PARTICIPANTS' PAPERS

THE BRAZILIAN LEGAL FRAMEWORK FOR INVESTIGATION, PROSECUTION AND TRIAL OF TRANSNATIONAL ORGANIZED CRIME

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I. INTRODUCTION

This essay expounds the current Brazilian legal system for combating national and transnational criminal organizations, detailing especially the domestic legal regime of investigation, prosecution and trial for combating this international threat.

In this regard, studies were based on the Federal Constitution and on well-grounded laws, decrees, international conventions and protocols pertaining to the guiding principles for fighting organized crime, which Brazil has ratified and introduced into its legal system.

In order to enrich the information made available through this paper, factual analyses concerning Brazil's situation in reference to actions of transnational criminal organizations have been included, along with some data relating especially to narcotics trafficking in neighbouring countries in South America, such as Colombia, Peru, Bolivia and the tri-border region, involving Brazil, Argentina and Paraguay.

According to the terms of Article 5 of the Federal Constitution, Brazil is committed to the international community and to its own citizens in being vigilant towards the rule of law, respect for human rights, liberty, equality and the right to life itself, without any distinction whatsoever. Despite that, there are no articles in the Constitution with literal references to the investigation, prosecution, trial or punishment of transnational organized criminal activities. On the other hand, repudiation of crimes of terrorism and racism is expressly mentioned by Article 4 of the Federal Constitution as a guiding principle of the international relations of Brazil.

In fact, the Federative Republic of Brazil has made the same mistake as most countries in the world: considering transnational organized crime as a criminal question and adopting towards it the same legal statements as adopted for ordinary crimes, disregarding that these kinds of organizations work with different methods than ordinary criminal groups. Most transnational criminal organizations are characterized, nowadays, by the absence of a standard hierarchy,[1] represented by the existence of multiples cells with considerable power of decision instead of despotic leaders; the choice of a variety of transactions according to market opportunities; and still, the adoption of sophisticated techniques for the suppression of evidence of their criminal practices.

These characteristics make the investigation and prosecution of transnational organized crime a very difficult and complex task, especially in identifying and punishing the ringleaders (the real core of those organizations) in any country of the world and not necessarily where the actions took place. It could not be different in Brazil.

However, as will be demonstrated, in spite of the lack of constitutional statements relating to transnational organized crime, the Brazilian Government has developed an infra-constitutional legal system based mostly on international conventions and protocols pertaining to the matter (e.g. the Palermo Convention, signed in 2002 and adopted as a federal law in 2004). The commitment to international standards and mutual co-operation led to the creation of procedures for facilitating the investigation of organized crime activities, such as (i) electronic surveillance (wire-tapping, phone call and internet communications interception, etc.); (ii) undercover operations; (iii) controlled delivery of illegal drugs; (iv) witness and victim protection; and (v) methods for obtaining co-operation from people involved in criminal organizations, by extinction of punishment or reduced penalties (mechanisms similar to *plea bargaining* or *plea of guilty* adopted by the United States of America's legal system, which grants reduction from one to

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[1] Criminal organizations with strong cultural and ethnic influence still adopt a standard model of hierarchy, like some Italian and South American Mafia, as well as the Japanese *Yakuza*.

two thirds of the penalty in case of spontaneous collaboration that leads to a solution of penal infractions and their authorship).

The international conventions and protocols signed by Brazil – in addition to the legislation concerning money laundering prevention and prosecution – form the legal framework that will be detailed in this essay, as the starting point for an overview of the investigation and criminal procedures adopted in the country.

The major problems concerning the investigation, prosecution and trial of criminal organizations will also be covered, with special emphasis on the lack of co-operation and commitment by the judiciary members and prosecutors with the police investigations, difficulties with undercover operations and the corruption which affects some state polices and local Judiciary Powers at a level which harms the whole local institution.

II. TRANSNATIONAL ORGANIZED CRIME AS A WORLDWIDE MENACE

The process of globalization brings, besides an expansion of legitimate international commercial transactions, a great increase in illegal activities by criminal organizations, which represent a threat to every country in the world, especially because they restrain the development or improvement of quality of life.

The challenge facing nations today is to create an international environment inhospitable to criminal organizations, in order to achieve some effectiveness in the struggle against this worldwide menace. Criminal organizations share the misguided belief that killing, kidnapping, extorting, robbing, and trafficking illegal drugs, firearms and people will overrule the legally formed sovereign States, by the imposition of their own distorted rules, formed in absolute disregard to the fundamental rights so dear to humankind.

Brazil is especially affected by the growth of transnational criminal organizations related to drug trafficking. The increase of illegal drug demand all over the world transformed Brazil to an important link in the chain between producer and costumer countries, due to its location and size. This situation strengthened national criminal organizations such as PCC (*Primeiro Comando da Capital* - First Command of Capital) and CV (*Comando Vermelho* - Red Command), and encouraged the establishment of transnational criminal organizations in the national territory.

