

Possible Criminal Justice Solutions to Organized Crime: Drug Trafficking and Terrorism

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Abstract: Among the different manifestations that constitute the concept of organized crime, drug trafficking and terrorism arouse special interest because of their intense public repercussions. This is so with the phenomenon of drug trafficking for its use of terror indiscriminately as a tactical and strategic mechanism to stake out its supremacy and control, often managing to break the people's confidence in the legitimacy of the rule of law. In the face of this situation, it is important to stop perceiving the drug trafficker as a common criminal because he has always been capable of adapting himself empathetically to the different transformations that the State has undergone in the last fifty years. Until we understand the nature of criminal organizations, their strategic capacity and their insertion into society and we admit the errors committed in public policies in security and we search for a complete panorama of the phenomenon, society will continue to be held prisoner by this violence. Regarding terrorism, there are few countries where these crimes take on such relevance as in Spain, not so much for the frequency but rather for the analysis that is made of the criminal justice reaction to them. In this area, criminal law is the paradigm of a regulation at the limit of constitutional legitimacy because of the anticipation of barriers to incrimination, the infringement of the principle of legality in the writing of many categories of offenses, the exacerbation of sentences or the absence of any preventive purpose to the sentences of securing the incapacitation of the criminal as the only objective. And, nevertheless, the concern of a great part of society that the institutions of criminal persecution and criminal justice remain passive in the face of this phenomenon can be noted (Cancio, 2010). Before this discouraging panorama of both manifestations of organized crime, a brief analysis of antiterrorist and anti-drug trafficking criminal law, its application in case law and its confrontation with governmental policy will be carried out in an attempt to find some solution which may very well prove to be difficult.

Keywords: Organized crime, drug trafficking, terrorism, penal law for enemies, confiscation, money laundering crime.

SOCIO-ECONOMIC CONDITIONS THAT CREATE A FAVOURABLE CLIMATE FOR VIOLENCE: SPECIAL REFERENCE TO LATIN AMERICA

Economic development in Latin America has been very important in this first decade of the 21st century. The total regional GDP has increased at a rate of more than 5% in the last few years and economic growth has been the strongest it has been since the 1970s. The average inflation rate since the year 2000 is at 7%, which is an extraordinary achievement for a region known for its runaway inflation.

In spite of these improvements, Latin America continues to lag behind other regions in the war on poverty and inequality. Approximately 37% of the population lives below the poverty line and of these, 22% lives on less than one dollar a day. And furthermore, the region continues to be the most unequal in the world (O'Neil, 2008). According to the GINI coefficient (used to measure inequality in the distribution of wealth) the region received worse results (0.52) than Central and Eastern Europe (0.33), South Asia (0.39), East Asia and Pacific (0.40) and Sub-Saharan Africa (0.47). Inequalities in wealth distribution are a reflection of structural inequalities with considerable negative consequences such as

violence. Latin America is the most violent region in the world. For example, its murder rate triples the world average. The cost of this violence is astonishing: the Inter-American Development Bank (IDB) calculates it to be 14% of the GDP. The violence carries with it a loss of economic activity, for example, the decrease in investment and tourism and the drastic increase in operational costs like hiring security and rescue operations. A large part of this violence is perpetrated by national and international organized bands of criminals involved in illicit activities like drug trafficking and terrorism.

In many Latin American countries, the police forces and judicial systems are unable or unwilling to confront these criminal organizations. Various studies carried out in Mexico and cited by O'Neil (O'Neil, 2008), prove that more than 95% of crimes go unpunished and approximately 75% are never even reported. According to surveys, half of Latin America's population has very little confidence in the police and in the judicial system. The Global Corruption Barometer published by *Transparency International*, indicates that 10% of Latin Americans admit having paid bribes in the last month. A vicious cycle of corruption and weak State capacity contribute to increasing violence and criminality. The violence related to drugs and the security crisis in Mexico has reached extraordinary levels in the last two years. According to data available to the public, 6290 people died in Mexico last year as a result of violence related to drugs. In

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private, some Mexican civil servants point to a number that reaches 9000 deaths, but even the lowest figure is higher than the total number of casualties in Iraq in 2008, more than in Afghanistan and six times that of the average number of casualties in a civil war, which is approximately 1000 people per year. As far as the number of victims goes, although not the objectives and means, the violence in Mexico is even greater than the violence that devastated Colombia in the 1980s and beginning of the 1990s when Colombia went through a similar confrontation between drug trafficking organizations (DTO) and the State. A part of the violence is also spreading to the other side of the border to the United States. Border patrols have to confront armed drug traffickers more frequently. In May of 2010, the Mexican government indicated that of the 75,000 firearms confiscated in the last three years, around 80% or 60,000 of them came from the United States, especially from Texas, Arizona and California.

Besides benefitting from impunity and corruption, drug trafficking also thrives due to a combination of negative socio-economic conditions in the countries that produce and deal and the high demand for narcotics in the US and Europe, and more and more in Latin America itself. It has been proven that a link (Fumarulo, 2007) exists between the increase in cocaine consumption in the US and the violence in Mexico and Colombia and the manner in which illegally acquired capital is handled by the Colombian and Mexican criminal organizations.

But beyond the countries traditionally identified as drug consuming, such as Western Europe and the United States, Iran and Pakistan have been significant consumers for some time. New and large consumer markets have also arisen in Russia and Asia. In Latin America, countries that were before simply countries of origin and transit, like Brazil, have also turned into solid and significant user markets. Use in Mexico itself is presently rising: since the supply of drugs has increased, they have become a means of payment in illegal trade, and there are no prevention and treatment policies. The world cocaine market moves some 90,000 million dollars per year. The effort must also be focused on initiatives against money laundering related to drug trafficking. The DEA (US Drug Enforcement Agency) calculates that drug trafficking organizations launder 29,000 million dollars a year. The creation of a system similar to the CIA's Foreign Terrorist Asset Tracking Group for the sharing of secret, diplomatic, regulatory and police information related to laundering money from drug trafficking "is crucial to putting an end to the flow of money that finances illegal activity and increases violence in the hemisphere" (O'Neil, 2008).

Finally, an integrated anti-drug trafficking policy should be established that deals with demand as well as supply. This policy obviously requires the participation of the US and the EU which are the main sources of demand.

A GENERAL APPROACH TO THE CONCEPT OF ORGANIZED CRIME

The definition of *organized crime* can be looked at from three different perspectives (Flores, 2007): the perspective based on the organizational structure; the perspective based on client relations established around the exchange of

sources and, similarly, the socio-political relations within which they operate based on corruption, and lastly, the perspective based on the illegal business that this represents and on the market relations in which they move.

Stated more concretely, the tripod of criminal organization is formed by violence, corruption and obstruction of justice. They use violence (Herrán; Santiago; González & Mendieta, 2007) as a means to establish control over their own members, which guarantees internal discipline, to assert themselves over their competitors in the illicit markets, all of them transnational, that they intend to control: drugs, prostitution, people smuggling, arms trafficking, money laundering... They use corruption to expand their activities through bribes. The degree to which corruption has penetrated, especially police circles, is great, which has in turn generated mistrust among citizens in the legitimacy of the rule of law.

