

THE GLOBAL WAR ON THE ILLICIT DRUG TRAFFICKING AND ORGANISED CRIME: GRABBING THE RAGING BULL BY THE HORNS, THE LEGS OR THE TAIL?

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ABSTRACT

The drug trafficking industry, spearheaded by organised crime, is an ongoing global challenge. Its magnitude and adaptability is acknowledged in various international reports and the existing international instruments are a testament of the situation which indeed merits international concern. The lucrative expectations involved in the trade breeds corruption have also been linked to the financing of international terrorism and arms trafficking.

The ongoing 'war on drugs' is increasingly being questioned as a result of negative side-effects stemming from the militarisation of law enforcement. Alternative avenues in domestic law and policy need to be considered with the aim to focusing cases drug abuse and drug trafficking separately. Competing with the black market is an option which has been taken up by some jurisdictions which, however, presents potential risks. The challenges faced by source, transit and recipient countries are different and therefore legal policies can vary from one scenario to another.

The role of the International Criminal Court should also be considered in cases of transnational drug trafficking operating within areas of absence of law or institutional fragility, particularly in settings of armed conflict and post-conflict.

KEYWORDS: DRUG TRAFFICKING – ORGANISED CRIME – DRUG
DECRIMINALISATION – DRUG PROHIBITION – DRUG LEGALISATION

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1. Introduction

Drug trafficking can inarguably be considered as one of the major threats humanity faces in terms of public health, social tranquillity, political order and regional stability. It comprises the global illegal trade in narcotic drugs and psychotropic substances, from street level transactions to transnational trafficking flows, involving the cultivation, manufacturing, processing, production, distribution and selling of substances prohibited under international law and falling outside the remit of allowances found within domestic legal frameworks.

As an illicit commercial activity, drug trafficking constitutes a direct violation of drug prohibition laws that are found in the vast majority of states across the globe as inspired by the currently applicable international law instruments dealing with the subject. Addressing this criminal, social and medical phenomenon by the enactment of effective regulations and policies, together with their respective enforcement, is a constant and ongoing process. This is due to fluctuating trends of the industry, the evolving capabilities of this criminal niche, the socio-political and economic considerations revolving around the trade, and the widespread and constant, if not increasing, demand for the contemplated product.

2. The drug trafficking industry

In order to properly analyse and size up the issue of drug trafficking, one needs to first and foremost acknowledge the magnitude of the system behind the industry. The reliance on accurate data concerning drug trafficking is of utmost importance, which is a major problem in itself and also a prevalent issue that is also found in other areas of the black economy such as, for example, arms trafficking. This is due to the fact that criminality has a firm hold on such industries which are thus shrouded in the covertness that is part and parcel of the workings of the underworld. In its yearly World Drug Reports the United

Nations Office on Drugs and Crime (hereinafter 'UNODC') lays out estimates and assumptions based on the best available data, which is still admittedly considered as limited, giving rise to a constant and urgent need for the improvement of data collection measures and analytical capacities with regards to each particular region and concerning each type of narcotic or psychotropic substance in question. The drug trafficking market is split up into product sections accordingly: opiates and opioids; cocaine; amphetamine-type stimulants (hereinafter 'ATS') and new psychoactive substances (hereinafter 'NTS'); and finally cannabis.¹¹¹

2.1 Opiates and heroin

The global market for illicit opiates, when compared with other plant-based drugs, can be regarded as one of the most significant sectors in drug trafficking,¹¹² despite the fact that illicit cultivation and production are limited to particular geographical areas around the globe, these being the southern parts of Asia and Latin America.¹¹³ Consequentially, the product is trafficked across large distances and multiple territories to meet the market's widespread demands,¹¹⁴

Moreover, the chemical and pharmacological similarities between opiates and opioids denote corresponding usage in licit pharmaceutical products, consequentially giving rise to an interplay that causes diversions from licit to illicit market flows at various stages of the supply chain.¹¹⁵ Illicit opiate trade production mainly originates from the states of Afghanistan and Myanmar (Burma) and the UNODC 2011 World Drug Report (hereinafter '2011 Report') stated that global opium cultivation had reached an estimate of 195,700 hectares in the year 2010,¹¹⁶ which registered an increase from the figures yielded in 2009.¹¹⁷

Afghanistan retained first position as the main global producer and cultivator of opium even in the rankings demonstrated by the 2013 World Drug Report (hereinafter '2013 Report'), noting aggressive expansions in Afghanistan and Myanmar¹¹⁸, whereas Mexico was regarded as the main producer of opium in the Americas.¹¹⁹ The 2014 World Drug Report (hereinafter '2014 Report') provided an even more worrying outlook; poppy cultivation had increased in both

¹¹¹As systematically divided within UNODC Drug Reports; <<http://www.unodc.org/wdr2014/>> accessed 21 August 2015

¹¹²United Nations Office on Drugs and Crime, World Drug Report 2010 (Vienna, 2010) 16

¹¹³ibid 20.

¹¹⁴(n2) 16

¹¹⁵United Nations Office on Drugs and Crime, World Drug Report 2014 (Vienna, 2014) 23

¹¹⁶United Nations Office on Drugs and Crime, World Drug Report 2011 (Vienna, 2011) 14.

¹¹⁷ibid

¹¹⁸ibid

¹¹⁹ibid

Afghanistan and Myanmar,¹²⁰ and the global area of illicit opium cultivation stood at a staggering 296,720 hectares.¹²¹ Evidence also indicated that Afghan heroin began reaching new markets such as Oceania and South-East Asian areas (which were traditionally supplied by South-East Asian producers),¹²² whereas the traditional Balkan route retained its prominence as the 'lifeline' of heroin availability within the European continent.¹²³

2.2 Cocaine

In terms of cocaine manufacture and trafficking, which also includes the product termed as 'crack cocaine', the impact of such activity was mostly felt in the Western Hemisphere¹²⁴ and can easily be regarded as one of the main transnational criminal threats of the present day.¹²⁵ The 2010 Report marked Colombia as the main global cultivator, followed by Peru and finally Bolivia.¹²⁶ It is worth noting that over the years Colombian cocaine cultivation has significantly reduced due to considerable action taken by law enforcement authorities consisting of eradication measures. These measures have also led to positive results in the increase of governmental control over the State's territory. Colombian traffickers responded by resorting to shipping their cocaine stocks to transit countries within the region, such as Venezuela and Ecuador.¹²⁷

Gradually, Mexican drug cartels became the main organisers for cocaine shipments directed towards the main global market, the United States of America (USA), for roughly the last 15 years, collaborating with and substituting Colombian trafficking circles¹²⁸ that were under pressure inflicted by anti-drug trafficking campaigns. Similarly, West Africa started being used as a trafficking gateway to the second largest cocaine market; the European continent.