In a continental sized country like Brazil, in the middle of the path between the South American drug producers and European customers, transnational criminal organizations have found the ideal conditions for acting not only in the illegal trafficking of drugs, but also in activities related to illegal gambling, money laundering, extortion, firearms and people trafficking.

III. TRANSNATIONAL CRIMINAL ORGANIZATIONS ESTABLISHED IN BRAZIL

The main strategy for combating transnational crimes in Brazil has been the intelligence monitoring of criminal organizations, which has been executed by the police forces in their levels of competence as well as by the Brazilian Intelligence Agency (ABIN), established by Federal Law No. 9,883 of 7 December 1999. ABIN is responsible for the planning, execution, co-ordination, supervision and control of all intelligence activities and information systems in Brazil; always furnishing precise and reliable data to the President of the Republic and its Ministers about strategic matters, including the activities of criminal organizations.

In the co-ordination of the Brazilian Information System (SISBIN), ABIN supplies the Federal and State police forces with information about national and transnational criminal organizations acting in the national territory, aiming at their effective repression.

Its intelligence monitoring activity has detected the following transnational criminal organizations - generally named in this essay by the word “mafias” - acting in Brazil:

A. The Italian Mafias

Since 1972, Brazil has identified organized criminal activities related to Italian criminal organizations such as *La Sacra Corona Unitá*, *Camorra*, *Cosa Nostra*, *La Nuova Famiglia*, *Máfia E Sttida*, and *N’Drangheta*. In that year, a criminal operation between *La Sacra Corona Unitá* and *Corsa Union* (a French-Italian criminal organization) was discovered and called the *Ilhabela Connection*. The plan was to establish a chain of pubs

and restaurants on the coast of two important Brazilian states, São Paulo and Rio de Janeiro, as a disguise for illegal drug trafficking from cocaine producing countries in South America to Europe and the United States. Many leaders of these organizations have been arrested in Brazil since then, namely Tomaso Buschetta (*Camorra*), Antonio Salomone (*Cosa Nostra*), Umberto Ammaturo (*Camorra*), and Marco Pugliese (*Sacra Corona Unita*). The investigation into drug trafficking and money laundering was made in collaboration between Brazilian police forces and the International Criminal Police Organization – (ICPO, commonly known as Interpol). Nowadays, the Italian criminal organizations have been active in Brazil, especially on firearms, drugs and persons trafficking, illegal gambling, prostitution, and money laundering; their territorial bases are settled in the states of São Paulo and Rio de Janeiro, and at the northeastern coast of Brazil, especially in capital cities such as Fortaleza, Natal, Recife and Salvador.

B. The Japanese Mafia: *Yakuza*

In 1993, the Brazilian Federal Police discovered a *Yakuza* operation involving cocaine trafficking from São Paulo to the Shizuoka region of Japan. The operation was commanded by Hitoshi Tanabe, one of the leaders of the Japanese mafia, who ended up charged with drug trafficking. In fact, the Brazilian Federal Police discovered during the investigation that the *Yakuza* had bases in Brazilian territory, concentrating their activities in the states of Paraná – where Hitoshi Tanabe was found – and São Paulo. More recently, in 2003, another *Yakuza* operation was frustrated. This time, the operation was related mainly to human trafficking (illegal immigration and slavery), but the same structure was also used for illegal drug and firearms transactions.

C. The Chinese Mafias

Since the late 1990s particularly, with the opening of national borders for worldwide commerce, Chinese criminal organizations have been increasingly active in Brazil. The Chinese mafias concentrate their illegal practices on smuggling, falsification of high end products, human trafficking, and fraud with mobile phones and credit cards. In Brazil, the Chinese mafia used to concentrate its activities in the São Paulo state, where the Chinese community is based. However, more recently, it has been spreading its activities all over the country, in spite of the arrest and trial of one of its main leaders.

D. The Russian Mafias

The association between the Russian mafia and the *Cartel of Cali* (a Colombian criminal organization), discovered in 2001 during the investigations involving Rudolf Ritter and his company, called *St. Petersburg Holding Company*, revealed a money laundering network developed by these organizations. At the beginning of that year, the Brazilian Federal Police arrested Mario Kronenberg, a member of the Russian mafia who was trying to transport cocaine from São Paulo to Europe. Those operations revealed the use of Brazilian ports and airports by Russian criminals, involved in drug trafficking from Colombia to Russia, using Brazil as a main corridor between those poles, confirming once more the relevance of Brazilian locations for those activities.

