2013, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52013DC0324>

<sup>38</sup> R. MEINRADO, Inquiry to the Swiss National Council regarding international cigarette smuggling in connection with OC. Rationale, "It is true, on the other hand, that the smuggling of cigarettes in Switzerland does not meet any conditions for legal aid in criminal matters. This is, however, always granted if the foreign procedure concerns a treaty, which would be qualified as a tax fraud in fiscal matters in Switzerland (art. 3 (3), second sentence, of the Federal Law on International Acts in Criminal Matters, IRSG, SR 351.1). Art. 24 (1) of the Regulation on international legal assistance in criminal matters (IRSV, SR 351.11) defines the tax fraud as the tax fraud as defined in art. 14 (2) of the Federal Law on Administrative Criminal Law (VStrR, SR 313.0). The fraudulent withdrawal of duties using falsified or false documents fulfils the facts of the tax fraud, for which legal assistance may be granted. In the case of large cigarette smuggling attributable to organised crime, the Customs Administration has always been able to provide legal assistance", <https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20003441>

<sup>39</sup> Justiz Online, *Gemeinsame Richtlinien der Justizminister/-senatoren und der Innenminister/-senatoren der Länder über die Zusammenarbeit bei der Verfolgung der Organisierten Kriminalität*, 2016, <http://www.jvv.nrw.de/anzeigeText.jsp?daten=510&daten2=Vor>

<sup>40</sup> German Criminal Code art. 129 – Forming Criminal Organisations. Section 7 - Offences against public policy, [https://www.gesetze-im-internet.de/englisch\\_stgb/englisch\\_stgb.html#p1204](https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p1204)



(herein later referred to as *StPO*) in section 100a<sup>41</sup>.

## 5. Relevant Offence Fields and Legal Foundations

The portfolio of serious offences, which can be attributed to organised crime, is classified into areas of crime and refer to section 100a *StPO*, which are listed in alphabetical order.

The following legal bases are relevant for the following areas of crime:

- Asylum Procedures Act - smuggling of human beings;
- Commodities control act - environmental crime;
- Criminal code – *inter alia*, crimes against property, violent crimes;
- Foreign trade legislation - smuggling related to economic sanctions;
- General fiscal law – avoidance of taxation and customs offences;
- International Criminal Code;
- Medicines law – crime of counterfeiting;
- Military weapons control act – illicit trafficking of military weapons;
- Narcotics law – illicit trafficking of drugs and drug smuggling;
- Residence Act - trafficking in human beings and people smuggling;
- Weapons law - illicit trafficking of small arms and light weapons (SALW), arms smuggling.

## 6. Ethnic Organised Crime Groups and Their Offence Fields

The Federal Criminal Police Office assesses the capacities of TOC groups based on the number and weighting factors of relevant indicators from the list of ‘general indicators for the detection of organised crime relevant issues’<sup>42</sup>. The Federal Criminal Police Office conducts evaluations of the actual phases after preparation and planning of the respective crimes. Both the duration of the investigation and the use of the resources used play a decisive role in determining the indicators. The Federal Criminal Police Office clearly points out that a low potential of a TOC group does not necessarily indicate a small degree of organisation and professionalism.

The crimes to be prosecuted under German jurisdiction in section 100a *StPO* are often committed by certain ethnic groups by tradition and not infrequently because of a division of the classical areas with other TOC groups. According to the Federal Criminal Police Office, the nationality of the persons responsible for the assignment, who have the leadership function in the TOC groups, is decisive<sup>43</sup>. These leaders need not necessarily represent the ethnic majority within a group. According to the 2014 Federal Criminal Police Office national situation report, the following ethnic organised crime groups are mainly concerned with the following areas of crime and are given here as exemplary and

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<sup>41</sup> German Code of Criminal Procedure (StPO), as amended by the notice of 7 April 1987 (Law Gazette I, 1074, 1319), which was last amended by art. 2 (3) of the Law of 21 January 2015 (Federal Law Gazette I, p.10) has been amended. The translation includes the amendment(s) to the Act by art. 3 of the Act of 23rd April 2014 (Federal Law Gazette Part I p. 410), [https://www.gesetze-im-internet.de/englisch\\_stpo](https://www.gesetze-im-internet.de/englisch_stpo)

<sup>42</sup> Bundeskriminalamt-BKA German Federal Criminal Office, *Organised crime. National Situation Report 2014*, 2015, p.11-17