To all of this we must add the international nature of organized crime in the last years. As is known, the economic, political and technological changes undergone since the end of the 20th century have diffused national borders, circumstances that have caused a change in the *modus operandi* of organized crime which goes beyond the political barriers of each State. Evidently, this latter characteristic contrasts continually with the serious tension derived from the aspirations of sovereignty of the States.

Terrorism, as an expression of organized crime, has also become globalized. Groups like Al-Qaeda have expanded their area of activity to more than half the countries in the world, while at the same time continually demonstrating, as we all know, the existing connection between different terrorist organizations, such as ETA in the Basque Country and the FARC or the AUC (United Self-Defense Forces of Colombia) in Colombia, for example.

Along with globalization, organized crime has tended to become more sophisticated. They work within the digital world and are virtually untouchable.

Finally, organized crime in all of its expressions has a common central characteristic: the aim of obtaining profits.

CRIMINAL LAW DEFINITION: LEGAL FRAMEWORK IN THE EU AND THE UN; REFERENCE TO THE COMJIB; THE 2010 SPANISH CRIMINAL CODE REFORM

The European Union, through international agreements signed primarily after 1998, has established a long list of conditions necessary to really be able to refer to organized crime: a certain duration in time, people with a real evidence of criminality or who have been convicted previously for serious crimes, and in all cases their objective must be to accumulate political and/or economic power. Furthermore, the EU has established some additional criteria of which at least two must be met. These criteria go from the existence of a certain discipline and internal control within the organization which may include the use of violence (Fernández Steinko, 2008). Violence, whose power is concentrated more in the threat of using it than in its effectiveness. The power of the criminal group in this respect is the real capacity to threaten with violence as a last resort (Mapelli, 2001). The part of the definition that makes reference to this accumulation of political or economic power is fundamental as it al-

cludes not so much to a reality, not so much to an especially serious crime committed by its members, but rather to the potential danger that emanates from it, derived in a large part from the capacity to accumulate economic resources (Moore, 1986).

Therefore, the following instruments should be highlighted:

The Joint Action (98/733/JHA), adopted by the Council based on article K.3 of the European Union Treaty (21/XII/1998), on making it a criminal offense to participate in a criminal organization in the Member States of the European Union establishes in article 1: "With the meaning of this Joint Action, a criminal organization shall mean a structured association, established over a period of time, of more than two persons, acting in concert with a view to committing offenses which are punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty, whether such offenses are an end in themselves or a means of obtaining material benefits and, where appropriate, of improperly influencing the operation of public authorities.", and providing for in Art. 2, the obligation on the part of the Member States to make one or both of the following activities a criminal offense: to participate actively in the criminal activities of the organization or merely to agree that the criminal activity should be pursued.

Following along these lines, the Council Framework Decision 2008/841/JHA regarding the fight against organized crime, that revokes the Joint Action, defines "criminal organization" in the article as "a structured association, established over a period of time, of more than two persons acting in concert with a view to committing offenses which are punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty, to obtain, directly or indirectly, a financial or other material benefit". In Art. 2, each Member State is required to regard as offenses one or both of the following, participating in the criminal activities of the organization, including financing or agreeing to pursue the criminal activity without necessarily taking part in the actual execution of the activity.

The UN Convention on Transnational Organized Crime signed in Palermo on November 15, 2000 (General Assembly Resolution A/RES/55/25), is the first solid example of the UN's involvement in this fight, in this head-on battle against organized crime. The notion of organized crime is specified in Art. 2 of the Convention as "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 offenses established in accordance with this Convention, in order to obtain, directly, or indirectly, a financial or other material benefit" And it establishes (art. 5.1) that each State Party shall establish as criminal offenses: a) agreeing to commit a serious crime, with or without the need for the conspirators to have participated actively in the eventual execution, active participation in the illicit activities of the criminal organization or active participation in the other activities of the organization, so as to contribute to its criminal aims; b) organizing, directing, aiding, abetting, facilitating or counseling the commission of serious crime involving an organized criminal group.

This line of thought initiated by German criminal jurisprudence that defines organized criminality as "the planned perpetration of crimes induced by a desire to obtain profits or power, an aspiration that can come to be very important when two or more participants divide the work during an undetermined period of time:

- a) Using semi-managerial or semi-professional structures
- b) Employing violence or other intimidating mechanisms,
- c) Influencing politics, the media, the administration, justice or economy. In the majority of European legislation, crimes of terrorism are explicitly excluded from organized crime offenses (Fernández Steinko, 2008; Kinzig, 2004).

Whereas, the COMJIB (Conference of Ministers of Justice of Ibero-American Countries) at its 17th Plenary Session which took place in Mexico some months ago, adopted an intermediate position when defining illicit association upon disregarding the aim of obtaining material benefit: "The structured groups of at least three persons that exist for a permanent or temporary period of time with the aim of committing crimes". The following addition was included: "Only in the case of disregarding irrelevant facts or with little criminal significance is there the possibility of foregoing punishment for associated criminal behavior referring to crimes considered to be minor".

Finally, the reform of the Spanish Criminal Code brought about by *Ley Orgánica 5/2010* (LO (general act of Parliament) introduces for the first time a definition of organized crime that does not include the aim of obtaining material benefit: "For the purposes of this Code, a criminal organization is understood to be a stable group formed by more than two persons existing for an indefinite period of time which divides tasks or functions in a coordinated manner with the aim of committing crimes or repeatedly committing minor crimes".

It should be observed that the criminal law concept of organized crime has been progressively broadened, as can be seen because both the 1998 Joint Action and the 2008 Council Framework Decision require the structure of at least three persons who conspire to commit offenses which are punishable by deprivation of liberty or a detention order of a maximum of at least four years, regardless of the purpose of these offenses in the case of the Joint Action and highlighting material benefit in the 2008 Council Framework. Furthermore, the Palermo Convention defines organized crime either by conspiring to commit or by participating in serious criminal offenses without placing a limitation on a particular deprivation of liberty sentence and focusing on obtaining material benefit; the COMJIB excludes only the concept of minor crimes and on the other hand defines the criminal organization as being either permanent or temporary; and finally the reform carried out in Spain through LO 5/2010 widens the definition of organized crime to include conspiring to commit minor crimes. Evidently, the fewer requirements needed to constitute the concept of organized crime, the smoother the road to criminal prosecution since the burden of proof is reduced. However, the unlimited broadening of the concept will generate new problems of legal insecurity and the risk of leaving interpretation in the hands of the judges. Finally, it will be necessary to analyze if the broad

scope of the offense classification is coherent and therefore, justifiable regarding the established right that it intends to protect. A priori, the broadening of the concept to include minor crimes, apart from distorting the essence of organized crime, demonstrates an attack on the principle of proportionality.