E. The African Mafias

After the establishment of police forces specialized in the combat of drug trafficking in South and Central America, the international criminal organizations adopted new strategies for maintaining these illegal practices. Among other strategies was the establishment of bases in several African countries, especially Niger and Mozambique, which function as the doorway for drug distribution in Europe. In Brazil, Federal Police and Civil Police of the São Paulo State have been developing several investigations into Nigerian criminal organizations, learning that the focus of their deeds is drug trafficking to Europe. The investigations developed by those forces demonstrate, also, that Nigerian mafias started their activities in Brazil by prostitution, and generally used people involved in those activities for transporting drugs from the city of São Paulo (Guarulhos Airport) to Africa. Drug trafficking was so intense that since 2004, approximately 1,100 kg of illegal drugs have been apprehended there each year. Nowadays, the Nigerian Mafias have settled mainly in the central region of the city of São Paulo (in the neighbourhoods of Bom Retiro, Consolação, Liberdade e Santa Cecília) and have changed their routes and started to use the airports of cities like Recife and Fortaleza, on the northeastern coast of Brazil, as these terminals are not as tightly controlled by police forces as the southeastern airports, which were traditionally used by criminal organizations (São Paulo and Rio de Janeiro).

F. South American Mafias

The primary activity of the South American transnational criminal organizations is drug trafficking. As demonstrated by the United Nations Office for Drugs and Crimes,[2] Colombia, Peru and Bolivia are the three major producers of cocaine in the world, responsible for 56%, 28% and 16%, respectively, of the whole world drug production in the year of 2004 (around 687 t). The model of criminal organizations traditionally adopted in those countries - a *standard hierarchy* group, commanded by a single leader, with a relatively clear hierarchy and strong social and ethnic identities among their members - has changed due to the increase of the repression of the activity, managed especially by the DAS, the anti-drug unit of the United States of America. The DAS, since the 90s, has worked in collaboration with the government of those countries. In fact, with the exception of the Colombian Revolutionary Army (FARC), the biggest criminal groups, such as *Cartel de Cali* and *Cartel de Medellin*, were broken by law enforcement in the 90s, and were replaced by small regional organizations. Unfortunately, it seems that repression of the activities of small groups is also very difficult. In the Brazilian case, national criminal organizations such as PCC and CV are buying drugs directly from the small groups in those three neighbouring countries. In fact, there are three big corridors for cocaine and marijuana entrance in to Brazil, destined not only for the European, Asian and African markets, but also the national market. The three corridors are: the North corridor (consisting of the states of Amazonas, Pará, Maranhão, Piauí and Ceará), the Central corridor (the states of Acre, Rondônia, Mato Grosso, Goiás, Minas Gerais and Espírito Santo) and the South Corridor (the states of Mato Grosso do Sul, Paraná, Santa Catarina, Rio Grande do Sul, São Paulo and Rio de Janeiro). Side by side with the entrance of drugs, there is intense firearm trafficking, aiming at the preparation of criminal organizations against police repression and also aiming at the execution of robberies against financial institutions and vehicles and airplanes transporting valuables.

IV. BRAZIL'S LEGAL REGIME FOR COMBATING ORGANIZED CRIME

A. The Brazilian Constitutional Statements about Material and Procedural Warranties

The most important written document in Brazil's legal regime is the 1988 Constitution of the Federative Republic containing 250 articles with dozens of paragraphs and sections and hundreds of items, 54 amendments and six revision amendments, regulating the country's entire legal system and guaranteeing the free exercise of the Executive Power, the Legislative Power, the Judicial Power, the Public Prosecution and the Constitutional Powers of the units of the Federation.

As explained before, all offences perpetrated by transnational criminal organizations will be punished by the Brazilian judiciary in accordance with the prescriptions of the Palermo Convention, but also in strict obedience to the constitutional commands that establish material and procedural warranties for all citizens living in the country, such as the following:

(i) There shall be no exceptional tribunal or court (Article 5, XXXVII);
(ii) There is no crime without a previous law to define it, nor a punishment without a previous legal sanction (Article 5, XXXIX);[3]
(iii) Penal law shall not be retroactive, except to benefit the defendant (Article 5, XL);
(iv) The practice of torture, the illicit traffic of narcotics and related drugs, as well as terrorism, and crimes defined as heinous crimes shall be considered by law as non-bailable and not subject to grace or amnesty, and the principals, agents and those who omit themselves while being able to avoid such crimes shall be held liable (Article 5, XLIII);
(v) No punishment shall go beyond the person of the convict, and the obligation to compensate for the damage, as well as the decreeing of loss of assets may, under the terms of the law, be extended to the successors and be executed against them, up to the limit of the value of the assets transferred (Article 5, XLV);
(vi) The law shall regulate the individualization of punishment and shall adopt, among others: deprivation or restriction of freedom; loss of assets; fine; alternative rendering of social service; suspension or deprivation of rights (Article 5, XLVI). Furthermore, there shall be no punishment of death, save in the case of declared war, under the terms of Article 84, XIX; of life imprisonment; of hard labour; of banishment; which is cruel (Article 5, XLVII).