<https://www.bka.de/SharedDocs/Downloads/DE/Publikationen/JahresberichteUndLagebilder/OrganisierteKriminalitaet/organisierteKriminalitaetBundeslagebild2014.html>

<sup>43</sup> *Ibid.*

not exhaustive<sup>44</sup>:

- German-dominated organised crime groups  
Illicit trafficking of narcotics and drug smuggling, criminality in connection with economy, avoidance of taxation and customs offences, property criminality, money laundering, violent criminality, environmental criminality, counterfeit criminality, pimping, people smuggling, corruption, arms trafficking and smuggling, cybercrime
- Turkish-dominated organised crime groups  
Illicit trafficking of narcotics and drug smuggling, violent criminality, criminality in connection with economy, pimping, THB and people smuggling, avoidance of taxation and customs offences, property criminality, cybercrime, counterfeit criminality
- Polish-dominated organised crime groups  
Property criminality, avoidance of taxation and customs offences, illicit trafficking of narcotics and drug smuggling, counterfeiting
- Italian dominated organised crime groups  
Illicit trafficking of narcotics and drug smuggling, money laundering, avoidance of taxation and customs offences, counterfeit criminality, arms trafficking and smuggling, criminality of property, criminality in connection with economy
- Serbian dominated organised crime groups  
Property criminality, criminality in connection with economy, illicit trafficking of narcotics and drug smuggling, THB and people smuggling, violent criminality

The respective different forms of organised crime are multifaceted and diverse. Their ideas are clearly structured and hierarchically organised and strengthened by ethnic and cultural solidarity, language and dialectics, habits and customs, as well as social and family ties. In addition, there are interrelationships between criminals of different intellectual ability, whose work-sharing interactions are determined by the implementation of the respective criminal interests. Such phenomena have recently been observed in the areas of THB and people smuggling by operating crime gangs in Libya to the EU member states and Syria to Turkey, respectively Cyprus and Greece, organised by purely purposive interests.

## 7. Conclusions

TOC comprises a huge potential of threats to national law enforcement services and other security agencies involved in border security and management, both of EU member states and non-EU countries with regard to their defined needs in terms of national security and public order. According to the glossary of the Federal Agency for Civic Education, TOC has been used since the 1980s as an internationally accepted term for complex and rational forms of crime that operate across national boundaries<sup>45</sup>. This excludes all relevant offences, which are related to terrorism and the phenomenon of foreign terrorist fighters. The most important areas of TOC are all serious offences with regard to section 100a *StPO*, or their corresponding relevant offences.

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<sup>44</sup> BKA, *Organisierte Kriminalität. National overview of the situation in 2014, 2015*, pp. 13-17. The frequency of the number of cases recorded in the *PKS* is determined by the frequency of the respective offence fields.

<sup>45</sup> BPB, *Glossary – Organised (transnational) Crime*, <http://www.bpb.de/politik/grundfragen/deutsche-verhaeltnisse-eine-sozialkunde/138404/glossar?p=129>.

In December 2006, during the 14<sup>th</sup> OSCE Ministerial Council meeting in Brussels, extensive measures were taken in the fight against TOC<sup>46</sup>. At the beginning of 2006, however, it was recognised that the defined activities were unlikely to be achieved when appointed officials from OSCE participating States started to discuss the complexity of TOC<sup>47</sup>. Despite intense expert discussions carried out during the course of meetings, initially the assigned ‘experts’ faced enormous difficulties in finding a level of common understanding for the description of organised crime. The reason was simple: the ‘experts’ followed the respective national definitions, sometimes paired with a basic understanding of the definitions of Interpol and Europol. Since there was no common international definition available, this led to the misunderstandings of the participating organised crime experts and fundamental misunderstandings.

The comparison of descriptions for organised crime illustrates that a simple and absolutely certain implementation of the definitions for organised crime is complicated and difficult to manage. Both the content and the scope of the definitions of the respective EU member states and international organisations are very different. While the UN expresses itself with a one-sentence definition, other EU member state institutions or international organisations need almost a full page. On the one hand, in the analysis of the respective definitions, it turned out that the multiple use of the conjunction ‘or’ promotes the inclusion of many different forms of criminal offences, instead of facilitating a clear and simple understanding of what organised crime is. On the other hand, the linking of the individual qualification characteristics with the conjunction ‘and’ is also not uncomplicated, since it invariably raises the question of how many of these criminal offences must at least be listed in order to affirm organised crime as defined. Von Lampe is questioning the degree to which criminal offences can be organised rather than how organised the actual criminal offenders are in order to cover a specific portfolio of scene-type crimes<sup>48</sup>. A description of organised crime should then usually refer to a criminal organisation, that is to say a group with formal structures, as in the definition of the FBI. A distinction between forms of organised crime and non-organised crime is therefore likely to be drawn between complex associations of criminals on the one hand and individually acting perpetrators on the other.