In short, the main differences between the European legal framework (2008 Council Framework Decision), the UN Convention and the Spanish definition of the offense can be found in three specific areas: firstly, the models of criminal organization in the European legal framework and the UN Convention include organized crime induced by material benefit (except in the 1998 Joint Action whose art. 1 establishes that the offenses can constitute an end in and of themselves or be a means to obtain material benefit and, in this case, improperly influence public authority), which means (Brandariz, 2009) in addition to the potential danger of destabilizing social order and generating loss of confidence in the rule of law, a complex structure supported by a lucrative aim must be added. As Professor Brandariz indicates (Brandariz, 2009), this greater harmfulness is apparent in these aspects: a certain automatism in the functioning of the group favoring a lack of inhibition for committing offenses and the interchangeability of these, which complicates the investigation, resulting in a greater degree of impunity. In short, this greater harm, which goes beyond the infringement of established rights, specifically affects the stability of economic and political order. Therefore, a specific punitive policy is justified. Whereas, this lucrative aim has not been required in the Spanish legislation invoking the 4th point of the 2008 Council Framework Decision (which establishes the freedom of the Member States to classify as criminal organizations other groups whose aim is not to obtain financial gain or other material benefit, therefore going beyond the obligations derived from art. 2 a) of the aforementioned 2008 Council Framework Decision). Although it is true that (Zúñiga, 2009; Brandariz, 2009) the inclusion of limiting criteria means a stumbling block for criminal prosecution because it increases the burden of proof. Along these lines, in its last Plenary Session (the 17th), the COMJIB accepted that the complexity and specialization of criminal organizations makes it inappropriate to include criteria such as that of a lucrative aim that poses a restriction to the concept of “unlawful assembly”. In this way, whatever may be the aim pursued, forming a group to commit any offense of any type should be considered in and of itself criminal.

The second difference is that within the context of the European Union, only serious crimes are classified as offenses, that is, those punishable by deprivation of liberty or a detention order of a maximum of at least four years, respectively. In the Palermo Convention, “serious crimes” are alluded to generically without specifying, adding “offenses established in accordance with this Convention”, which means a broadening of the scope of the offense. The COMJIB only excludes minor crimes from the classification while the new Spanish definition of the offense is extended to include any crime or minor offense¹.

Thirdly, the Spanish reform opts for a much greater penalty than that provided for in the 2008 Council Framework Decision where art. 3.1 b) establishes a maximum of five years imprisonment, while the Spanish Criminal Code establishes in art. 570 bis 2° last subsection that in certain circumstances, a maximum of twelve years imprisonment may be imposed.

Another important change in the new Spanish legislation, as stated in the preamble to the LO 5/2010, is centered on giving a criminal law answer, not only to criminal organizations (for example, drug trafficking), that require proof of a permanent structure, but also to other similar phenomena very present in today’s society, at times extremely dangerous or violent, that do not comply with the structural prerequisites. Thus, the legal reform has responded to this reality defining, in parallel with the organizations, the so-called *criminal groups*, in the new article 570 ter, precisely by exclusion, that is to say, as forms of criminal agreement that do not fit into the archetype of the cited organizations, but which do contribute an added criminal danger to the actions of their members. Therefore, it seems to invoke the 4th point of the 2008 Council Framework Decision again when it provides for the Member States being free to classify other *groups of persons* as criminal organizations, beyond the obligations stated in art. 2a) of the aforementioned 2008 Council Framework Decision.

The structure of the new offenses corresponds to a similar model in both cases; organizations and groups. Nevertheless, on the one hand, the punishment is stiffer with the first ones, whose more complex structure corresponds to a deliberate purpose of constituting a greater qualitative and quantitative threat to security and legal order, and on the other hand, their distinct nature demands some differences in the description of actions characteristic of the offense.

Furthermore, this new Spanish regulation is going to present problems with our art. 515.1° CP (*Código Penal* (criminal code) (that defines unlawful assembly) because it may partially overlap with the scope of application of the offenses that we are analyzing. In reality, each one of the two criminal offenses can have different scopes of application. So, (Lamarca, 2010) art. 515.1° in the first place provides for assembly that becomes unlawful after its constitution because at a particular moment it encourages the commission of offenses or has as its aim the commission of offenses, by which this apparent overlapping of laws is resolved in favour of art. 515. 1° as a result of the *principio de especialidad* (under Spanish law, when there is overlapping of laws, the special law overrides the general law) (art. 8.1), whereas if the organization is unlawful in its origin (provided for in the first subsection of art. 515.1° “Those with a view to commit-

¹ “Criminal Organizations and Groups”
Article 570 bis:

“1. Those who promote, constitute, organize, coordinate or direct a criminal organization will be punished by deprivation of liberty for four to eight years if the organization had as its aim or objective to commit serious crimes, and by deprivation of liberty for three to six years in the rest of the cases; and those who participate actively in the organization, form a part of it or cooperate financially or in any other way with the organization will be punished with imprisonment of two to five years if the aim is to commit a serious crime, and with imprisonment of one to three years in the rest of the cases. For the purposes of this Code, a criminal organization is understood to be a stable group formed by more than two persons existing for an indefinite period of time which divides tasks or functions in a coordinated manner with the aim of committing crimes or repeatedly committing minor crimes”.

ting offenses”) are considered to be a criminal organization constituted with the aim of committing offenses, whether or not it has the legal appearance of unlawful assembly (Crespo, 2010). In this case, art. 570 quáter 2 provides expressly for the application of the *principio de alternatividade* (under Spanish law, in the case of overlapping laws, choosing the one which establishes the application of the stiffer sentence) when the conduct provided for in these articles was included in another precept of this Code.

REASONS FOR SPECIFIC PUNISHMENT OF CRIMINAL ORGANIZATIONS

In order to lay the foundations of a specific punishment one has to start with the definition of the established right which is protected through the categories of criminal offenses: on the one hand is the freedom of assembly originating from legal writings and jurisprudence which is wrongfully used upon forming a part of these organizations (Moral de la Rosa, 2005). For others it is public order, the protected established right or analogous notions such as the self-protection of the power of the State, the security of the State or the very hegemony and power of the State institution against any other organization that pursues ends contrary to those of the State. In this way, the offenses of unlawful assembly would be considered *delitos de peligro* (under Spanish law this type of offense is committed only if there are several offenders acting together and they spread alarm) for such protected rights (García-Pablos, 1997; Sánchez García de Paz, 2005). Finally, a broad sector of legal writers believes that in these criminal organizations, the mere existence of a stable group organized to commit offenses is punished, therefore protecting those established rights which the members of the group join together to attack for which the legislator wishes to have a preventative protection in the form of *barrier crimes* at his disposal. In this regard, the unlawful element of the criminal groups would be configured, either as a *delito de peligro*, which anticipates the protection of the established rights threatened by the unlawful elements which form a part of the criminal program of the organization (Choclán, 2001). In this sense, Professor Silva (Silva, 2008) opts for a special preventative reasoning of the reactions against criminal organizations that seems to respond to the indirect danger of those organizations for established rights because, according to him, what might come about in the organization is a state objectively favorable to the committing of crimes by the members of the group and, therefore, dangerous to concrete established rights which are harmed in the end by members of the organization or as an act previous to being raised to the category of autonomous offense (Barber, 2004). This appears to be the consideration of the 2010 Spanish criminal legislation upon laying down: “which divides tasks or functions in a coordinated manner with the aim of committing ...”. On the other hand, this model of conspiracy is that which the Common Law system follows and one of the alternatives proposed in the previously mentioned European legal framework. It is not, therefore, the real danger but rather the potential conspiracy against an established order from outside that said order which the specific punishment of these criminal organizations is attempting to avoid, in accordance with this conception.