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[2] "*Coca Cultivation in the Andean Region – A survey of Bolivia, Colombia and Peru*", June 2005, http://www.unodc.org/pdf/andean/Part1_excutive_summary.pdf

[3] This article demonstrates the adoption by the Federal Constitution of the Vagueness Doctrine.

(vii) Extradition of a foreigner on the basis of political or ideological crime shall not be granted (Article 5, LII);
(viii) No one shall be deprived of freedom or of his assets without the due process of law (Article 5, LIV);
(ix) No one should be considered guilty before the issuing of a final and unappealable penal sentence (Article 5, LVII);
(x) Private prosecution in the cases subject to public prosecution shall be admitted, whenever the latter is not filed within the period established by law (Article 5, LIX);
(xi) No one shall be arrested unless in *flagrante delicto* or by written and justified order of a competent judicial authority, save in the cases of military transgression or specific military crime, as defined in law (Article 5, LXI);
(xii) The arrest of any person as well as the place where he is being held shall be immediately informed to the competent judge and to the family of the person arrested or to the person indicated by him (Article 5, LXII);
(xiii) The arrested shall be informed of his rights (among which is the right to remain silent, and he shall be ensured of assistance by his family and a lawyer) and be entitled to identification of those responsible for his arrest or for his police questioning (Article 5, LXIII and LXIV);
(xiv) No one shall be taken to prison or held therein, when the law admits release on own recognizance, subject or not to bail (article 5, LXVI).

The Brazilian Federal Constitution also establishes rules about extradition, and adopts as fundamental warranty the statement that "*no Brazilian shall be extradited, except the naturalized ones in the case of a common crime committed before naturalization, or in the case there is sufficient evidence of participation in the illicit traffic of narcotics and related drugs, under the terms of law*" (Article 5, LI).

About the evidence obtaining procedures, the Federal Constitution establishes that evidence obtained through illicit means is unacceptable in the process (Article 5, LVI), as well as that the secrecy of correspondence, financial data and telephone communications are inviolable, except if a written judicial order is obtained in order to break this secrecy, in the manner prescribed by an ordinary law, for purposes of criminal investigation or criminal procedural finding of facts (Article 5, XII).

The Constitution, in Article 5, XI, also establishes the home as a "*refuge of the individual*", prohibiting anyone to enter without the consent of the dweller, except in the event of *flagrante delicto* or disaster, to provide help, or during the day by court order. Because of that, home searches for criminal evidence must be preceded by a judicial order, upon a police or prosecutor request. Home searching is done under the rules dictated by the Articles 245/248 of the Criminal Procedure Code.

It is important to make clear that Article 5, paragraph 2 of the Constitution also states that the rights and guarantees expressed in the Constitution do not exclude others deriving from the regime and from the principles adopted by it, or from the international treaties to which the Federative Republic of Brazil is a party, of course, after the adoption of its statements by the Brazilian National Congress.

In fact, the Brazilian National Congress holds exclusively the competence to decide conclusively on international treaties, agreements or acts which result in charges or commitments that go against national property (Article 49, I of the Constitution). Such competence is to be exercised through a legislative decree. The President of the Republic has exclusive power to sanction, promulgate and order the publications of law, as well as to issue presidential decrees and regulations for the true enforcement thereof (Article 84, IV of the Constitution). The President may also conclude international treaties, conventions and acts *ad referendum* of the National Congress (Article 84, VIII of the Constitution).

B. An Overview of Criminal Procedures:
The Police Inquiry (Investigation) and Criminal Procedure (Prosecution) in Brazil

1. The Military and Judicial Polices

Under Article 144 of the Federal Constitution, public safety is a duty of the State and the right and responsibility of all citizens, being exercised to preserve public order and the safety of persons and property, by means of the following institutions:
(i) federal police
(ii) federal highway police

(iii) federal railway police
(iv) civil police
(v) military polices and military fire brigades.[4]

As demonstrated, the police forces in Brazil are organized primarily at the state level, rather than the national or local level (Art. 144, I to V). Although Brazil does have a federal police force, as well as specialized federal police authorities for highways, railways, and ports, the Brazilian Constitution, in the aforementioned Article 144, assigns to the state police forces the responsibility for the investigation of the vast majority of criminal activities, excluding from their authority only military crimes (Art. 144, Paragraph 4).

The duties of the Federal Police include prevention of interstate and international drug trafficking and smuggling, protection of the country's borders, and the execution of orders demanded by federal judges, such as execution of arrest warrants for those indicted on federal offences, for instance.

In Brazil, the state police are divided into two nearly autonomous entities, the civil and military police (Art. 144, IV and V), both of them under the control of the state governor, even though the military police forces are also auxiliary and reserve units of the National Army.

The two police forces are divided according to functional lines: the military police is a uniformed force which patrols the streets, maintains public order, and may arrest suspects caught in the act of committing crimes. It is also the military police who usually respond to crimes while they are in progress, while the civil police investigate crimes once they have already occurred and been reported.