A further aspect of the description of TOC is to include the increasing co-operation of organised crime groups at an international level, which can take place either in accordance with long-term agreements or through specific project-related agreements. This can result either in an occasional collaboration as well as in a longer cooperation between organised crime groups based on labour division agreements, involving different nationalities, ethnic groupings and different languages. *Behrens* and *Brombacher*<sup>49</sup> assess TOC as one of the biggest threats to security in the 21<sup>st</sup> century and map out two dominant types for a better understanding of organised crime that relate to structural or procedural aspects of organised crime as a quest for profit. In this way, they strengthen the thesis of *Von Lampes* that organised crime as a structure refers to the organised commissioning of criminal offences and not to the organisational forms of the members of the respective organised crime groupings.

Without any doubt, the implementation of the European Arrest Warrant (EAW) can

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<sup>46</sup> OSCE Decision No. 5/06 Organised Crime. MC.DEC/5/06 OSCE (2006).

<sup>47</sup> From 2005 to 2009, the author was the Senior Border Adviser in the OSCE Secretariat and was present in all relevant meetings as the leading OSCE expert.

<sup>48</sup> K. VON LAMPE, *op. cit.*, p. 3.

<sup>49</sup> T. BEHRENS, D. BROMBACHER, *Transnationale Organisierte Kriminalität*, in T. JÄGER (ed.), *Handbuch Sicherheitsgefahren*, 2015 pp. 135-145.

be assessed as a major achievement in the fight against TOC<sup>50</sup>. As a result of the framework decision from 2002, this option increases the effectiveness of international police cooperation in the implementation of criminal proceedings and has been established as an EU-wide instrument for the enforcement of national arrest warrants in EU member states. The EAW implies faster and simpler surrender procedures and an end to political involvement and EU countries can no longer refuse to surrender, to another EU member state, their own citizens who have committed a serious crime or are suspected of having committed such a crime in another EU member state, on the grounds that they are nationals. A high level of mutual trust and cooperation between EU member states made simplifying and improving the surrendering procedure possible.

The purpose of the EAW, specifically in the area of TOC expanded possibilities, is to apprehend the 'back-men' and elude them from their organised crime structures and national protection area and bring them to justice. The country requested for extradition may in principle not check the legality of the arrest warrant. The main problem was the extradition of one's own nationals to another state for the purpose of criminal prosecution and/or execution of sentences.

The EU member states and their neighbouring countries are increasingly exposed to a large number of very serious threats in which TOC groups are engaged, *inter alia*, in trafficking in human beings and people smuggling, illicit trafficking of small arms and light weapons and drugs, child pornography, money laundering and tax evasion, just to mention a few of the most important areas. Additional threats have arisen through terrorism and its radicalised foreign terrorist fighters, as well as violent extremism.

Europol has a particular role to play in coordinating the work of the national police services of all EU member states in the areas of TOC and other specific transnational threats and ensuring an all-encompassing information exchange. Europol is the leading EU police agency in the fight against TOC defined as a transnational threat. Frontex, on the other hand, needs to be strengthened in its competences in order to work more effectively against TOC groups in the areas of irregular migration, trafficking in human beings and people smuggling, and thus other closely related offences, such as the production and distribution of false documents and here in particular counterfeit travel and identity documents.

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<sup>50</sup> The European Arrest Warrant (EAW) is applied throughout the EU since 1<sup>st</sup> January 2004. It replaced lengthy extradition procedures within the EU's territorial jurisdiction. It improves and simplifies judicial procedures designed to surrender people for the purpose of conducting a criminal prosecution or executing a custodial sentence or spell in detention, [http://ec.europa.eu/justice/criminal/recognition-decision/european-arrest-warrant/index\\_en.htm](http://ec.europa.eu/justice/criminal/recognition-decision/european-arrest-warrant/index_en.htm).