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Introduction

Upper- and underworld cross-border crime economy

Petrus C. van Duyne

If economy is bound to be in a state of constant change, unless sliding down into a state of stagnation, crime economy is an even more volatile phenomenon. Not in the first place because it concerns on-going changes in demand and supply, but also because its criminal characteristics are constantly changing. These changes are not only caused by shifts in the demand for illegal commodities or services, but also by valuations of the society itself. Human trafficking is a good example to clarify this point. Before 1989 helping persons to cross the Iron Curtain was not considered a criminal act (in the west), but a brave display of humanitarian solidarity with the suppressed and deprived citizens of the 'East Bloc'. At present helping people to escape their economic misery at home is criminal human smuggling, if not trafficking in human beings. Of some commodities, like cannabis, the consumption is tolerated in virtually all jurisdictions in the European Union, while the wholesale trafficking is punished draconically relative to that tolerance. Also the appreciation of the age-old interaction between the upperworld and the underworld criminal economy has changed. Whether the upperworld is at present more threatened by the crime-economy is difficult to determine, given the absence of any valid yardstick, but the *fear* of the penetration by crime -entrepreneurs has certainly been intensified. This anxiety seems to have been fanned by a number images, non of them new, but coated with new public fear arousing emotions. One of them is the *organized crime* scare, another the phenomenon of *cross-border* or *transnational crime*: (organized) crime in a *global* village to which at present is added terrorism.

What is true about this image? Is crime more 'global' than one or two decades ago? Is this 'global village' threatened by internationally operating organized crime groups? Let us first look at this alleged 'global village'. It is a strange metaphor. The connotation of 'village' is some rural, cosy and enclosed

community, where people know each other and also some protective shell of the benign (but also stiffening) social control exists. Looking at the global reality, such a village does not exist.

This so-called 'village' has many unattractive 'unvillage-like' features. Parts of that 'village' are aflame with civil war and bloodshed. Other parts enjoy an unprecedented wealth and prosperity, while the majority still find themselves in destitute circumstances. The wealthy parts of that 'village' have erected protective 'walls' against the destitute to keep them out of their neighbourhoods. The same applies to cheap goods which may compete with the expensive goods produced in the richer neighbourhoods. It must be admitted that mobility in that 'village' has increased, but mainly for the leisurely classes in the richer neighbourhoods, which spend cheap holidays in the poorer sunny areas, which they called 'unspoiled'. Communications have also intensified and accelerated up, though the reverse side of that medal is a decrease in transparency.

Given these differences in wealth and opportunities it is not surprising that the consequence of this state of affairs is a thriving trade in all those commodities and services, which the rich neighbourhoods are willing to buy. Many of these commodities are sold for inflated prices because of the 'criminal price wedge'. Though most prohibited commodities are actually cheap at the source, the chain of transactions from producer to the consumer is long and very price increasing, among other things due to the security requirements against the law enforcement agencies. Whether this cross-border crime trade has the terrifying capacity to threaten the rich neighbourhoods of our 'global village' remains to be seen.

In his contribution Nikos Passas elaborates the very thin or even absent foundations of this proclaimed threat. He first formulates a concise definition of cross-border crime, from which one can deduct that we are dealing with an age-old phenomenon of international crime-trade. In this he projects the interface between 'upper' and 'underworld'. This provides an intriguing interaction, which actually blurs the line between the two worlds. As a matter of fact, the legitimate upperworld knows too many criminal black holes of its own to maintain this comfortable dichotomy between the 'goodies' (us) and the 'baddies' (them). The typology which Passes designs provides some order in this complicated, or rather chaotic landscape. Nevertheless, it remains difficult to depart from the 'them-they' dichotomy, as illustrated by some of his categorizations, like 'legal actors' versus 'illegal actors' or the suggestion that 'there is no interface between legal and illegal actors.' It would clarify distinctions if we would call a so-called 'legal actor' committing crimes, a 'criminal actor',