The civil police work as the states' judicial police and are authorized by law to perform investigations which are run by precincts. Each precinct is run by a precinct chief called by the Constitution *Delegado de Polícia*, who must hold a law degree.

The Brazilian Constitution also empowers the Public Prosecutors Office to exercise external control over police activities under the terms of the Supplementary Law 75, of 20 May 1993. This external control shall be used to establish co-operation between prosecutors and police authorities, facilitating the procedures for obtaining evidence, and improving the repression of any kind of crime. However, the practical application of this rule created a gap between police authorities and prosecutors that contributed to the decrease of the credibility of the Brazilian criminal justice system in general.

2. The Police Inquiry

Once a crime has occurred, a police inquiry (*inquérito policial*), conducted by the Civil Police Chief, may be initiated by written orders of the appropriate police authority *ex officio,* at the request of the victim or offended party, or by orders of the judge or the public prosecutor's office. Inquiries must be opened whenever the police are informed of a possible violation of the penal code (Criminal Procedure Code, Articles 4 and 5).

Once an investigation is started, the police must collect as many facts as possible about the crime, conduct all necessary examinations of the crime scene and, if there is enough evidence, state the likely authorship (Criminal Procedure Code, Art. 13). The police must take a statement from the victim, when it is possible, and may undertake any investigation considered necessary, including interviewing witnesses and collecting physical evidence, which must be sent for expert examinations.

Searches of homes (which must occur during daytime due to Art. 5, XXXIX of the Federal Constitution), and other evidence obtaining procedures such as preventive detentions; undercover operations; electronic surveillance; wire-tapping recorders; communications (eg. phone calls or internet communications) interception; freezing, seizure or confiscation of property, may only occur during the inquiry, by written orders of the judge with jurisdiction over the matter, or by request of the police chief or the prosecutor. Due to Article 13, II, of the Criminal Procedure Code, either the prosecutor or the judge can require the police to

[4] Complementary Laws Nos. 97 of 9 June 1999 and 117 of 2 September 2004 allow that both the Armed Forces and the Public Safety Institutions work together when necessary to re-establish the rule of law and public order.

conduct additional investigations at any time during the inquiry.

The time limit for the civil police to conclude an investigation is, ordinarily, 30 days if no one is being held in detention (Criminal Procedure Code, Art. 10), and ten days if a suspect has been arrested, except in cases of federal crimes and trafficking of illegal drugs, in which cases the term is 15 days if a suspected has been arrested (Federal Law 5,010 of 30 May 1966, Art. 66; and Art. 29 of Federal Law 10,409 of 1 November 2002). If these time limits are exceeded, the judge (usually at the request of the police chief or the prosecutor) can extend the investigation for the same period. In practice, the time limits established by law for the end of the inquiry are almost never met, especially in complex investigations like those of criminal organizations.

In relation to the period of prosecution, it is important to mention punitive prescription under the Brazilian law system. The Criminal Code, in Article 109, states that if a person is not convicted within a certain period of time after the beginning of the criminal proceedings, the State is no longer able to punish the offender. This period of time varies according to the gravity of the crime, and it ranges between two and twenty years. The initiation of criminal proceedings against a defendant does not stop ("toll") the statute of limitations.

The police inquiry may only be closed by order of the judge, ordinarily at the request of the prosecutor or by suggestion of the police chief who writes the final report on the result of the investigation (Criminal Procedure Code, Art. 17 and 18).

3. The Criminal Procedure

Once investigations are finished, the police chief must write a detailed written final report to the judge. This final report is passed on to the prosecutor to determine whether a suspect should be accused. An accusation (*denúncia*) may be issued whenever the prosecutor determines there is enough *prima facie* evidence to so justify (Criminal Procedure Code, Art. 41 and 43). If the prosecutor or the judge believes that further police investigation is necessary, they may order it to be undertaken by the police.

In the case of homicides, the procedure is not the same, as it is the only kind of crime in which a trial is held before a jury composed of citizens. Due to this peculiarity, there is an initial phase of the process which ends by an indictment sentence in an ordinary court. The prosecutor's indictment request (*pronúncia*) may be rejected by the judge if he or she decides there is not enough evidence of the existence of the crime or evidence of individual responsibility. If the request is accepted, the judge orders the case to proceed to the aforementioned trial, which under Brazilian law is held before a jury composed of seven citizens (Federal Constitution Art. XXX, and Art. 433, of the Criminal Procedure Code).

As has already been said, there are no special rules in the Brazilian criminal procedural system for the prosecution or trial of criminal organizations, but there are laws that created tolls for evidence obtaining procedures following the prescriptions of the Palermo Convention,[5] which deals with electronic surveillance; undercover operations; controlled delivery of illegal drugs; procedures to detect and punish money laundering activities such as freezing and seizure; property confiscation procedures; witness and victim protection; and methods for obtaining co-operation from co-defendants involved in criminal organizations, by extinction or reduction of punishment.