The 2011 Report marked significant drops in cocaine cultivation and even more positive was the sharp decline in the USA's demand¹²⁹ despite the fact that this area remained the largest market.¹³⁰ On the other hand, an increase was noted in the European market there were also indications that the West African transit

¹²⁰(n5) x

¹²¹ibid

¹²²ibid

¹²³ibid

¹²⁴United Nations Office on Drugs and Crime,
<<http://www.unodc.org/wdr2014/en/cocaine.html>> accessed 21 August 2015

¹²⁵(n2) 16

¹²⁶ibid

¹²⁷ibid

¹²⁸ibid

¹²⁹(n6) 16

¹³⁰(n6) 17

point could have caused a spill-over effect on countries within that sub-region.¹³¹ The 2012 Report also included Oceania, particularly Australia and New Zealand, as another main market destination for cocaine shipments.¹³² The 2013 Report reiterated the reality of cocaine trafficking patterns shifting into new regions such as the Caribbean area, whereas East and South-East Asia were flagged as zones at risk of cocaine market expansion, as indicated in seizure statistics.¹³³ Various parts of Latin America suffered spill-over effects arising from the widespread availability and relatively cheaper price, facilitated by close proximity to producing countries found in the area.¹³⁴ The 2014 Report remarked on the steady decrease of cocaine cultivation, noting the relatively effective, albeit devastating, measure of aerial spraying conducted by the Colombian authorities, resulting in Colombia's potential cocaine production plummeting to an estimate of 309 tonnes, the lowest rate since the year 1996.¹³⁵ Nonetheless, analysts still never rule out possible rebounds in the market.

2.3 Amphetamine-type stimulants and new psychoactive substances

The ATS industry, comprising synthetic substances belonging to amphetamine and ecstasy-group substances, such as methylenedioxymethamphetamine (hereinafter "MDMA"), is one of the more contemporary threats of considerably grave proportions for multiple reasons. Firstly, it relates to a section of drug trafficking which is very capable of morphing according to its exigencies; as a result, the monitoring of this threat and the collection of relevant data, to date, has proven to be a highly daunting process.¹³⁶ Secondly, production is not constrained by climate requirements and can therefore take place practically in almost every geographical location, manufactured within clandestine workshops commonly known as 'kitchen laboratories', dependent only on a supply of precursor substances and materials.¹³⁷ Thirdly, ATS are essentially synthetic drugs, easily alterable and concocted by use of a number of substitution chemicals (capable of mimicking the effects of pure MDMA) some of which are not under international control and capable of bypassing prohibition or control legislation through lacunae.

The 2013 Report further confirmed signs of expansion in the ATS global industry, as suggested by seizure and consumption rates. Europe, North America

¹³¹ *ibid*

¹³² *ibid*

¹³³ United Nations Office on Drugs and Crime, World Drug Report 2013 (Vienna, 2013) x

¹³⁴ *ibid*

¹³⁵ (n5) 34

¹³⁶ (n2) 23

¹³⁷ (n2) 140

and Oceania remained the traditional main markets, especially in relation to 'ecstasy'; however, the developing countries of Asia and Africa were proving to be strong emerging markets.¹³⁸ Methamphetamine production was constantly being discovered in new zones, such as Poland and the Russian Federation, and indicators pointed at an increased production rate of synthetic drugs in Central America, with Mexican drug cartels being the main motor within this region.¹³⁹ Figures for amphetamine seizures also arose in the Middle East, in relation to the drug marketed as 'captagon.'¹⁴⁰ The unfailing regular emergence of new harmful substances was wreaking havoc within the international drug control system as a result of the NPS phenomenon which entailed,

... substances of abuse, either in a pure form or preparation, that are not controlled by international drug conventions, but which may pose a public health threat. In this context, the term "new" does not necessarily refer to new inventions but to substances that have newly become available in specific markets. In general, NPS is an umbrella term for unregulated (new) psychoactive substances or products intended to mimic the effects of controlled drugs.¹⁴¹

NPS development is of considerable speed and creativity, whereby there was an increase of 50% in the reporting of NPS presence in different Member States between 2009 and 2012, its presence tallying up to 251 countries.¹⁴² The 2014 Report indicated once again the constantly increasing number of clandestine laboratories, as estimated from the number of workshops dismantled by law enforcement authorities in which a total of 144 tons of ATS were seized.¹⁴³ Central and south-west Asia, together with Central Africa have become emerging markets,¹⁴⁴ whilst the eastern parts of Asia, together with Europe, accounted for over 80% of global seizures in ecstasy.¹⁴⁵ Another major issue is the steady proliferation of NTS which by end of 2013 tallied up to 348 different substances, a figure which clearly exceeds the number of psychoactive substances controlled at international level (which amounts to 234 substances).¹⁴⁶

¹³⁸(n23) xi

¹³⁹ibid

¹⁴⁰ibid

¹⁴¹ibid

¹⁴²ibid

¹⁴³(n5) xii

¹⁴⁴ibid

¹⁴⁵ibid

¹⁴⁶ibid

2.4 Cannabis

In connection with cannabis or marijuana, each UNODC World Drug Report since 2010 has reiterated that tracing accurately the current trends of this sector of drug trafficking is virtually impossible. This is mainly due to the fact that this particular drug is produced domestically in a vast amount of territories, using different cultivation methods according to prevailing regional environmental factors, consequentially leading to wild fluctuations in plant density.¹⁴⁷ Another issue would be the irrevocable pointer that this substance is consumed at a widespread level in extensive amounts, thus limiting the potential for obtaining conclusive results on the extent of the substance's consumption rate.¹⁴⁸ One relatively reliable indicator is that the production and exportation of the cannabis resin product (known commonly as '*hashish*') is concentrated mainly in Afghanistan and Morocco followed by Lebanon, India, Nepal and Turkey.¹⁴⁹

A notable global trend that was underlined in the 2010 Report relates to the increase in indoor cultivation of marijuana, pinpointing Europe, Australia and North America as the main hotspots of this industry through involvement of organised criminal operations seeking to supply local markets without incurring the risks that are normally attached with transnational trafficking by importation.¹⁵⁰ The 2011 Report pointed out that in the period of 2010 the hashish industry of Afghanistan was even more lucrative than its opium poppy industry. The 2012 Report described cannabis as

“... the world's most widely used illicit substance... there are between 119 million and 224 million cannabis users worldwide and consumption is stable”,¹⁵¹ however, the “... localized, small-scale nature of cannabis cultivation and production makes it very difficult to assess.”¹⁵²

3. The ongoing war on drug trafficking

Needless to say, such observations emanating from the UNODC point to a conclusive assertion: despite the progress made in some areas, the war on drugs has not made any significant headway. More studies emerge indicating the costly futility of the completely prohibitionist strategies that have been employed so

¹⁴⁷(n23) xi

¹⁴⁸(n6) 190

¹⁴⁹(n6) xi

¹⁵⁰(n2) 26

¹⁵¹United Nations Office on Drugs and Crime, World Drug Report 2012 (Vienna, 2012) 2

¹⁵²ibid

far. The overall demand for the sale of drugs has not substantially decreased.¹⁵³ Thus, notwithstanding law enforcement efforts, the drug trafficking trade has not, by any means, diminished; in numerous scenarios it has stabilised and in some cases it is even on the increase. As a matter of public health and social policy, it is an ongoing challenge which must be constantly addressed and tackled with unflinching optimism by the authorities. However, the negative side effects of drug trafficking, and consequently of the policies basing the war against it, on both developing countries (as producers) and industrialised nations (as end-user markets), cannot be ignored. The far-reaching presence of this illicit trade is a colossal threat that is capable of wreaking havoc in whole communities as well as paving the way for developments which give rise to regional unrest, as seen in various parts of the globe.