Beyond the element of a high degree of danger associated with this group or of generic references to “peace” or “security” being affected, the fact that these organizations assume the monopoly on violence that belongs exclusively to the State must be stressed. So, there is an unlawful element inherent in the criminal organization. In the words of Professor Cancio (Cancio, 2008), this is an unwarranted assumption of an organization not only in the sense that an organization is assumed, but also that it is an organization that assumes it. The criminal organization assumes the exercise of rights pertaining to the scope of State sovereignty. Only the exercise of a discipline that includes violent criminal acts really questions the role of the State, a definition that brings to mind drug cartels or terrorist organizations. Specifically, as terrorism intends to attack the State’s power, the high degree of danger associated with terrorist organizations goes beyond the specific harm of established individual rights. The rest of criminal organizations which are not terrorists also adopt a position of confrontation toward the State with the intention of having control of the use of violence, and on occasion, constructing a parallel State or a State within a State. This is the case in many parts of Latin America, for example, specific areas within Colombian territory (whether because of guerrilla or paramilitary groups). These apolitical criminal organizations operate using coercive mechanisms within the group and outside the group by committing violent acts which have been established as criminal offenses.

The conceptions of the unlawful element of both authors is not so far apart although in the case of Professor Cancio, it is based on the negation of the rule of law and in the case of Professor Silva, on the actual increase in the degree of danger. The main difference resides in the response to this unlawful element. Professor Cancio bases his arguments on the just desserts, whereas Professor Silva focuses on incapacitation, which applied to the criminal organization, is illegalization. If its members are also punished it is because of the need to prevent organization members from participating in specific crimes (Cancio; Silva, 2008).

The reform of the Criminal Code brought about by LO 5/2010 of June 22nd, in its preamble sides with the authors who saw that the configuration of these organizations went far beyond a mere demonstration of abusive, deviant or pathological exercise of the freedom of assembly. Before this in Spain, an attempt to stop the vastly complex phenomenon of organized crime was made employing an almost ridiculous legal category such as the traditional offense of unlawful assembly originally used to control political dissidence, without having managed to adapt it to the current legal and political context. Indeed, the classification of criminal offenses has been subject to certain inertia in comparison with that tradition, in such a way that their regulation has not been refocused toward the scope of effectiveness of real criminal organizations (Brandariz, 2009; Cancio, 2008). This category which, as was stated in the previous section of the paper, has remained after the recent reform together with the new offenses that regulate criminal organizations and groups, which will eventually generate problems of overlapping laws, whose possible solution has already been suggested (*cf.* last subsection of part IV).

Indeed, as stated before, the legislator in 2010 has understood that “criminal organizations and groups in general are

not really ‘associations’ that commit crimes, but rather groups with an intrinsic criminal nature, lacking, in many cases, any legal form or appearance or having this appearance for the sole purpose of concealing its activity and seeking impunity. Precisely because of the controversy that has arisen in the legal writings in relation to the systematic categorization of these criminal offenses, they have finally opted for –as stated in the preamble of the law- altering the structure of the present Criminal Code the least amount possible, in situating it within the framework of crimes against public order. They are unmistakably, if we take into account that the phenomenon of organized crime directly attacks the very basis of democracy since these organizations, apart from multiplying exponentially the potential harm of the different criminal behaviors carried out in the group or through the group, they are characterized by the aspect of generating complex procedures and instruments especially directed at insuring the impunity of their activities and of their members, and of the concealment of their resources and the profits gained from their activity, all within a false appearance of conformity with the law, altering the normal functioning of markets and institutions, corrupting the nature of legal business and even affecting the management and capacity of action of the administrative authority of the State”.

CONSIDERING THIS CRIMINAL LAW RESPONSE TO THIS PHENOMENON: “PENAL LAW FOR ENEMIES” REVISITED

The criminal law response to this phenomenon falls within the so-called *Penal Law for Enemies* (Jakobs, 2002, 2003), characterized by the justification of the existence of a criminal law and criminal procedure that restrict individual rights in order to defend society against future aggression, halfway between *symbolic* criminal law and *punitivism* (Cancio, 2003, 2010), whose aim would be the exclusion and incapacitation of that enemy, (Silva, 2001) which is indicative of the failure of criminal law in this field, giving priority to police control and repression (Fumarulo, 2007). In the words of Professor Cancio (Cancio, 2003) this criminal law functions from a prospective point of view (reference point is a future action) rather than retrospective (focusing on the crime committed), characterized by a broadening of the punitive barrier, exacerbation of the punishment, considerable restriction of the guarantees and procedural rights of the accused as well as limiting prison benefits. So, as Professor Silva states (Silva, 2001; Cancio, 2010), penal law for *enemies* is labelled like a 3rd speed in which the imposition of the most severe deprivation of liberty sentences (belonging to the 1st speed) coexist along with the relaxation of political-criminal guarantees and of the rules of accusation (belonging to the 2nd speed used in this case for less serious sanctions). To these three characteristics of Penal Law for Enemies, a fourth should be added: the orientation toward criminal law *de autor* (tendency to try and convict people not for what they have done but for who they are) of the regulation as a consequence of the exclusion of the category of subjects as enemies.

Is this criminal law of *exception*, call it as you like, justifiable? Insofar as the crimes that are being fought do not diminish, it would not be legitimate to restrict the guarantees that this exceptional law supposes, and in any case, it would

never be to my way of thinking to combat merely minor crimes (option chosen by the Spanish criminal legislation of 2010), which contravenes, as has been stated, the principle of proportionality of punishment. That is to say, that beyond questioning that the new classification of offenses confirms conduct near to the category of conspiracy (to commit even less serious or minor crimes) punished as autonomous crimes with quite stiff sentences, in some cases, it should be pointed out (Brandaríz, 2009; Zúñiga, 2002) that this furtherance of the punitive barrier to avoid the infringement of the protected rights threatened by the criminal activity is very difficult to justify to deter less serious or minor crimes.

Therefore, *de lege ferenda*, firstly, in my opinion, the limiting criteria of lucrative aim should be introduced even though this implies, on the one hand, increasing the burden of proof and, on the other hand, the risk of excluding certain classifications that while being serious have other motivations, since it is the intrinsic characteristic of criminal organizations, which makes infringement of protected rights feasible as has been delimited here, that is to say, which attack the foundation of democracy assuming the monopoly of violence which corresponds exclusively to the State. Secondly, this classification should be relegated to more serious offenses for reasons of *ofensividad* (in Spanish law, there is no crime without a concrete danger of harming a protected right) and of less intervention. Otherwise, the effort made for years in Spanish legal writing and jurisprudence to rationally limit, through interpretation, the potential reach of the crimes of organization based on its literal drafting will be repeated.