C. Brazilian Legislation for Combating Organized Crime and the United Nations Convention against Transnational Organized Crime

1. The United Nations Convention against Transnational Organized Crime and The Brazilian Criminal Code (Law Decree No. 2,848 of 7 December 1940)

The Brazilian Government has adopted the United Nations Convention against Transnational Organized Crime by the introduction to its legal system of the Federal Decree 5,015 of 12 March 2004.

[5] In fact, most of these prescriptions were adopted by the Brazilian legal system before the signing of the Palermo Convention by the Government, as the laws which contain such prescriptions began to be edited in 1995.

This fact brought into national legislation the concepts of *organized criminal group*,[6] *structured group*[7] and *serious crime*,[8] however, this occurred without the creation of a specific notice to punish organized criminal groups. So, due to the Vagueness Doctrine,[9] the applicable notice for an action of creating a structured and organized group to practice ordinary crimes, serious or not, is that of Article 288 of the Criminal Code (Gang Crime), which establishes a penalty of one to three years in prison, increased to a penalty of two to six years if the crime is committed by armed gangs. A group of at least four people is necessary to characterize a gang.

With regards to organized gangs formed with the objective of trafficking drugs, Article 14 of Federal Law 6368/76 reduces the numbers of members necessary to characterize the crime to a minimum of two people and states that the penalty ranges from three to ten years in prison.

These points demonstrate that the definitions brought into the Brazilian system by Federal Decree 5,015 of 12 March 2004 were not completely unknown before, and were useful in order to clear and limit the possible use of the instruments created previously by Federal Law 9,034 of 3 May 1995, in investigations and criminal procedures against criminal organizations.

2. The United Nations Convention Against Transnational Organized Crime and Federal Law 9,034 of 3 May 1995 (Altered by Federal Law No. 10,217 of 11 April 2001)

In 1995, seven years before the ratification of the United Nations Convention against Transnational Organized Crime, signed in Palermo, Italy, in 2002, the Brazilian Government included, in its legal system, an important instrument for combating any kind of criminal organization. The initiative brought to the law enforcement authorities new tools for evidence gathering, such as (i) controlled action, such as delaying the arrest of a suspect until a better moment in order to obtain evidence; and (ii) free access to financial and fiscal information.

Six years later, Federal Law 10,217 of 11 April 2001, modified the statements of these rules, and added new procedures such as (i) electronic surveillance and wire-tapping, (ii) undercover operations, and (iii) measures to enhance co-operation with law enforcement authorities by granting the possibility of punishment reduction from one to two thirds of the penalty to those participants of the organized criminal groups who supply information useful for investigative and evidentiary purposes on such matters as the identity, nature, composition, structure, location or activities of organized criminal groups; as well as offences that organized criminal groups have committed or may commit.

With regards to what has been said about the constitutional guarantees, all these instruments must be preceded by a judicial order, and are covered by an inviolable secrecy that is broken only after the formal *accusation*.

3. Federal Law 9,296 of 24 July 1996 - Phone Calls and Data Communications Interception

In accordance with Federal Law 9,296, in force since 1996, the interception of phone calls and data communications is authorized upon previous judicial order. Furthermore, it may be used only for criminal investigation and penal procedural instruction, on request from the police chiefs charged with the investigations or by the prosecutor.

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[6] The United Nations Convention Against Organized Crime establishes that (a) "organized criminal group" is a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.

[7] "Structured group" shall mean a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure.

[8] "Serious crime", according to the same UN Convention, shall mean conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty.

[9] Under this principle, a law which does not fairly inform a person of what is commanded or prohibited is unconstitutional as violative of due process of law. This is the doctrinal basis for striking down legislation which contains insufficient warning of what conduct is unlawful. It requires that penal statutes give notice to the ordinary person of what is prohibited and proved definite standards to guide discretionary actions of police officers so as to prevent arbitrary and discriminatory law enforcement. It was adopted by the Brazilian Federal Constitution, Article 5, XXXIX.

According to Article 2, the request of public authorities must demonstrate the following situations:
(i) reasonable evidence of authorship of the crime under investigation;
(ii) high relevance of the fact that is being investigated, which must characterize a crime punishable by the law with prison (*reclusão*), such as the offences of illicit trafficking of drugs, kidnapping, money laundering, firearm trafficking, armed robberies, etc.;
(iii) inexistence of other ways to obtain the desired evidence.

Despite the fact that nowadays there are several different systems of telephone and data communications (Internet, MSN Messenger, e-mails, Voice over Internet Protocols, etc.), phone calls and data interception are used as an important tool for collecting evidence about all serious crimes mentioned. The interception is especially important in obtaining evidence of crimes committed by criminal organizations, as the communication usually proves the contacts between the groups and clarifies the participation of each member. In its investigations regarding criminal groups, the Brazilian police usually intercept calls and communications for periods of time between six to twelve months, achieving reasonable success.