Within this context, the effects of drug trafficking have to be analysed in relation to three crucial aspects. Firstly, one should realise the possibility that the 'traditional' prohibitionist approach to drug trafficking could be a trigger for the commission of high levels of violence between the authorities and traffickers, or competing factions of the latter, potentially inflicting significant collateral damage on exposed sections of the public.¹⁵⁴ Secondly, one should acknowledge the immensity of this underground market which yields staggering profits that pave the way to corruption, resulting in the erosion of a State's judicial and administrative frameworks, particularly those pertaining to states with institutional fragility but also encompassing states with supposedly sound systems of enforcement.¹⁵⁵ Finally, one should properly address the prevalent link between drug trafficking and other major criminal activities such as money laundering together with the financing of insurgencies and terrorist activity (that leads to the further perpetration of gross criminality worthy of international concern).¹⁵⁶

3.1 Drug trafficking as a source of widespread violence

Drug-related violence is not solely confined within the traditional concept of violence committed as a direct result of drug-induced psychosis fuelled by consumption and abuse,¹⁵⁷ but also relates to a culture of violence which

¹⁵³ Juan Carlos Garzón Vergara, 'Fixing a broken system, Modernizing drug law enforcement in Latin America', (International Drug Policy Consortium, Transnational Institute, Series on Legislative Reform of Drug Policies, 2014) 38

¹⁵⁴ *ibid* 1

¹⁵⁵ *ibid* 4

¹⁵⁶ Bantekas Illias and Nash Susan, 'International Criminal Law' (2nd edition, Cavendish Publishing, UK, 2003) 225

¹⁵⁷ Dan Werb; Greg Rowell; Gordon Guyatt; Thomas Kerr; Julio Montaner; Evan Wood, 'Effect of Drug Law Enforcement on Drug-Related Violence: Evidence from a Scientific Review' (International Centre for Science in Drug Policy, 2010) 5

constantly manifests itself in scenarios where drugs are produced or heavily marketed, generally sparked by criminal organisations in their pursuit of gaining or maintaining a share of the lucrative trade.¹⁵⁸¹⁵⁹ Criminal organisations, syndicates, cartels and gangs who invest in drug trafficking and derive their primary source of financing from this illicit trade have been implicated in a considerable proportion of homicides perpetrated within their respective areas of control.

For instance, despite the USA being a nation with a relatively potent political, administrative and judicial structure, an analysis made on drug trafficking gangs within the city of Chicago demonstrated these groups' connection with a quarter of cases of violent assault and homicide.¹⁶⁰ Similarly, in Los Angeles, gang violence linked to drug trafficking accounted for 43% of the 1,365 homicides perpetrated in the period between 1994 and 1995.¹⁶¹ In North America, the profits made from illicit trading of marijuana are a powerful source of corruption and social instability. The same market, within the British Columbian and Canadian scenarios, was recently estimated to tally up to an annual 7 billion Canadian dollars and, as a result of such prospects, fierce gang wars have been waged to stake such profits, particularly those emanating from the export of the substance to the USA.¹⁶²

Violence as a result of drug trafficking can destabilise entire countries. Key examples of this phenomenon are Colombia, Mexico, Brazil and Afghanistan and western African countries as states with less robust frameworks that have the tendency of responding to extensive drug trafficking (conducted even by paramilitary or terrorist groups) with the militarisation of law enforcement, which makes the situation even more grimmer; clashes between military forces and Colombian cartels in 1999 accounted for the Colombian casualty ratio of 1 out of every 1000 Colombians, a figure 10 times higher than that of the USA.¹⁶³ Similarly, following a Mexican nationwide counternarcotic campaign in 2006, violence exploded within the territory, with an estimate of 17,000 casualties up to 2010.¹⁶⁴ The logic of violence in drug wars, "criminal conflict"¹⁶⁵ as termed by

¹⁵⁸ibid 5, 7, 15

¹⁵⁹See Steven D. Levitt and Sudhir Alladi Venkatesh, 'An Economic Analysis of a Drug-Selling Gang's Finances', <<http://pricetheory.uchicago.edu/levitt/Papers/LevittVenkateshAnEconomicAnalysis2000.pdf>> accessed 21 August 2015

¹⁶⁰(n47) 7

¹⁶¹ibid

¹⁶²(n47) 17

¹⁶³ibid

¹⁶⁴ibid

¹⁶⁵(n43) 4

Benjamin Lessing,¹⁶⁶ which is found predominantly in environments such as that of South America, denotes organised crime violence which involved non-state actors who, unlike revolutionary insurgents, do not necessarily have the downfall of the State's government as their main mission,¹⁶⁷ yet potentially inflicting an even higher level of widespread violence than situations of armed conflicts sparked from civil conflict, insurgencies or coups.¹⁶⁸ Violence is essentially a natural consequence to the criminals' competition for drug trafficking profits, a business scenario absent from formal recourse and dispute resolution mechanisms, as argued by Jeffrey Miron:

Prohibition creates violence because it drives the drug market underground. This means buyers and sellers cannot resolve their disputes with lawsuits, arbitration or advertising, so they resort to violence instead.¹⁶⁹

3.2 Drug trafficking and institutionalised corruption

The copious profits yielded from drug trafficking contribute to various factors that could empower organised crime groups operating in the industry, from mere self-enrichment to increased resources for aggressive expansion (such as recruitment and arming) and also facilitating the infiltration of the concerned State's organs for the accruing of support and protection from key influential persons, particularly those in public office, through acts of bribery or shares in criminal proceeds. The standards of political accountability, as well as the quality of checks and balances against corruption, within a given State may, to a large extent, contribute to the level of potentiality for organised crime influencing key positions within such a State's political or administrative framework. As detailed by the United Nations Development Programme, three fundamental dimensions of State capacity can be categorised as: institutional environment; strategic autonomy; and legitimacy.¹⁷⁰ This approach is mostly relevant with regards to the severity of the South American scenario or the situation in the Kachin State in Myanmar. However, studies show that even in states with sound governments and sufficient resources that should enable them to fully apply a prohibitionist agenda, criminality can still create avenues where a State's presence and role

¹⁶⁶See Benjamin Lessing, 'The Logic of Violence in Criminal War: Cartel-State Conflict in Mexico, Colombia and Brazil' (CDDRL Working Papers No. 145, Stanford University, 2013)

¹⁶⁷(n43) 4

¹⁶⁸ibid

¹⁶⁹(n47) 15

¹⁷⁰See United Nations Development Programme, 'Citizen Security with a Human Face: Evidence and Proposal for Latin America' (Regional Human Development Report, 2013-2014) 2-3, 12-17

against trafficking can be prone to calibration in ways that facilitate criminality.¹⁷¹

Research concerning the USA, ironically one of the major players in the global war against drug trafficking, demonstrated that between 2005 and 2012, a total of 144 employees of State border security agencies were arrested or indicted for corrupt activities, 65% of this figure having been stationed along the south-west (Mexican) border during the commissioning of such crime.¹⁷² Police corruption in First World States traditionally involves mutually beneficial agreements between drug traffickers and police officers in the form of bribes in exchange of information, operational protection and immunity from arrest.¹⁷³ Furthermore, police corruption can take the form of illegal practices conducted by officers even to the detriment of criminals, such as the unlawful confiscation and use of drug money or stocks (resulting in their eventual recirculation) or the submission of false reports or testimony concerning potentially illegal or unconstitutional searches.¹⁷⁴ Generally these crimes would trace back to a small, closely-knit group of officers working, cooperating and coordinating with each other. The vast majority of these cases comprise what are termed as 'mission-compromising corruption activities';¹⁷⁵ that is, conduct which severely hinders the positive efforts taken in the war against drugs and in most cases also facilitates or engages in this criminal trade and others, such as the trafficking of small arms, light weapons and possibly even portable weapons of mass destruction.¹⁷⁶