even if his place in the market or the legal entity in which he functions is entirely a *legitimate* one. A legitimate corporation can turn into a crime-enterprise or a criminal organization (while still remaining a legal entity), all by the own extent of its own law breaking. It does not matter what commodities or services it sells: whether it handles prohibited substances (other than the usual toxic waste) or criminally jeopardizes individual or public safety (casualties are ‘collateral damage’, not killings) it is still a criminal legal entity (Mokhiber 1988). This more positive law oriented interpretation may prevent the creeping in of semantic ambiguities. By adopting the more simple neutral juridical meanings of the words ‘criminal’ and ‘legal’ we consider a corporation a legal actor if established according to the law, though as legal entity it can commit crimes, even ‘organized crime’. Lawbreaking is an activity, while the actor, either as ‘natural person’ or as ‘legal person’ is the bearer of the criminal liability for organizing crimes.¹

Passas ends his elaboration with a number of fruitful research proposals to fill the void in our knowledge of this field. This call for a ‘knowledge policy’ should not be a parochial one. To foster and implement such a knowledge development the minimal requirements are a harmonisation of methodology, access to data in states which are involved and (of course) their financial support. Indeed, if the picture is so gloomy and threatening, the first task of the policy makers, who warned the public so intensely, is to collect knowledge and insight. Unfortunately, thus far, this appears to be the last thing that has entered their minds, let alone that anything has been initiated to improve our (or their) understanding.

A substantial part of the book and colloquium is devoted to the financial crimes, finances of crime and the policy against the handling of crime-money. This field is first described by Baloun and Scheinost in their study of economic crime in the Czech Republic. It reports the various forms of ‘upperworld crime’ or in Passas’ typology, the criminal symbiosis between ‘legal’ though highly criminal actors, whether it concerns the ‘tunneling’ of banks and privatized corporations by asset stripping or privileged loans which were never repaid. This appears to be a non-cross border crime, while its surrounding economic landscape is also determined by Czech internal relations and acceptance of a substantial black economy. However, local black and criminal economies

¹ In the Dutch, Belgian, French and other EU systems of law (but not in Germany and Austria), a distinction is made between ‘legal persons’ and ‘natural persons’. Both can be held liable in civil and criminal cases.

are no islands either: the evasion of corporate tax and social security dues by the employers is to a large extent dependent on the availability of unregistered illegal foreign labour. The cross-border crime aspect of 'local' crime—local in the sense of the place where the goods are marketed—is evident in the case of the criminal trading of high taxed commodities like gas. Operating such scams is dependent on efficient cross-border co-operation between various crime-entrepreneurs. In the case of the Czech Republic, Poland, Russia, Slovakia and Ukraine.

Case descriptions of an economy in transit like the Czech Republic show a much more intricate and interwoven crime-market and criminal finances than the fear for the crime-money as has been fanned by the Financial Action Task Force. In the article of Van Duyné this phenomenon of the crime-money and money-laundering is analysed and compared with the tangible evidence which has been put forward thus far. Again it can be observed that there is an inverse relationship between the intensity of the expressed fear and the amount of generated knowledge. This does not only apply to the empirical side of the problem, but also to its conceptual aspects.

Though the concept of laundering is usually applied to *money*, and therefore referred to as money-laundering, the legal formulation of the circle of application is much wider. Rephrased loosely it concerns all consequential handling which are devoted to conceal the results of a predicate crime for profit. Analogous to hiding one's committing a burglary or a violent crime by wiping off traces, one may call it 'financial fingerprint wiping'. However, it does not only apply to the actually generated money, but to the manipulation, physical by or administratively, of all objects and rights, tangible and intangible. This blurs the distinction between money-laundering and predicate crimes like (tax) fraud, while it shifts the burden of proof almost over the edge of self-incrimination. At any rate, due to this formulation the problem has become so broad as to render it unmeasurable and very susceptible to political manipulation. This has resulted in the unreliable and inflated, but canonized (gu)estimates of the FATF and the United Nations.