4. Legal Tools for Obtaining Co-operation from People Involved in Criminal Organizations – Federal Law 9,034 of 3 May 1995 (altered by Federal Law No. 10,217 of 11 April 2001); Federal Law 9,807 of 13 September 1999; Federal Law 10,409 of 1 November 2002

According to the Brazilian legal system for combating organized crime – stated, at this point, in Federal Laws 9,034/95 (organized crime), 9,807/99 (spontaneous collaboration with criminal justice) and 10,409/02 (drug trafficking) – the national system does not grant total immunity for the participants of organized criminal groups. There is only the potential punishment reduction from one or two thirds or punishment extinction, when the spontaneous collaboration of the author will lead to clarifying the penal infractions and their authorship.

The precepts of judicial pardon existent in Federal Law 9,807/99 (Art. 13 and 14) have brought practical benefits in combating organized crime in Brazil, especially the illegal drug trafficking investigations and prosecution.

These statements were brought into the national legal system sixteen years ago by the Law of Violent Crimes (Federal Law 8,072 of 25 July 1990) and have been applied with success in investigation and prosecution stages of the application of penal law, despite the knowledge of the delinquents of the possibility of violent consequences resulting from the betrayal of their accomplices.

Another measure contained in Federal Law 9,807/99 for obtaining co-operation from people is the Program for the Protection of Victims and Witnesses, which can be requested (i) by the witness himself, (ii) by the victim, (iii) by the Department of Justice, (iv) by the police, or (v) by public agencies and entities for the defence of human rights. Whether the protection will be granted or not is decided by the judge responsible for the criminal process, and includes the following measures:
(i) Transference of residence
(ii) Monthly financial aid per person
(iii) Food and clothing supplies
(iv) Safety when traveling from one place to another
(v) Help in finding a new job
(vi) Removal of public employees without loss of remuneration
(vii) Social, psychological and medical assistance
(viii) Change of identity.

5. The Controlled Delivery Recommended by Art. 20 of the United Nations Convention and Federal Law 10,409 of 1 November 2002

With regards to Article 20 of the United Nations Convention against Organized Crime, Brazil had adopted the controlled delivery of illegal drugs as an investigative technique for combating criminal organizations even before the adoption of the UN Convention as an internal law. This new investigative technique was introduced to the Brazilian legal system by Article 33 of Federal Law 10,409/2002.

This law represents a great advance in combating organized crime in Brazil, as before it, the

constitutional and penal laws principles were interpreted in a way that prevented the usage of the method of controlled delivery. It was said that once the police had the duty of arresting any person caught in the act of committing a crime or who was found attempting to commit, committing, or right after committing the crime; if the arrest was not immediately executed, the police agents would be committing a crime named *Prevaricação*, which consists of not doing what a public servant is supposed to do according to law. Such interpretation was finally overruled, with the help of the new legal statements, which brought a new light to studies on the matter.

Federal Law 10,409, Article 33, detailed norms regulating this investigative technique, such as:

(i) A statement that the request is a duty of the police authorities, and ought to be preceded by a judicial order after the prosecutor's opinion;

(ii) Demonstrations that the most likely itinerary of the drug transportation is previously known;

(iii) In the case of transnational transportation, a previously issued warrant of the foreign authorities to assure the arrest of people involved and the apprehension of the drug.

The practical experience in combating organized drug trafficking has demonstrated that controlled delivery brought a great increase in drug apprehensions worldwide, specifically of narcotics that only pass trough the Brazilian territory to foreign markets like Europe and North America, and, also, of narcotics that transit through two or more states inside the country, coming primarily from the tri-border region to be sold in large costumer centres such as São Paulo, Rio de Janeiro, Brasília and Porto Alegre.

6. The Legal Instruments to Control, Investigate, Prosecute and Punish Money Laundering Activities - Art. 7, 18 and 27 of the United Nations Convention and Federal Law 9,613 of 3 March 1998

Concerning the guidelines recommended by the UN Convention with regards to money laundering prevention – especially Articles 7, 18 and 27 – the Brazilian legal framework established mainly by Federal Law 9,613, of 3 March 1988, provides an effective system of administrative and financial controls.

The aforementioned legislation brings to the Brazilian legal system a new criminal policy of preventing and combating money laundering, including the criminalization of this practice (Art. 1 establishes a penalty of three to ten years' imprisonment) and with express prohibition for the indicted to be *released on own recognizance*[10] or pay any kind of bail bond (Art. 3) during the prosecution and trial.

The institution of seizure is mentioned in Article 4, and enables the apprehension and deprivation of goods, merchandise or real property acquired as the proceeds of crime, even if these chattels have already been registered in the name of third parties with no connection with the crime under investigation.