In short (Cancio, 2008; Brandaríz, 2009), any group whose aim is to commit offenses cannot be considered *unlawful assembly*. But rather, in order to challenge the State in its exclusive use of violence, it is necessary for the organization to first have a solid and powerful structure, which can be obtained primarily through lucrative aims, and secondly, to be coherent, the catalogue of criminal infractions must be limited in the sense that only serious offenses really challenge that state monopoly.

RESPONSE BASED ON THE IDEA THAT “CRIME DOES NOT PAY”

Given that the danger of organized crime is defined starting with its capacity to accumulate profits that can be used to infiltrate the economy, to broaden the scale of crime, to corrupt civil servants or to assume the monopoly of violence, since the 1980s the fight against organized crime has been based to a great extent on tracking their finances (Fernández Steinko, 2008). Therefore, the fundamental elements to weaken their economic power are confiscation and the fight against money laundering as the essential aspects in this battle. The European provisions² of the last years have been

² Council Framework Decision 2001/500/JHA harmonizes some of the national provisions regarding confiscation and penalties applicable to money laundering. Council Framework Decision 2003/577/JHA applies the principle of mutual recognition to the resolutions of freezing of property and securing evidence.

Council Framework Decision 2005/212/JHA has as its objective to insure that Member States have effective measures that regulate confiscation of crime-related proceeds, particularly regarding the demonstration of the origin of the property affected.

The Framework Decision 2006/783/JHA applies the principle of mutual recognition to the confiscation resolutions. The question of mutual recognition is very pertinent since

directed at insuring the harmonization of national provisions relating to confiscation and penal sanctions applicable to money laundering, as well as applying the principle of mutual recognition to the resolutions of preventative embargo of property and of securing evidence between different countries, and of confiscation, and especially, emphasizing everything regarding the burden of proof of the origin of the property affected.

Confiscation

Regarding confiscation, the Communication of the Commission to the European Parliament and the Council COM/2008/0766 final, recognizes this classification as well as the recovery of proceeds of criminal origin constituting a very effective tool to fight against organized crime which is essentially motivated by the desire for profit. In effect, confiscation impedes that these funds can be used to finance other illegal activities, undermine confidence in the financial systems and corrupt legitimate society. So, the need for confiscation without criminal conviction has been proposed, thus incorporating the 3rd Recommendation of the Financial Action Task Force FATF to European law, for example, when there is a suspicion that the property in question is the product of serious crime. Thusly, a case could be brought before a civil court being grounded in the presumption that the property comes from criminal activities. In these cases, the burden of proof is reversed by making it incumbent on the accused to prove the legal origin of the property.

Likewise, the creation of an offense of possession of unjustified property has been proposed within the European law framework to pursue the proceeds of crime in those cases in which the value is disproportionate in comparison with the income reported by the owner. In this case, the proceedings are carried out before a criminal court and the burden of proof is not completely reversed (this classification exists in French criminal law).

these procedures are used more and more, especially in countries that apply Common Law and they are becoming very effective instruments when pursuing the products of organized crime's activities.

The Second Protocol of the Agreement regarding protection of the financial interests of the European Communities, provided for measures of confiscation as well as cooperation with the Member States in the fight against fraud and money laundering which included confiscation.

The proposal of Framework Decision regarding the European letter of request on obtaining evidence to collect objects, documents and data destined for criminal proceedings, provided for regulations on the follow-up of the resolutions on preventative embargo dictated in accordance with the Council Framework Decision 2003/577/JHA. It also includes certain provisions of the 2001 Protocol of the Agreement regarding legal assistance in criminal matters.

Brussels Communication 20-11-2008 (Communication from the Commission to the European Parliament and the Council – Proceeds from organized crime: ensuring that “crime does not pay” COM/2008/0766 final). Finally, the provisional report of the European Commission to the European Parliament and to the Council made in Brussels on 23-3-2010, COM (2010) 112 final, on progress in Bulgaria under the Cooperation and Verification Mechanism, to help with, among other issues, the fight against organized crime, as well as the provisional report of the European Commission to the European Parliament and to the Council made in Brussels on 23-3-2010, COM (2010) 113 final, on progress in Rumania under the Cooperation and Verification Mechanism, to help with, among other issues, the fight against organized crime proposes among other questions, to reform the laws dealing with confiscation of proceeds from crime and the fight against money laundering and confiscation of criminals' property, modifying the notary's act to prohibit cash payment of real estate transfers.

The UN Convention on Transnational Organized Crime of 15/XI/2000 already proposed equivalent confiscation (Battista, 2007), that is to say, when it is not possible to determine the price or the profit of the crime the security measure can use other property that the accused has at his disposal with a similar value, which lightens the investigative burden.

The reform of Spanish criminal legislation (LO 5/2010), through the modification of art. 127, complies with the Council Framework Decision 205/212/JHA, of February 24, 2005, regarding confiscation of the products, instruments and proceeds from crime. The preamble to the law highlights that the main objective of organized crime is profit, and consequently, establishing common provisions for monitoring, embargo, seizure and confiscation of the proceeds of the crime is the priority for carrying out an effective fight against it.

For this reason, the existing provision on confiscation has been completed by commending it to the judiciary and the courts to come to an agreement as to the effects, property, instruments and profits proceeding from criminal activities committed within a criminal organization or group, or when it is a terrorist act, whether or not having been committed within a terrorist group or organization, as established in the Council Framework Decision 2002/475/JHA on the fight against terrorism. To facilitate the measure, it has been established that it will be presumed that property proceeds from criminal activity when the value of said property is disproportionate with the legal income of each and every one of the persons convicted for crimes committed within a criminal organization or group. Furthermore, judges and courts are empowered (differing from what happens with deliberate crimes in which the judge is obligated to approve it) to approve confiscation when it is a negligent offense that carries a prison sentence greater than one year.

The proposal arises from the criminal law policy usefulness of depriving those who commit crimes within a criminal organization of the proceeds from criminal activity prior to this having been revealed, not because the origin has been proven in any final judgment, but rather because the subject's assets have increased unjustifiably.

In this way (Informe CGPJ, 2008; Hava, 2010), the reform starts from the broadened confiscation “to the effects, property, instruments and profits proceeding from a criminal activity committed within the framework of a criminal organization” that is, the object of confiscation in these cases are the effects, property, instruments or profits proceeding from a different criminal activity, that is to say, prior to that which motivates the broadening of the confiscation because with organized crime it is usually only possible to prove the intervention of its members in some concrete offense and belonging continually to the organization, but it is infrequent that concrete interventions in other previous offenses can be proven. Nevertheless, this previous criminal activity seems undeniable at times, precisely in view of the unjustified assets of the accused. This connection of the assets from presumably illegal origin with criminal activity within the organization avoids that the merely illicit origin, although not criminal, of the assets be sufficient grounds for the broadened confiscation of property, which is of great importance

to define the scope (Rueda, 2009) of the broadened confiscation.