With regard to corruption within settings of weak institutional control, such as in the cases of Latin America or parts of Africa and the Middle East, one encounters situations where governmental control is absent or otherwise reconfigured by private interests and illegal actors. These environments, where the concerned State may lack the capacity to enforce its own laws, give rise to a considerable level of distrust by the public towards the authorities' legitimacy. Such atmospheres demonstrate a prevalent nexus between organised crime and politics, underlining the fragility of the State's framework of governance, whereby criminal groups may push for particular political and legal decisions

¹⁷¹ *ibid*

¹⁷² Report to Congressional Requesters, 'Border Security: Additional Actions Needed to Strengthen CBP Efforts to Mitigate Risk of Employee Corruption and Misconduct' (United States Government Accountability Office, Washington DC, 2012) 8

¹⁷³ DrugWarFacts.org, <http://www.drugwarfacts.org/cms/Corruption#sthash.yla76BmI.lPR2vgbV.dpbs>, accessed 21 August 2015

¹⁷⁴ David Cole, 'No Equal Justice: Race and Class in the American Criminal Justice System' (New York: The New Press, 1999) 23

¹⁷⁵ (n56) 11

¹⁷⁶ *ibid* 6

that are favourable to their respective interests, often in coalition with existing power structures.¹⁷⁷¹⁷⁸¹⁷⁹ As once reported by the United Nations Drug Control Program,

...wherever there is a well-organised, illicit drug industry, there is also the danger of police corruption... In systems where a member of the legislature or judiciary, earning only a modest income, can easily gain the equivalent of some 20 months' salary from a trafficker by making one "favourable" decision, the dangers of corruption are obvious.¹⁸⁰

4. An outlook on the main international public law instruments

The war on drugs is spearheaded on a public international law level mainly by three instruments: The Single Convention on Narcotic Drugs of 1961 (hereinafter "Single Convention") which was then amended in the year 1972; the Convention of Psychotropic Substances of 1971 (hereinafter "1971 Convention"); and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (hereinafter "Vienna Convention"). These Conventions mainly advocate a global prohibitionist approach towards the issue of drug trafficking and drug abuse and have been used as a model for a vast amount of domestic laws which follow the same prohibition agenda. None of these instruments differentiate between the contemplated substances on a level of severity; hence there is no distinction found between 'soft' and 'hard' drugs in their respective texts. The wording used as being on a broad level, which is the inevitable result of the negotiations, agreements and compromises reached between signatories during the drafting of the legal instruments.¹⁸¹

Ultimately, the Conventions needed to be relatively consistent with the extensive amount of legal systems, each having its own juridical interpretations and standards on the criminality behind certain behaviour. As such, the Conventions were made to be of indirect applicability, therefore capable of being implemented through their incorporation within a State Party's national law;¹⁸²

¹⁷⁷(n43) 5

¹⁷⁸See also Juan Carlos Garzón, 'Mafia & Co. The Criminal Networks in Mexico, Brazil and Colombia' (Woodrow Wilson International Centre For Scholars *Latin American Program*, 2008) 136-139

¹⁷⁹See also Ivan Briscoe and Martin Rodríguez Pellecer, 'A state under siege: elites, criminal networks and institutional reform in Guatemala' (Netherlands Institute of International Relations, The Hague, 2010) 2, 8-13, 19, 29, 31, 39, 41-50

¹⁸⁰United Nations International Drug Control Program, 'Economic and Social Consequences of Drug Abuse and Illicit Trafficking' (Technical Series Report No. 6, 1998) 39

¹⁸¹Krzysztof Krajewski, 'How flexible are the United Nations drug conventions?' (International Journal of Drug Policy, 1999) 330

¹⁸²ibid

notwithstanding the primacy of public international law, this doctrine cannot be implemented at a domestic level in an unconstitutional manner or otherwise providing 'irregular' solutions from a constitutional perspective.¹⁸³

The substantial differences which are manifested between the first two Conventions and the third one indicate the shifting in the prohibitionist attitudes and perceptions towards drug policy,¹⁸⁴ whereby the Single Convention and the 1971 Convention

...primarily contain provisions of an administrative nature... in an effort to establish an international system for controlling the legal production of and trade in narcotics and psychotropic substances.¹⁸⁵

In fact, both instruments require the application of criminal policy measures only with regards to the supply side of the drug issues. On the other hand, the Vienna Convention focuses specifically in matters relating to criminal law, such as offences, sanctions, extradition procedures, mutual legal assistance, investigation methods, and various other elements. The question remains, however, whether the intention of such Conventions was the application of criminal measures designed to combat the supply factor of the industry controlled by organised crime and terrorism or whether it also extends to issues pertaining to the demand aspect of the trade, relating to the consumption and consumerism motivating the market. It can be inferred that the *raison d'être* of the three instruments is based on the assumption that if drug demand was suppressed with penal sanctions, it would directly lead to lesser frequencies in supply.¹⁸⁶ As outlined in the goals of the latest legal instrument, the Vienna Convention,

The Parties... desiring to eliminate the root causes of the problem of abuse of narcotic drugs and psychotropic substances, including the illicit demand for such drugs and substances and the enormous profits derived from illicit traffic...¹⁸⁷

This clearly indicates that the Vienna Convention seems to encompass the concept of 'trafficking' in the broadest of definitions, roping in both the supply and demand elements of the system. In fact, Article 3, paragraph 2, clearly stipulates that.

¹⁸³ *ibid*

¹⁸⁴ *ibid*

¹⁸⁵ Stewart DP, 'Internationalizing the war on drugs: the UN convention against illicit traffic in narcotic drugs and psychotropic substances' (Denver J International Law Policy, 1990) 390

¹⁸⁶ (n71) 331

¹⁸⁷ United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988) 1

Subject to its constitutional principles and the basic concepts of its legal system, each Party shall adopt such measures as may be necessary to establish as a criminal offence under its domestic law, when committed intentionally, the possession, purchase or cultivation of narcotic drugs or psychotropic substances for personal consumption contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention.¹⁸⁸

At face value, this section of the Vienna Convention may seem somewhat contradictory when taking into consideration that most of the text of the instrument deals with the narrow sense of trafficking, namely, the large-scale trafficking perpetrated by transnational organised crime. However, international treaties are not purely legal documents, and are greatly influenced by the politics behind the negotiations undertaken in their formulation. In this sense, the main ‘opposing’ stakeholders are on one side the states considered to be the producers of illegal substances, mainly consisting of the developing countries of South America and Asia; and on the other side there are those states which end up as the main markets of such illegal commodities, that is, the industrialised countries of North America and Europe.¹⁸⁹ Therefore, such international agreements will have a tendency to boil down to the striking of a fair balance between the duties and obligations of both groups of stakeholders in tackling the criminal phenomenon on each front, be it supply or demand.