A weak point of Federal Law 9,613 is the absence of statements about *freezing* - the prohibition of transfer, conversion, disposition or movement of property during the investigation, prosecution, or trial. This possibility is mentioned by the United Nations Convention, Article 7, which states that the measure must be determined by a court order and the crime investigated must be related to drug trafficking. Despite that, the courts have been expanding the range of the measure, applying it to every property acquired with money derived from crimes, based on the implied judicial powers. It is important to say that the judge, at the final sentence, may determine the confiscation (the permanent deprivation of property) of the chattels seized during the investigation and prosecution, in favour of the Federative Republic, according to Article 7. I of the aforementioned law.

Federal Law 9,613 brought another great advance in combating money laundering in Brazil, consisting of *shifting the burden of proof* of the illegal origin of the chattels subject to seizure. It is no longer a duty of the prosecutor, but a burden of the indicted, who must demonstrate the licit origin of the properties in his or her name, personally, in the presence of the judge (Art. 4, paragraph 2).

Pursuing the aim to set money laundering eradication as a priority policy of the State, Federal Law 9,613

[10] This is a kind of pre-trail release based on the person's own promise that he or she will be present at trial, its outlines are described by Articles 321 to 350 of the Criminal Procedure Code. There are two basic models; one with and one without the payment of a bail bond

has created two departments to deal with the matter: (a) the Brazilian financial intelligence unit called Council of Financial Activities (COAF) and (b) the Department for the Combat of Financial and Exchange Illicit Acts (DEAFI) as a unit of the Central Bank of Brazil, designated to be in charge of the general monitoring of financial market activities. The first department receives information, and examines and identifies suspect occurrences of illicit activities related to money laundering. It also co-ordinates and proposes mechanisms for the co-operation and exchange of information inside and outside the country that could provide quick and efficient actions in the war against money laundering. The second department, DEAFI, receives information and allegations by the COAF in relation to the financial system, in order to apply administrative sanctions to the financial institutions which do not comply with the legal statements related to money laundering prevention.

These legal statements, created six years before the incorporation of the UN Convention against Organized Crime into the Brazilian legal system, reveal the government's objective of punishing and preventing the occurrence of money laundering and financial crimes in Brazilian territory, and the practical use of the legal tools created by such laws has proven their efficiency.

V. CONCLUSION

As demonstrated, the Brazilian legal framework for combating organized crime contains in its outlines the most important and modern tools and institutions recommended by the UN Convention signed in 2002 at Palermo on the matter.

The legal instruments exist and the authorities must apply them to their full extent in order to achieve better results. In fact, ten years after the introduction of the first legal statements concerning investigative tools against criminal groups, the Brazilian legal authorities – police chiefs, prosecutors and judges – have finally started to explore the potential of the available legal tools, as their use before could be qualified as timid. This change of behaviour is due to the great increase in the activities of national and transnational criminal organizations in Brazil, demanding stronger combat strategies; to the reduction of cost and improvement of technology, which became more easily available; and also to the deepening of studies that show the law enforcement authorities the extent of their legal powers.

Based on the legal improvements detailed before, police and prosecutors have increased the use of electronic equipment for surveillance and communication interception. The use of relationship analysis, software and methods of intelligence activity (especially undercover operations), in addition to the growing use of technology and information analysis, have provided a larger degree of success in crime solution and extinction of criminal organizations in Brazil.

Besides the authorities' efforts, the Brazilian government is committed to the adoption of every measure to diminish the scourge of organized transnational crime – diplomatic efforts, economic co-operation, law enforcement, exchange of financial and intelligence information and especially mutual co-operation with the United Nations, its Member States, the Organization of American States, and other international and regional organizations. These collateral organizations must also co-operate with every single country, by demanding the adoption of minimal standards of legislation and commitment, and offering expertise.

Despite these improvements, the path to establishing control of criminal organizations' activities is a long one due to the fact that in the same way that the State improves its investigation, prosecution and trial mechanisms, the mafias change their ways of action, their hierarchical structure and their systems to conceal the proceeds of crime in order to continue to break the law.

The Brazilian criminal organizations have recently performed demonstrations of power unheard of up to this year (2006). This kind of demonstration of high levels of organization and power might attract the interest of transnational organizations, triggering the strengthening of the national groups. The recent events that took place in São Paulo state, where many police members were killed by organized crime members, brought the theme to discussion by the press. Up to then, the existence of organized criminal groups was unknown to most citizens, who were not aware of such a threat. Now, especially in São Paulo, there is growing popular concern on the matter, which hopefully will lead to improvement in the general attitude towards the problem.

The country's most daring challenge at the moment is to make citizens and politicians in the National Congress aware of the menace that criminal organizations represent, in order to obtain general co-operation against it, not only by the institutional entities, but also from the public in general. With regards to the prosecution of crimes, there is a need to promote a closer co-operation among law enforcement organizations, especially among the police and the public prosecutors and members of the Judiciary, in order to apply the rule of law against criminals to its full extent, making jurisprudence more rigorous against perpetrators.