In reality, the legislator has established with this provision a reversal of the burden of proof for the origin of enrichment of these persons, in line with the demands made clear in European regulations, that is to say, a presumption that to be constitutionally valid it can only be a rebuttable presumption (*praesumptio iuris tantum*), of an enrichment proceeding from committing crimes (“*from criminal activity*”, in the terminology of the Criminal Code).

Leaving aside the problems that arise with this broadened confiscation regarding the guarantees associated with evidence mentioned before, this provision has been complemented with the contribution provided for in the *Disposición Final 1ª de la Ley Orgánica 5/2010* (final provision of the act of parliament) which modifies the Criminal Procedure Law introducing a new article 367 septies that provides for the creation of an Office of Assets Recovery, devoted to the localization, administration and management of all property linked to crime committed by criminal organizations which can facilitate the pursuit of this criminality.

Money Laundering Crime

Regarding the offense of money laundering, its classification constitutes a clear example of that criminal law that functions from a prospective point of view (reference point is a future act) instead of retrospective (focusing on the committed crime), as it (Fernández Steinko, 2007; Bajo; Bacigalupo, 2009) is a legal instrument that does not judge so much or only what has happened but rather what could happen in the case that the illicit money was used effectively to infiltrate the legal economy and society, that is to say, that what continues to be a threat is effectively fulfilled. And, at the same time, remembers the very notion of degree of danger of organized crime. A person has committed a serious crime but since there is no evidence, he is arrested for having attempted to launder money presumably obtained from said crime, for everything that he could do with said money. Therefore, the laundering is separated from the main crime. It is even an autonomous offense if the person is unable to demonstrate the origin of his assets. Such that the person can even be punished more severely than for the original crime which violates the principle of proportionality of punishment. It also supposes at the same time a reversal of the burden of proof violating the principle of presumed innocence since it is the accused that has to demonstrate the non-illicit origin of his assets considered suspicious.

Along these lines, the 2010 criminal legislation, through the modification of articles 301 and 302 of the Criminal Code, broaden the criminal classification to include two new features: first, the utilization and the possession of assets known to come from *criminal activity*, even if the crime was committed by the very subject that possesses the assets, that is to say, also punishing (and this is the second new feature) the conduct of self-laundering, outside of the structure of the offenses of money laundering and receiving stolen goods that refer to a previous crime committed by another person. This double punishment may violate (Manjón-Cabeza, 2010) the principle of double jeopardy, although it does not seem to be permitted by either the criminal legislation nor by the Supreme Court of July 18, 2006, where it was maintained

that this offense does not exclude, in any case, the actual overlapping with the prior offense.

The report by the General Council of the Spanish Judiciary (Informe CGPJ, 2008), observes that the traditional classifications of money laundering have in common the characteristic that they tend to dissimulate the illegal origin of the assets, giving an appearance of legality to the proceeds or profits of the crime. So, concealment, complicity, transmission and acquisition mean an apparent change of ownership that situate the property within the assets of another person, who has not committed the crime, with the purpose of incorporating it into the legal and economic traffic. However, when the 2010 legislation sanctions he who simply possesses or utilizes property known to be the product of criminal activity (or even from gross negligence), it is not incriminating conduct which really constitutes money laundering since this conduct does not involve a real or apparent change of ownership.

To the former we must add the drawback that merely possessing or using property without having intervened in committing the crime from which it originated can be punished more severely than having committed the very offenses of larceny, fraud, embezzlement, etc. from which the goods proceed. This conclusion (Informe CGPJ, 2008) lacks any logical criminal law policy justification and greatly exceeds the constitutional principle of proportionality of punishment.

Regarding the expression “criminal activity”, the report of the *Consejo Fiscal* (a board that assists the Chief State Prosecutor in his duties) on the 2008 draft (Informe Consejo Fiscal, 2008) suggested this terminology instead of “offense” which seems to mean that a prior conviction for the predicate offense is not necessary in accordance with the Supreme Court’s decision which does not require a judicial resolution about the predicate offense (thus relaxing the guarantees associated with evidence from the investigation). The introduction of this nuance is coherent with the terminology used in the new classification of confiscation (category closely related with the offense of money laundering) and with where this offense is characteristically carried out, that is, within organized crime, where it is not always possible to prove the concrete intervention of a particular member in a particular offense (because of the interchangeability between them) although his continuing membership in the organization can be proven, which in and of itself constitutes “criminal activity”.

This new category in the fight against money laundering makes it clear (Fernández Steinko, 2008) that it is not so much an instrument to facilitate pursuing the crime but rather it is primarily useful for dismantling the economic structural power in the world derived from organized crime.

All in all, both measures, confiscation and money laundering, as they are currently defined, are useful in the fight against organized crime, although questionable from the point of view of limiting guarantees. However, these instruments are not sufficient. They need to be complemented.

Independent International Organizations for Finance Control. Tax Havens and Jurisdictions with Bank Secrecy

For some decades, the term Gross Criminal Product has been coined to refer to the money moved by drugs, illegal

arms sales, coerced prostitution, urban development corruption and trafficking in persons.

It is true that a parallel economy based on crime exists but this is not fed primarily through blue collar crime but rather the main beneficiaries are groups that are infinitely more powerful than all of them together (Fernández Steinko, 2008) because of their organizational and planning capacity: the great fortunes of the world, large multinational companies and, more concretely, their elite closely linked to tax evasion with lack of democratic control of their activities and the parallel institutional structures of the most influential States in the world. The possible solution should begin with the creation of independent bodies to study organized crime and criminal finance, which is the path that should be used to halt any other problem. The presence of representatives of workers and of civil society in the boards of directors would make the accounting manipulation that was seen, for example, in ENRON, more difficult. Thus, the creation of independent international regulatory organisms for international finances would make it possible to fight against parallel finances. The flow of criminal money is important but it does not have these last dimensions for the international economy in its whole. Tax evasion generates a much higher social, political and economic harm. The dismantling of the social actors behind these practices leads us to the crime.

Aside from the creation of this instrument, it should not be forgotten that the structural power derived from organized crime (Fernández Steinko, 2008) is sustained primarily because of the role played by tax havens, that is to say, the *off shore* financial centers (areas in which business can be carried out with non-residents which permits creating impenetrable networks of businesses legally and carrying out financial transactions between them and with others in foreign countries without having to notify any authority) and jurisdictions with bank secrecy (Liechtenstein, Panama, Switzerland) created to ensure their clients' confidentiality, together with other ways of ensuring the same thing, such as establishing companies, intermediaries or trusts designed to make it impossible to identify the real owners or final beneficiaries of the accounts, as well as using computing and accounting techniques to make said accounts disappear.

In this respect, in the aforementioned Communication of the Commission to the European Parliament and the Council, Brussels 20-11-2008, it was recommended that the provisions of the 2001 Protocol be included which establish that the authorities of the Member States should facilitate information about the accounts and bank operations of certain identified persons and that the banking secret cannot be cited to avoid cooperating in this context.