Nonetheless, the increasing awareness of the reality that drug demand is in fact a social and public health ailment leads to the adoption of strategies which aim to focus on an increasingly cure-based approach directed at the end-users within the drug trafficking markets. Article 3, paragraph 4 of the Vienna Convention provides some space whereby signatories could opt to implement some form of measures based on education, rehabilitation, social reintegration, “... in appropriate cases of a minor nature... as an alternative to conviction or punishment”¹⁹⁰ as well as treatment and aftercare in cases “when the offender is a drug abuser”.¹⁹¹ These measures can also be implemented “... in addition to conviction or punishment of an offence established in accordance with paragraph 2...”.¹⁹² This would entail that consumers and addicts who are criminally prosecuted for offences other than possession, cultivation or purchase of drugs for personal consumption, such as the sale of drugs to substantiate a drug habit, would not necessarily be punished by penal sanctions. However, this

¹⁸⁸ *ibid*, Article 3, paragraph 2

¹⁸⁹ (n71) 334

¹⁹⁰ (n77) Article 3, paragraph 4, sub-paragraph c

¹⁹¹ *ibid*

¹⁹² (n77) Article 3, paragraph 4, subparagraph d

would depend not only on the circumstances revolving around each specific and individual case, but also on the extent of flexibility the concerned State Party wishes to adopt by applying a treatment-based, as opposed to punishment-based, approach within its drug laws.

5. Standing and alternative legal strategies against drug trafficking

In search for the most feasible strategy to deal with drug trafficking, lawmakers are faced with one fundamental question on which of the following three policies to adopt: the persistent application of a prohibitionist approach; the adoption of strategies advocating legalisation of all or specific types of drugs; or otherwise focusing on decriminalisation policies which uphold the strict oppression of drug trafficking while tackling drug demand and consumption mainly as social and medical issues rather than as criminal offences.

5.1 Drug prohibition *vis-à-vis* drug trafficking

The prohibitionist agendas have traditionally been applied extensively and rigidly in the vast majority of the domestic jurisdictions, in some scenarios such crimes warranting even lifelong incarceration and capital punishment. Although prohibition objectives traditionally retain very strong political endorsements, actual results have been dismal. The oppressive suppression of drug trafficking has proven to be ineffective in *completely* stamping out related organised crime. A clear case in point would be the relentless presence and vitality of transnational criminal networks such as, for instance, the rise of the BACRIM as a fractured network of smaller drug-trafficking groups with a greater inclination for violence, emerging from the costly eradication of Colombia's Cali and

Medellin cartels.¹⁹³ While the unintended consequence of increased drug-related violence might be acceptable to the general public as part of law enforcement's objective to substantially reduce the flow of illegal drugs, research clearly indicates that there has not been a meaningful reduction in drug supply or use.

The main mission behind a 'zero-tolerance' drug prohibition is that supply reduction would lead to price increases which would then discourage drug consumption and diminish drug abuse. However, experience would indicate that raising the risk of arrest, incarceration or asset seizure would not increase such prices, so much so that it has only brought about the replacement of players within the particular vicious circles while mandatory minimum sentencing policies for drug consumers guaranteed swelling in prison populations to the

¹⁹³ Jeremy McDermott, 'The BACRIM and Their Position in Colombia's Underworld',

< <http://www.insightcrime.org/investigations/bacrim-and-their-position-in-colombia-underworld>> accessed 21 August 2015

detriment of the taxpayer.¹⁹⁴ ¹⁹⁵ The targets laid out in the plan of action submitted during the UN General Assembly special session, inspired by the slogan “A drug-free world, we can do it”,¹⁹⁶ have not been achieved by its deadline in 2008, despite global and regional commitments to combat drug trafficking and associated crime. States with strong institutions found that drug supply and demand remained relatively constant and consequently drug law enforcement had targeted only the minor aspects and the weakest links of the criminal system. Furthermore, states with weaker frameworks discovered that the prohibitionist agenda seemed to empower the relevant criminal organisations, thus undermining the foundations of the State and the authority of its government.

It could be argued that the strict application of these public international law instruments could impose considerable limitations upon their respective signatories to develop their own tailor-made drug policies at a national level, although as such there always remains some form of leeway for reforms and liberalisation, which could somehow lead to legalisation. Legalisation would entail that the legality of drug use would not be confined solely within medical and scientific pursuits, as is the case in prohibitionist systems, and therefore it would lead to the lifting of provisions which criminalise the extra-medical use of drugs, thus legalising, or at least decriminalising, the supply and demand aspects of the drug market, under specified conditions. Administrative regulations would be still applicable, ideally backed by criminal sanctions to impose the expected level of conformity, in the same identical manner as imposed upon the sale and consumption of alcohol and tobacco. However, as argued by Vanda Felbab-Brown:

“On its own, [legalisation] is unlikely to address a host of problems associated with organised crime... Although frequently portrayed as an effective solution to the problem of organised crime, mere legalization of illicit economies, particularly of drugs, is no panacea.”¹⁹⁷

¹⁹⁴(n71) 17

¹⁹⁵See also ‘Shoveling Up II: The Impact of Substance Abuse on Federal, State and Local Budgets’

<<http://www.casacolumbia.org/addiction-research/reports/shoveling-ii-impact-substance-abuse-federal-state-and-local-budgets>> accessed 16 April 2015

¹⁹⁶(n71) 17

¹⁹⁷Vanda Felbab-Brown, ‘How to solve the problem without generating even greater violence’, (The World Today, Drug Policy, 2012) 18

5.2 The considerations behind drug legalisation policies

The two main arguments behind the legalisation of all or specified drugs in relation to tackling organised crime are that firstly it would render severe deprivation of resources to criminal groups, and secondly it would unshackle law enforcement authorities from part of the war against illicit drugs, allowing them to focus on the main players or other types of serious crime which may be interlinked with drug trafficking as an organised criminal activity, such as the arms trafficking or terrorism. These considerations, however, do not eliminate the inevitable risks of opening the floodgates to drug consumption upon society, since drug use would not constitute a criminal or administrative offence. Governments may opt to legalise the use and also the production of addictive substances whilst riding out the consequences of potentially greater drug use within society for the sake of other objectives. Some of these objectives would consist of providing better health care to those with compromising degrees of addiction, diminishing prison populations, generating higher revenues from taxation and accumulating better quality drug research and statistics.

Nonetheless, the fact remains that in the absence of a robust State presence that is capable of implementing effective law enforcement, such absence being a reality in various parts of Latin America and Africa, there can be few safeguards against the infiltration of organised crime even within a legalised drug trade. Legalisation is in no way a measure that guarantees control by the State government, and this can be seen in various instances of illegal businesses operating side-by-side and competing with their legal counterparts, such as the logging, fossil fuel and mineral industries, or the smuggling of legal goods such as alcohol, tobacco, medicines and (stolen) automobiles.

This could potentially lead to the birth of yet another grey market that deals in drugs on the premise that legalisation operates to tax drug consumption and therefore organised crime could step in to undercut the State by charging less¹⁹⁸ (which is a major dilemma in the recently launched Uruguayan scenario of cannabis legalisation)¹⁹⁹ and possibly participate covertly within the legal sphere as suppliers using 'frontmen' schemes. The resulting implications would be that the State's law enforcement would in fact need a similar amount of resources as that used within a prohibition model to maintain adequate control. These resources would be necessary to monitor the market and enforce proper legal compliance within the licit industry, inevitably waging an extended war on the underground aspect of the legal drug trade with similar prohibitionist

¹⁹⁸ibid 19

¹⁹⁹See Alfredo Pascual, 'Cannabis Legalization in Uruguay – A Good Idea Turning Into a Bad Experiment', (Austrian Economics Center, 2014 Book Project, 2014)

enforcement tactics, such as the eradication of unregistered crops and the dismantling of irregular workshops.