A comparison with the claims of these political bodies and the few empirical fragments reveals much data pollution as well as a less sophisticated criminal financial management than has commonly been assumed. The examples of crime-money infiltrating legitimate firms are very rare and even then it mainly concerns the usual pubs, hotels and real estate. While research is still in progress and the picture may change, as far as Northwestern Europe is concerned, there

is still little evidence of the Mr. Bigs 'marching towards the bulwarks of economic power'.

Even if the fear and the reality of the actual threat may diverge, it does not mean that policy makers and law enforcement agencies should lean back. As a matter of fact, the crime-economy is volatile and its actors constantly, probing loopholes and potentials of circumventing regulations, even if less organized and sophisticated than assumed. Regional differences in regulations present *regulatory asymmetries*, stimulating crime-entrepreneurs to jurisdiction-shopping until they arrive at the jurisdiction which suits their financial secrecy requirements. There is little strange about this: there is no multinational corporation which does not operate in the same way and frequently with more unwanted outcomes, either for the homeland or for the jurisdiction of choice. At this point one may go back again to Passas' examples of corporations committing crimes where they go, but *not* in their own country. For the purpose of safe money-laundering the situation is not much different. Adamoli provides a thorough account of the regulatory asymmetries regarding the European Union and the surrounding off-shore financial centres.

In order to shed more light on this complicated area TRANSCRIME of the University of Trento carried out a research to compare types of jurisdictions with standards of integrity concerning: criminal and procedural law, administrative regulations, banking laws, company law and international co-operation. The results of the research project revealed an interesting variation of jurisdictions regarding the likelihood that proceeds from crime will transit their financial centres. On one side of the scale there are the countries which have a high interest in the integrity of their financial system and on the other side there are the countries which main commercial commodity is 'financial secrecy'. This creates an enduring asymmetry to the detriment of the (rich) jurisdictions who see many of their efforts to chase the crime-moneys nullified.

The suggested remedy is to impose on the 'laxist' financial jurisdictions the duty to improve their regulations to the standard of the other 'good' countries. Otherwise they face the penalty of being branded as 'non-cooperative countries and territories', a 'verdict' imposed by the FATF. This qualification can entail negative financial consequences for the local banking industry. At this point we return again to the metaphor of the 'global village' as set out at the beginning of this introduction. The FATF is an informal rich man's club, dominated by the US, responsible to no democratic institution. Against its qualification 'non-cooperative country or territory' there is no appeal. It is not surprising that

thus far this body has reserved this verdict only for relatively powerless jurisdictions, which have few other economic resources than taking advantage of the intensified demand for financial secrecy. And, as is the case with the drug market, the rich countries are the regions where this criminalized demand developed in the first place.

Irrespective of such moral considerations, every neighbourhood in that village has to put its own legal affairs in order. The efforts to do so in the European Union is presented in the paper of Gert Vermeulen. The European leaders, convened in Tampere (Finland) in 1999, pronounced their firm resolve to meet the threat of organized crime head-on and to design and implement a common approach. This resolution was made more concrete in the so-called EU Millennium Strategy on Organized Crime, adopted by the Justice and Home Affairs Council (JHA). It produced, among others, a number of recommendations to approximate the Member State's *procedural* law. This applies to compliance with formalities and procedures as well as means, techniques and methods of police investigations. For example: interception of (GSM and satellite) telecommunications, controlled deliveries and the sensitive topics of covert investigations (infiltration) and joint (multi-national) investigation teams. At Tampere also additional steps were taken towards a single European legal area: a new international body –Eurojust– should be set up. It is to be composed of national prosecutors, magistrates or police officers of equivalent competence from each Member State. This body is to function as the judicial counterpart of Europol.

This approach would remedy much of the legal asymmetries which are still present within the European Union. Criminals should have no more space for jurisdiction shopping. On the other hand, European prosecutors should also not be allowed their form of shopping, trying to prosecute a cross-border operating criminal or crime-organization in the jurisdiction which is likely to be the most lenient to intrusive investigation methods and is expected to impose the severest sentences.