Likewise, computing technology applied to this area together with intelligence services (Herrán, M.; Santiago, J.L.; González, S.; Mendieta, E., 2007) constitute some of the most important instruments to unravel the complexity of organized crime. Therefore, workers in the judicial system must be capacitated to utilize them in their investigation.

And, evidently, faced with the transnational character of organized crime, at the same time international cooperation must be favored, ridding ourselves of the exclusive sovereignty aspirations of the State. The latest provisions of Euro-

pean regulations mentioned in section VII of this paper stress this.

THE SPECIFIC NATURE OF TERRORISM. REFERENCE TO NEW SPANISH CRIMINAL LEGISLATION

One of the important new features of the previously mentioned Criminal Code Reform (LO 5/2010) is the reorganization and broadening of the criminal scope of terrorist acts, including among them training, integration or participation in terrorist organizations or groups, thus complying with the legislative obligations originating with Council Framework Decision 2008/919/JHA.

Taking into consideration the intrinsic seriousness of terrorist activity (Preamble to LO 5/2010, 2010), seen as the greatest threat to the rule of law, as well as the peculiar way certain terrorist groups or cells of recent appearance on the international scene operate, whose degree of autonomy is precisely an added factor of difficulty in their identification and dismantling, the new legislation opts for equating the punitive policy for terrorist groups with that of organizations strictly speaking, maintaining in this aspect the same penal response that has been given until now by Spanish jurisprudence, unlike the policy adopted for other criminal organizations and groups.

In accordance with the guideline set out in the cited Framework Decision, the concept of collaboration with a terrorist organization or group was broadened, including conduct that until now had posed some difficulties and had not fit in legally, such as recruiting, indoctrinating or training terrorists. Along the same lines as the harmonizing European regulation, it includes the conducts of public distribution, through any means, messages or catchwords that, without necessarily constituting provocation, conspiracy or proposition for carrying out a specific criminal action, they have been shown to increase the risk of committing a terrorist act at a given moment.

Likewise, the express criminal category of financing terrorism (González Cussac, 2009) is provided for, continuing along the same lines as that set out regarding money laundering, including the reckless conduct of subjects obligated to collaborate with the Administration in the prevention of such financing.

This distinct punitive policy given to the rest of criminal organizations, based on punitive exacerbation, the notable advance of the punitive barrier in comparison to the previous legislation, equating groups and organizations, continue to question the limits of the State's right to sanction. Nevertheless, the emphasis on discovering the threads that lead to financing, more than anti-money laundering measures, could turn out to be useful if we take into account that money laundering does not always produce valuable information with alleged terrorism. Since, as we know (Fernández Steinko, 2008), the purpose of money laundering is to take proceeds from illicit activities and invest them in lawful activities. However, the crux of terrorism is financing which implies a reverse operation, namely the use of small sums that generally come from licit sources for illicit ends. These differences have an impact of the mechanisms of detection and investigation of other types of activities (it should not be forgotten that the central element of any organized crime

investigation is the capacity of interlacing data and combining information to acquire evidence). For this reason, financing of terrorism has currently acquired international character and there is ample consensus for the need for cooperation among countries. Nevertheless, access to citizens' confidential information, as at any time, must have sufficient legal control so as to guarantee the protection of privacy of persons and companies.

CONCLUSIONS

1) It has been demonstrated that the stiffening of sentences as a response to organized crime, in particular the offenses of terrorism and drug trafficking is not effective because the rates of these offenses have not decreased. If we do not clearly define the boundaries of the offense, we will be unable to effectively combat it, because when everything is a crime the deterrence effect of punishment vanishes. The punishment no longer completes its preventative function tending toward the incapacitation of the criminal. But, I do not believe that this is the way: it is about (Cancio, 2010) responding not incapacitating.

The stiffening of punishment when criminal law has proven ineffective turns into pure symbolic criminal law that calms the conscience and social demands constituting a clear exercise in hypocrisy because this hardening only affects the lowest layers of the pyramid structure of these organizations. This harmful consequence seems to have been taken into account by the 2010 Spanish criminal legislation when in certain areas that affect organized crime such as intellectual property offenses, for example, the possibility of extenuating the punishment has been established upon demonstrating a certain breakdown of the necessary proportionality of punishment in the case of small-scale sale of fraudulent copies of works protected by such rights, especially when the authors of this type of conduct are frequently people in poverty, at times used by criminal organizations, who are simply trying to eke out a subsistent living. On the contrary, it has been shown that the pinnacle is orchestrated by people who move huge structured networks to finance terrorism and arms trafficking and whom it is almost impossible to convict for lack of evidence and for the obstruction of justice that occurs in these high spheres as a consequence of corruption.

2) All of the forms of organized crime have a common end which is obtaining economic profit and/or political benefit to assume the State's monopoly on violence, which is where its danger truly lies. Therefore, the answer also has to be homogeneous based on the idea that crime does not pay. Thus, the fundamental elements to weaken its economic power are confiscation and the offense of money laundering. As a complement to them, independent international bodies to regulate international finance should be created to fight against parallel finance. The dismantling of the social partners behind these practices: controlling tax evasion by dissolving the structural power of the tax havens and jurisdictions with bank secrecy and redefining, at the same time, the limits of bank secrecy allowing banks margin to report crimes.

3) In the specific case of terrorism, the attack on the sources of financing must be emphasized since it has been demonstrated that money laundering does not produce valu-

able information in suspected terrorism and the crux of terrorism is financing, which implies a reverse operation to that of money laundering, namely the use of small sums generally from licit sources being used for illicit ends. Therefore, in this regard, strengthening the embargo of accounts, controlling access to them, etc. is warranted.

4) Professionalizing and internationalizing investigation as a basic instrument for unraveling the complexity of organized crime through, on the one hand, computer technology applied to this area, together with intelligence services. For this reason, workers in the justice system must be capacitated to use these in their investigation. And favor, at the same time, international cooperation, eliminating restraints derived from the sovereignty aspirations of the States.

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CONFLICT OF INTEREST

None declared.