Legalisation policies that are implemented within the jurisdiction of states with sound legal and political frameworks are also not immune from criminal practices within their system. Recent investigations indicated that the new regime of legalised marijuana within the American state of Colorado, as established by Amendment 64,²⁰⁰ has been exploited by traffickers, some of them suspected of having Russian *mafia*²⁰¹ and outlaw biker gang²⁰² affiliations. The corruption of legalisation laws consisted of using the zone's jurisdiction to cultivate and source cannabis to other states in America by means of a parcel package distribution system, as corroborated by seizure data.²⁰³ Wisconsin, Illinois, Alabama, Maryland, Massachusetts, California, Wyoming and Minnesota were among the targeted American federal states that were receiving cannabis consignments via mail trafficking flows.²⁰⁴ There have also been investigations relating to Colombian cartel involvement in the unsanctioned cultivation, manufacture and distribution of marijuana within Colorado. DEA spokesperson

Albert Villasuso stated the DEA's concern on the possibility of cartels employing frontmen and engaging in the sale of cannabis through both licit and black market channels.²⁰⁵

6. Drug decriminalisation: a halfway point between prohibition and legalisation

Ultimately, the middle way between prohibition and legalisation is drug decriminalisation, which is gradually gaining attention in various domestic jurisdictions.²⁰⁶ Decriminalisation and depenalisation have a small number of differences between them, mostly on a question of legal consequences. Both retain the fundamental aspect of the prohibition and the illegality of the unauthorised use of drugs. However, only strict cases of drug trafficking related to the supply, distribution and the financially profitable sale of illegal drugs are criminalised. Therefore, demand or consumption of drugs (encompassing possession, acquisition, sharing or cultivation of drugs specifically for personal use) would be removed from the criminal justice sphere. The European

²⁰⁰ See Section 16 'Personal Use and Regulation of Marijuana', Article XVIII 'Miscellaneous', Constitution of the State of Colorado

²⁰¹ See Rocky Mountain High Intensity Drug Trafficking Area, 'The Legalization of Marijuana in Colorado - The Impact' (Volume 2, 2014) 117-118, 140

²⁰² *ibid* 102

²⁰³ *ibid* 118

²⁰⁴ *ibid*

²⁰⁵ *ibid* 138

²⁰⁶ Glen Greenwald, 'Drug Decriminalization in Portugal - Lessons for creating Fair and Successful Drug Policies' (CATO Institute, Washington DC, 2009) 2

Monitoring Centre for Drugs and Drug Addiction formulated a definition which describes the distinction between the two terms, stating:

“Decriminalisation” comprises removal of a conduct or activity from the sphere of criminal law. Prohibition remains the rule, but sanctions for use (and its preparatory acts) no long fall within the framework of the criminal law... “Depenalization” means relation of the penal sanction provided for by law. In the case of drugs, and cannabis in particular, depenalization generally signifies the elimination of custodial penalties.”²⁰⁷

6.1 The Portuguese model of drug decriminalisation

Portugal initiated a nationwide policy of drug decriminalisation way-back in July 2001 and to date, there has been positive sentiment towards this decision. In fact, inter alia there has been no substantial call for its reversal yet.²⁰⁸

Principally, the relevant statute stipulates that the “consumption, acquisition and possession for one’s own consumption of plants, substances or preparations... constitute an administrative offence.”²⁰⁹

Focus is considerably diverted on the medical and social welfare of drug abusers: in fact, administrative sanctions can be suspended on condition that the concerned first-time offender seeks treatment.²¹⁰ Sanctions, where applicable, vary these include: suspension of the right to practise a licensed profession, ban from high risk locales or association with specified individuals, prohibition on travel and termination of public benefits. Essentially, drug trafficking in Portugal is defined as “possession of more than the average dose for ten (10) days of use”.²¹¹ The furnishing of drugs to minors or persons suffering from mental illness also constitutes an offence and inevitably an aggravating circumstance to the standing prohibition on trafficking, carrying a punishment of imprisonment between 4 to 12 years.²¹²

Law enforcement officials who encounter cases of drug use and possession are to issue citations but are not permitted to make arrests.²¹³ At the same time the policing authorities have been very supportive towards Portugal’s drug reform

²⁰⁷ European Monitoring Centre for Drugs and Drug Addiction, ‘Illicit Drug Use in the EU: Legislative Approaches’ (EMCDDA Thematic Papers, Lisbon, 2005) 4

²⁰⁸(n96) 1, 4

²⁰⁹(n96) 3

²¹⁰ibid

²¹¹ibid

²¹²(n96) 4

²¹³ibid

on account of decriminalisation providing better chances for abusers to curb their addictive practices through State intervention and assistance.²¹⁴ In the long run, what the Portuguese initiative seeks to achieve is to maintain the suppression of drug trafficking as a transnational, organised criminal enterprise. At the same time this initiative will stimulate measures to decrease demand not by punishment or prosecution, but rather by tackling drug consumption as a socio-medical challenge through appropriate educational and therapeutic channels.

6.2 The recently amended Maltese scenario

Fully aware of the above and other related scenarios, the Maltese government has very recently launched the “Drug Dependence (Treatment not Imprisonment) Act”²¹⁵ (hereinafter referred to as “the Drug Dependence Act”). Designed, on one hand, to provide the proper attention to persons who are found in possession of small quantities of illegal drugs in circumstances that denote personal use without processing the incident as a criminal case, and on the other hand to implement a strategy based on rehabilitation, rather than punishment, with regards to persons suffering from some form of illegal drug dependence.²¹⁶ The fundamental reasoning underlying this development is that, in acknowledgement of the fact that drug abuse is indeed a social ailment, the fight against drug trafficking pursued for financial gains will persist whereas a modicum of understanding and assistance should be made available to those caught up within such vicious circles as drug consumers.

This concept is actually endorsed by various international agreements pertaining to the United Nations. Special reference can be made to the UN Standard Minimum Rules for Non-Custodial Measures, as well as congruent with the recent position adopted by the International Narcotics Control Board which emphasised that a degree of proportionality must be applied in cases concerning personal possession, purchasing, cultivation and use of narcotics instead of prosecution and punishment. The underlying philosophy is that drug laws should reasonably reflect and be calibrated according to the severity of the act in question, as well as the role of the person accused within the criminal drug market as distinguishing factors.