All these well thought-out legal devises should not let us forget, that the crime-industry is still the result of the dynamics of the multitude of interfaces as set out in this volume. Klaus von Lampe gives a lively description of one of the most volatile crime-markets in Europe: the market of excise fraud with cigarettes. Though his research concerns the German illegal cigarette market, that market thrives due to the availability of a constant influx from abroad,

notably from Poland.² The development of this market reveals all the components of the dynamics of *organizing* crime, instead of the worn-out rhetoric of 'organized crime'. As usual, cross-border (crime) trade begins with price differences between countries, whether the commodity is licit or prohibited. Like water pressing against a permeable dike, the illegal trade seeps through all small holes to be subsequently consumed by normal price sensitive citizens. Some of that seepage will be collected by organizers, who channel it into a somewhat more structured form. By chance Eastern Berlin has many Vietnamese residents, who cannot or do not want to return to their homeland. Facing unemployment after the unification of Eastern and Western Germany they grasped the opportunity of organizing the cigarette street market in Berlin. They succeeded in doing so, not because of some sinister mafia-like 'transnational' conspiracy or demoralising police corruption, but because they were already used to semi-legal marginal trade under the communist rule.

The Vietnamese cigarette-entrepreneurs were relatively insensitive to law enforcement intervention, also because of the relatively low sentences, until the violence stemming from ethnic protection rackets forced to police to clamp down on this industry. Though a reduction of street vending has been achieved, the mechanism of the fiscal price wedge still fans an on-going cross-border crime-trade, part of which concerns wholesale shipments of millions of cigarettes. It is interesting to observe that, on the basis of the available evidence as collected by Von Lampe, this wholesale traffic with its multi-million interests at stake also did not develop the features usually attributed to organized crime. Hardly gross violence and no monopoly building. One may wonder whether the 'big bad wolf' of 'transnational organized crime' may more appropriately be projected in the comic strips of Donald Duck than in the serious world of criminal policy.

The image of 'organized crime' (and certainly its international brand), rationally striving at monopoly building, is as widespread as ill conceived. True, certain forms of the crime industry, notably illegal protection, must by its very nature monopolize a certain area. As Gambetta (1994) has convincingly described, in one particular geographical territory there is place for only one – the strongest and most vicious – protector. But trade is difficult to monopolize,

² At present the same applies to the illegal cigarette market in Great Britain, which is supplied from France and Belgium as well as by wholesalers operating professionally with Dutchmen, Baltic entrepreneurs and Chinese counterfeiters (Van Duyne, in preparation).

even if every trader, legal as well as illegal, has the tendency to strive for a closed market, either by himself or by a number of fellow-entrepreneurs. Though this image of monopolizing, 'rational, profit maximizing' oriented organized crime is echoed in all the mainstream literature, (Sieber and Bögel, 1993) very few manifestations of these traits are found in the real life crime-market. Even if it is important to approach the economy of the illegal commodity (drug) market from the angle of the economic theory, as is described by Matjaz Jager, in the end the shaping of the crime-market frequently follows different alleys. Apart from that it is interesting to follow Jager's account of the law enforcement advantage of organized crime when the objective is the reduction of some unwanted prohibited substance market. Monopolists do not strive for ever expanding markets but are rather interested in market control with more profits for less efforts. However, the comparison with the (limited) available evidence reiterates the dissenting opinions about the structure of the crime-market of prohibited substances. It is a relatively *open* market characterized by a high degree of cross-border mobility. What else can be expected? As Paoli (2000) in her study of the drug scene in the two cities Frankfurt and Milan describes, suppliers as well as customers are used to move around. They do that not only in their capacity as entrepreneurs or customers, but also because mobility as a part of the Western lifestyle has become cheap and therefore attractive.

The dynamics of the cross-border crime markets are fascinating as well as a matter of concern. Whether it is also a matter of fear, depends on a deeper valuation. A matter of concern remains our shallow knowledge of this part of contemporary history. This want of insight may fan the fear arousing rhetoric of the global village besieged or infiltrated by sinister interlopers. This second volume of the annual cross-border crime colloquia aims to contribute to the deepening of our understanding.