REFERENCES

- Bajo, M., Bacigalupo, S. (Eds.). (2009). *Política criminal y blanqueo de capitales* (pp. 11-252). Madrid: Marcial Pons.
- Barber, S. (2004). *Los actos preparatorios del delito* (pp. 152). Granada: Comares.
- Battista, G. (2007). Estrategias de combate de la movilidad patrimonial de la delincuencia organizada transnacional: de la cooperación judicial al reconocimiento recíproco de las órdenes de aseguramiento y decomiso de los productos del delito. In M. Herrán, J.L. Santiago, S. González, E. Mendieta (Eds.), *Análisis, Técnicas y Herramientas en el combate a la delincuencia organizada y corrupción con fundamento en la Convención de Palermo* (pp. 519-521). México: Coyoacán.
- Brandariz, JA. (2009). Asociaciones y organizaciones criminales. Las disfunciones del art. 515.1º CP y la nueva reforma penal, in FJ. Álvarez (Eds.), *La adecuación del Derecho penal español al Ordenamiento de la Unión Europea. La Política criminal europea* (pp. 728, 730, 731, 734, 745, 750, 751, 753). Valencia: Tirant lo Blanch.
- Cancio, M. (2003). *¿Derecho penal del enemigo? In Derecho penal del enemigo*, (trans. M. Cancio) (pp. 76-78, 80). Madrid: Thomson-Civitas.
- Cancio, M., Silva, JM. (2008). *Delitos de organización* (pp. 5, 6, 10, 11, 19, 20, 68, 75-81, 82, 83). Montevideo-Buenos Aires: B de F Ltda: Euros Editores SRL.
- Cancio, M. (2010). *Los delitos de terrorismo: estructura típica e injusto* (pp. 7, 17, 18, 27, 32, 133). Madrid: Reus.
- Choclán, JA. (2001). *Criminalidad organizada. Concepto de asociación ilícita. Problemas de autoría y participación*. In Granados, C. (Dir.), *La criminalidad organizada. Aspectos sustantivos, procesales y orgánicos* (pp. 254). Madrid: Consejo General del Poder Judicial.
- Crespo, P. (2010). *El tratamiento de la corrupción como crimen organizado en el nuevo código penal. Conferencia: XXXII Jornadas de la Abogacía del Estado, dealing with the "New Criminal Code"*. Madrid, p. 7.
- Fernández, Steinko, A. (2008). *Las pistas falsas del crimen organizado. Finanzas paralelas y orden internacional* (pp. 23, 24, 92-97, 116, 170-176, 183-194, 276-285). Madrid: Catarata.
- Flores, CA. (2007). Poder, corrupción y delincuencia. Modelo teórico de la articulación de vínculos de contubernio entre funcionarios públicos y el crimen organizado. In M. Herrán, J.L. Santiago, S. González, E. Mendieta (Eds.), *Análisis, Técnicas y Herramientas en el combate a la delincuencia organizada y corrupción con fundamento en la Convención de Palermo* (pp. 148-150). México: Coyoacán.
- Fumarulo, S. (2007). Delincuencia organizada y seguridad: represión y prevención. In M. Herrán, J.L. Santiago, S. González, E. Mendieta (Eds.), *Análisis, Técnicas y Herramientas en el combate a la delincuencia organizada y corrupción con fundamento en la Convención de Palermo* (pp. 238-240). México: Coyoacán.
- García-Pablos, A. (1997). *Asociaciones ilícitas en el Código Penal* (pp. 143). Barcelona: Bosch.

- González, Cussac, JL., Fernández, A. (Eds.). (2009). *Financiación del terrorismo, blanqueo de capitales y secreto bancario: un análisis crítico* (pp. 13-369). Valencia: Tirant lo Blanch.
- Hava, E. (2010). Comiso (art. 127 y Disposición Final Sexta), in FJ Álvarez, JL González Cussac (Eds.), *Comentarios a la Reforma Penal de 2010* (p. 161). Valencia: Tirant lo Blanch.
- Herrán, M., Santiago, JL., González, S., Mendieta, E. (2007). Aproximación general a la delincuencia organizada. In M. Herrán, JL. Santiago, S. González, E. Mendieta, (Eds.), *Análisis, Técnicas y Herramientas en el combate a la delincuencia organizada y corrupción con fundamento en la Convención de Palermo* (pp. 23-25, 67-72). México: Coyoacán.
- Informe, Consejo, F. (2008). *sobre el Anteproyecto de Ley Orgánica por la que se modifica la Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal*, pp. 162-163. (Report on the draft bill of the act of parliament that modified LO 10/1995, of November 23, of the Criminal Code, 2008, pp. 162-163).
- Informe CGPJ (2008). *al Anteproyecto de Ley Orgánica por la que se modifica la Ley orgánica 10/1995, de 23 de noviembre, del Código Penal*, pp. 49-56, 118, 122. (Report on the draft bill of the act of parliament that modified LO 10/1995, of November 23, of the Criminal Code, 2008, pp. 49-56).
- Jakobs, G. (2002). *La ciencia del Derecho penal ante las exigencias del presente*. In *Moderna dogmática penal, Estudios compilados* (trans. Manso, T.) (p. 734). México: Porrúa.
- Jakobs, G. (2003). *Derecho penal del ciudadano y Derecho penal del enemigo*. In *Derecho Penal del enemigo* (trans. Cancio, M.) (p. 22). Madrid: Thomson-Civitas.
- Kinzig, J. (2004). *Die rechtliche Bewältigung von Erscheinungsformen organisierter Kriminalität* (p. 57). Berlín: Duncker & Humbold.
- Lamarca, C., García Rivas, N. (2010). Organizaciones y grupos criminales. In FJ. Álvarez, JL. González Cussac (Eds.), *Comentarios a la Reforma Penal de 2010* (pp. 517-519). Valencia: Tirant lo Blanch.
- Manjón-Cabeza A. Receptación y blanqueo de capitales (arts. 301 y 302). (2010). In FJ. Álvarez, JL. González Cussac (Eds.), *Comentarios a la Reforma Penal de 2010* (pp. 344-345). Valencia: Tirant lo Blanch.
- Mapelli, B. (2001). *Estudios sobre delincuencia organizada* (p. 2088). Sevilla: Instituto Andaluz Interuniversitario de Criminología.
- Moore, M. (1986). Organized Crime as business enterprise (Eds.), *Major Issues in organized crime control* (pp. 50-54). Washington: Symposium organized by the US Department of Justice.
- Moral de la Rosa, J. (2005). *Aspectos penales y criminológicos del terrorismo* (pp. 180). Madrid: Centro de Estudios Financieros.
- O'Neil, S. (2008). *Las nuevas relaciones EE.UU-Latinoamérica. Política Exterior*, 124, XXII (pp. 96-101).
- Preamble to LO 5/2010 (2010), of the modification of the Criminal Code (Boletín Oficial del Estado, nº 152, 23-junio-2010), p. 54823.
- Rueda, L. (2009). La reforma del comiso y su adaptación al Derecho europeo. In FJ. Álvarez (Ed.), *La adecuación del Derecho penal español al Ordenamiento de la Unión Europea. La Política criminal europea* (p. 225). Valencia: Tirant lo Blanch.
- Sánchez García de Paz, I. (2005). La criminalidad organizada (Eds.), *Aspectos penales, procesales, administrativos y policiales* (p. 122). Madrid: Dykinson.
- Silva, JM. (2001). La expansión del Derecho penal. Aspectos de la política criminal en las sociedades postindustriales, 2ª ed. (pp. 159-167). Madrid: Civitas.
- Zúñiga, L. (2002). Redes internacionales y criminalidad: a propósito del modelo de <<participación en organización criminal>>, in L. Zúñiga; C. Méndez; MR. Diego (Eds.), *El Derecho penal ante la globalización* (p. 66). Madrid: Colex.
- Zúñiga, L. (2009). *Criminalidad organizada y sistema de derecho penal* (p. 280). Granada: Comares.

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