²¹⁴See Caitlin Hughes and Alex Stevens, ‘The Effects of Decriminalization of Drug Use in Portugal’, (The Beckley Foundation Drug Policy Programme, Briefing Paper 14, 2007) 1-2, 4, 6, 8-9

²¹⁵Laws of Malta, Drug Dependence (Treatment not Imprisonment) Act (Chapter 537)

²¹⁶Ministry for Justice, Culture and Local Government, ‘*Riforma tal-Ligijiet dwar id-drogi tal-abbuż*’, (Government of Malta, White Paper, 2014) 11

The Drug Dependence Act operates along other domestic legislation, namely the Dangerous Drugs Ordinance²¹⁷ (hereinafter referred to as “Chapter 101”) and the Medical and Kindred Professions Ordinance²¹⁸ (hereinafter referred to as “Chapter 31”), in setting the parameters for distinguishing cases of gainful drug possession and trafficking from others motivated by drug dependency or pertaining to lesser roles within a drug chain. Chapter 537 in fact excludes the application of the aforementioned older drug laws only where provision is made.²¹⁹ In fact, reference is made in the Drug Dependence Act to the Fourth Schedule of both Chapter 101 and Chapter 31, insofar that if a person is found in possession of an amount of a prohibited drug which is falls short of the amount indicated in the Guidelines of the said Schedules, irrespective of purity, the case may be tackled before the new Drugs Court.²²⁰

This measure depends on the satisfaction of three conditions: firstly, the offence, whether in violation of drug laws or any other law, is “... substantially attributable to the grave and medically proved drug dependence of the accused”;²²¹ secondly, the offence, other than any violation of the drug laws, does not consist of a wilful offence against the person or of a crime committed whilst the accused was “... in possession of arms proper...”;²²² and finally if there are “... objective reasons that the accused is likely to be rehabilitated from drug dependence or that he has made substantial progress or effort to free himself of drug dependence”.²²³ These conditions have to be deemed as having been satisfied by the Court of Magistrates in conjunction with its considerations after hearing submissions made on behalf of the accused and prosecution (as well as any testimony such Court may deem proper to hear), together with consultation provided by the Drug Offenders Rehabilitation Board. The Court of Magistrates, in its role as a Court of Criminal Judicature, may still take the above into consideration when punishing cases of possession of drugs for personal use which had been initiated prior to the introduction of Drug Dependence Act, and may nonetheless opt to apply such measures provided by the said legislation for such cases.

The Fourth Schedule in both Chapter 101 and Chapter 31, introduced recently in 2014, provide highly significant guidelines in terms of interpreting a violation of drug laws. Two roles emerge from such interpretation which are considered exercised in pursuit of an organised criminal agenda, manifesting in two

²¹⁷Laws of Malta, Dangerous Drugs Ordinance (Chapter 101)

²¹⁸Laws of Malta, Medical and Kindred Professions Act (Chapter 31)

²¹⁹(n105) Article 3, sub-article 2

²²⁰ibid Article 8, sub-article 2

²²¹ibid paragraph a

²²²ibid paragraph b

²²³ibid paragraph c

different degrees: a leading or a significant role. Significant roles are deemed to be those related to: the organisation or direction in buying and selling of a drug “... on a commercial scale”;²²⁴²²⁵ the existence of substantial links and significant influence enjoyed by the accused on other persons in a drug trafficking chain (including links to original sources); the acquisition or *expectation* of *substantial* financial gains; the use of a legitimate business as a shield or ‘front’ for drug trafficking business; and abuse of a position of trust or responsibility (such as an occupation in a correctional facility and legal or medical professions). Significant roles are deemed as those pertaining to: operational or managerial functions in a drug chain; the exertion of pressure, influence, intimidation or reward by the accused on others for their participation in a drug trafficking operation; participation by the accused in pursuit of financial or other advantages (even in solo ventures); the accused’s apparent awareness and understanding of the scale of the operation; and the supply of drugs to a prisoner without coercion (if the accused is not in a position of trust and responsibility).

6.3 The main issues behind the Maltese approach

On a practical level, the amendments introduced in the Maltese system follow the Portuguese model insofar as first-time offences in cases of drug possession for personal use would be faced with administrative sanctions. However, for cases to be considered these would entail only possession of a prohibited drug, other than cannabis, in a quantity of not more than 2 grams or 2 ‘ecstasy’ or similar pills, irrespective of purity, “... in circumstances which do not give rise to reasonable grounds to believe that the prohibited drug is not for personal use by the person in possession thereof”.²²⁶ In terms of possession of cannabis for personal use the threshold is 3.5 grams,²²⁷ or the cultivation of up to one plant. However the Court must be satisfied of the circumstances denoting personal possession and the offence may nonetheless give rise to suspended sentences of imprisonment or the application of probation orders²²⁸ which are inherently measures pertaining to the criminal justice system.

This interpretation of possession for personal use is more restrictive than the position followed in the Portuguese model and therefore the notion of drug trafficking remains quite relevant in cases which exceed the thresholds of the Drug Dependence Act. Whether this will yield better, long and short term results when compared with Portuguese jurisdiction remains to be seen. Furthermore, simple possession remains a criminal offence which would still empower the

²²⁴(n107) Fourth Schedule (Article 22), 52

²²⁵(n108) Fourth Schedule (Article 120A), 43

²²⁶(n105) Article 4, sub-article 1.

²²⁷ibid

²²⁸ibid Article 7.

police to execute arrests, as implied in the aforementioned position on cannabis cultivation for personal consumption as well as in the wording emanating from the Commissioners for Justice Act, stipulating that,

“Notwithstanding the other provisions of this Act, an offence against the Dangerous Drugs Ordinance or against the Medical and Kindred Profession Ordinance which is triable under this Act shall not cease to be a criminal offence and the courts of criminal jurisdiction shall retain a concurrent jurisdiction to try that offence...”²²⁹

The main aim behind this stance is supposedly a measure to combat drug trafficking.²³⁰ However, this raises a number of questions. Firstly, on whether the power of arrest applicable in cases of simple possession is in fact an unforeseen shift of the new law from the once envisaged decriminalisation to *de facto* depenalisation. Moreover, on the premise that the war against drug trafficking will continue to include direct police action, such as the arrest and interviewing of drug users caught with simple possession of drugs, one could legitimately question whether such a strategy is in fact a recycling of the practice in which authorities would focus on the weakest links of the drug trade, the end-users and addicts, as well as large-scale suppliers and distributors. This scenario may hinder law enforcement from investing its resources entirely to diminish the workings of the actual traffickers and organised crime.

In prosecuting drug users within the criminal justice system as a measure against drug trafficking, one would assume that the purpose would be for the relevant authorities to maintain a rigid stance against criminality, and possibly to acquire information on a trafficking source from its drug abusers via cooperation with the police. In this case, the pertinent questions would revolve on: what are the legal and judicial consequences on the accused should the individual refrain from cooperating and providing intelligence out of fear, or merely in the exercise of the right to silence? Also, should such a drug user under arrest decide to provide information, how useful will such cooperation be to investigate further on large-scale or leading traffickers who have minimal or no contact with end-users? What will the safeguards be against potential reprisals as a result of such collaboration with law enforcement, even in terms of the provision of testimony? If guarantees are made, for example, through witness protection programmes, knowing that organised crime virtually knows no moral boundaries in

²²⁹Laws of Malta, ‘Commissioners For Justice Act’ (Chapter 291), Article 3, sub-article 4

²³⁰Neil Camilleri, The Malta Independent, ‘Simple possession to remain an ‘arrestable offence’ – but only to fight drug trade – Bonnici’, <<http://www.independent.com.mt/articles/2015-03-17/local-news/Simple-possession-to-remain-an-arrestable-offence-but-only-to-fight-drug-trade-Bonnici-6736132323>> accessed on 21 August 2015

retribution, how strong will their feasibility and effectiveness be, especially in a small geographical area such that of the Republic of Malta?

On the other hand, based on the Guidelines provided in the Fourth Schedule of Chapter 101 and Chapter 31, persons found in quantities less than 100 grams for cocaine and heroin, 300 grams for cannabis and 300 tablets for 'ecstasy' type drugs and amphetamines (such drug groups being the most popularly used within Maltese territory)²³¹, any marginal lesser amount can be still reasonably attributable to consignments used by professional drug runners or pushers working for suppliers in a drug trafficking chain. If the conditions of Article 8 sub-article (2) of the Drug Dependence Act are somehow satisfied in a given scenario, does this necessarily mean that mid-scale drug trafficking professionals may have a window of opportunity to admit before the authorities that they are allegedly heavy drug consumers and thus evade criminal prosecution? How strict will the competent evaluation board²³² be in assessing the veracity of a person's claimed drug addiction in the light of such considerable amounts found in their possession? Whether the Drug Dependence Act will, in due course, prove to be an instrumental mechanism in sifting cases of professional drug trafficking or, alternatively, a loop-hole to be exploited by middle or lower scale traffickers, depends entirely on the approach adopted by the Courts and the Drug Offenders Rehabilitation Board when applying these amendments.

7. The potential role of the International Criminal Court in the struggle

The International Criminal Court (hereinafter 'ICC') may also have a role to play in the fight against organised crime within a drug trafficking context. Given the fact that drug trafficking has been employed as a main source of funding to non-state actors, in the form of armed insurgent groups²³³ as well as terrorist organisations,²³⁴²³⁵ it goes without saying that core crimes have been

²³¹ European Monitoring Centre for Drugs and Drug Addiction <<http://www.emcdda.europa.eu/data/stats>> accessed 21 August 2015

²³² See Articles 8 and 9 of the Drug Dependence (Treatment Not Imprisonment) Act, Chapter 537 of the Laws of Malta

²³³ See 'Insurgent Involvement in the Colombian Drug Trade – Drug Intelligence Report' (Intelligence Division – Drug Enforcement Administration, U.S. Department of Justice, June 1994)

²³⁴ See LaVerle Berry; Glenn E. Curtis; Rex A. Hudson; Nina A. Kollars, 'A Global Overview of Narcotic-Funded Terrorist and other Extremist Groups' (The Library of Congress, Federal Research Division – Washington, May 2002)

²³⁵ See also United Nations Office on Drugs and Crime, 'Drug trafficking and the financing of terrorism', <<https://www.unodc.org/unodc/en/frontpage/drug-trafficking-and-the-financing-of-terrorism.html>> accessed 21 August 2015

perpetrated whilst resourced by the proceeds of drug trafficking. Seeing that drug trafficking is also a major maritime security threat and a main motor behind other offences such as money laundering, arms trafficking and the financing of crimes under international criminal law, the international community should rethink on the ICC's role, especially in cases of armed groups perpetrating such crime and the host state being unable or unwilling to take all steps necessary to prosecute the perpetrators.

The ICC should enjoy jurisdiction on public officials involved in corrupt practices that facilitate drug trafficking, or see them fairly prosecuted by means of complementarity within the concerned state's jurisdiction. Whilst it can prove difficult to satisfy the necessary requirements for *mens rea* in traditional core crimes, the Chief Prosecutor for the ICC can also include charges on drug trafficking which would carry a lesser burden of proof than crimes against humanity or war crimes and increase the chances of establishing some form of conviction. This could be highly relevant in cases where a non-state actor engages in drug trafficking to illegally purchase arms to be eventually used as force multipliers against a state, community or group. When accompanied by the aforementioned traditional core crimes, drug trafficking should be considered as an aggravation to such violations. If the ICC would have jurisdiction on drug trafficking cases it could relevant cases as activities that facilitate the perpetration of core crimes. This would solidify the global stance against one of criminality's industries as a force which provides the means or the scenarios for the perpetration of gross violations of international criminal and humanitarian law.

Alternatively, large scale drug traffickers who, for some reason, would be out of the concerned state's judicial reach can be prosecuted at ICC level and thus the institution could play an instrumental part in disrupting significant criminal networks of potentially transnational proportions. From an international humanitarian law level, drug trafficking should be suppressed as an organised criminal activity with a role in money laundering and the financing of arms trafficking and terrorism, together with the staggering level of violence it has the potential to cause upon a given community, not to mention the detriments on public health. This approach can have a positive effect on mutual legal assistance between states. Should the gainful participation in drug trafficking be considered as a crime under international law via the Rome Statute, punishments can be revised accordingly in all applicable jurisdictions, depending on the extent and gain of such participation. Complementarity would be the general rule however the Chief Prosecutor could step into cases perpetrated within scenarios of

²³⁶ See also Frank Shanty, 'International Terrorism and Drug Trafficking from Afghanistan', (Library of Congress, Greenwood Publishing Group, 2011)

conflict or anarchy, or in cases of participation by public officials if it is objectively manifest that the concerned state government is unwilling to prosecute accordingly.

This can be a very delicate point in diplomatic relations and cooperation is not always guaranteed. Member States of the Rome Statute could operate together through the existing channels within Interpol, the UN and regional institutions in apprehending and prosecuting major drug traffickers at large. This initiative would raise the question on whether the ICC would then need to expand its physical reach and set up regional tribunals and observatories to effectively approach each respective area's challenges. Lack of diplomatic cooperation and 'red-tape' offered by host states in the investigation or prosecution of persons wanted for large-scale drug trafficking could be a major spoke in the wheels and, at this point, one might even explore on whether civil society can have a role in supporting the ICC's mandate.

8. Concluding thoughts

Drug trafficking is a major powerhouse of organised crime and the idealistic objective of a direct and widespread crusade against the industry, noble as it may seem, leaves too many questions unanswered in the face of increasing production and demand, too many resources squandered in terms of criminalising consumption and thus too many disillusionments as a result of corruption and the replacement of shattered trafficking networks with new equally aggressive ones. The international community should never bow their head to lawlessness and corruption notwithstanding the staggering odds however it should rethink its strategies towards the issue in pursuit of more concrete solutions. Therefore, alternative approaches which depart from traditional prohibitionist models should not be dismissed altogether but instead duly considered and, if viable, diligently applied.

At this point it is still too early to clearly evaluate the long term results of recently launched drug legalisation policies in specific jurisdictions, since such approach would still entail an extended war on illicit drug supply, as well as economic arm wrestling between authorities as legal suppliers and criminality as a black market narcotic industry. The concept of decriminalising drug possession is perhaps a more moderate approach, with a view of shrinking the consumer market which drug traffickers thrive upon, by focusing on the medical and psychological treatment of drug users rather than their prosecution, together with the constant educating of society on drug abuse, which should ideally allow authorities to focus solely on the supply factor.

The notion of suppressing drug trafficking as a crime under international law, being an activity which motivates other types of criminality (including violations

of the Rome Statute), merits more consideration, since it may unify the global stance not only against organised crime per se, but ultimately also hinder the perpetration of gross acts against humanity and the undermining of regional security and economic stability. This would inevitably involve extensive diplomatic negotiations since every region has its own challenges to this issue. A certain level of mutual trust and support would be required between the two blocs of stakeholders, being the countries which are the main areas of supply and those which have the highest consumer rates. This can only be reached by constant positive political discourse and an ongoing active participation of supranational institutions and international civil society, aimed at fostering the principle that drug trafficking is a global obstacle which can only be properly addressed through the joining of efforts at supranational level.

