

# Criminal organizations and Judiciary Power

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*The lawyer Jorgina de Freitas, convicted for fraud against the State Pensions Fund, makes-up one of the contestants in the beauty contest at Bangu prison, Rio de Janeiro.*

## Introduction

**C**ONFRONTING organized crime is a theme that not only sets the order of business for the judiciary (both national and international), but also fills a significant number of pages in the national press, a clear indication of the extent to which the theme has not only attracted the attention of specialists, but of the population in general.

In a way, the attention invested in the theme ends up making it a prime target for those who, by some means or other, wish to exploit it for their own political gain. Thus we see the sudden emergence of self-styled “specialists” in public security in general and in the combat of Organized Crime in particular; generally prescribing miraculous solutions that would seem to have been visited upon them by Divine messenger.

Behind all this political exploitation of such a serious matter lies the

feeling of *insecurity and fear* that has assailed the population and driven it into hiding before the sheer force of the violence practiced upon it by criminal organizations, and given carpet-coverage in the media. Even if these acts are sporadically repressed by organs responsible for fighting crime, we have not seen any concrete action capable of diminishing the abovementioned sense of fear.

This essay aims to identify the kinds of criminal organization known to us, the sectors in which they operate and their main characteristics, as well as the problems faced by agents of crime prevention and repression, particularly the Judiciary, in confronting Organized Crime in Brazil.

## **Types of Organized Crime**

Considering the goals that inspire their operations, we can discern the existence of two kinds of criminal organization: those which engage in illegal activities with a view to achieving political and/or ideological ends, and those that, in a manner similar to a normal company, perpetrate illegal acts in pursuit of profit. In terminology proposed by the author, we could call the former “ideological” criminal organizations, and the latter “corporate” criminal organizations. However, more often than not the two will find themselves intercommunicating in virtue of an increasingly “globalized” approach to Organized Crime, as even when they seek to conquer territories, break them up or win political power, these criminal organizations need to raise funds to finance their projects.

*Ideological criminal organizations* are a group given scant study. When the media, scholars or even the public speak of “Organized Crime”, these groups are rarely what they have in mind. Indeed, the expression “Organized Crime” – sometimes substituted by the term “mafia” – was incorporated into general parlance to describe a group that exploits a given branch of crime with a view to obtaining profit; in other words, the reference is always to the corporate type.

These organizations, like normal companies, operate in such a way as maximizes profit. The difference is that, while legitimate enterprises pursue this goal through licit activities, criminal organizations seek their profit by illicit means, such as the trafficking of drugs or people.

## **Concept**

The first problem that arises in combating Organized Crime is defining what it actually is. Far from being an academic question, there are important practical consequences involved, starting from the fact that Brazilian legislation sanctions the use of more invasive methods of policing in tackling criminal organizations, such as infiltration, audio and visual surveillance and controlled action – article 2 of Law no: 9034/95 -, than it does for investigating criminal activities not related to Organized Crime.

In this sense, article 1 of Law no. 9034/95, under the wording of Law

no.10219/01, determines that: “This law defines and regulates means of proof and investigative procedures applicable in case of crimes resulting from the illicit practices of criminal gangs, mobs, organizations or associations of any order”.

The original wording of the law referred only to crimes perpetrated by gangs or mobs, which led some to assume (cf. Willian Douglas in Gomes et al., 2000, p.48-56) that the expression “Organized Crime” had the same penal sense as “gang or mob”, which would contradict the understanding that the law was not supposed to apply to rudimentary criminal associations.

Law no.10217/01 introduced the terms “organizations or associations of any order” to article 1, thus giving the law its current wording. The promulgation of the law obliged the doctrine to embark upon a search for a juridical meaning for “Organized Crime” as distinct from the acts of “gangs or mobs”. As mentioned earlier, there were practicalities at stake in this search, as it concerned the employability of operational instruments of investigation and institutes permissible only in the situations prescribed by the law. In this regard, however, the law cited above failed to define what it understood by “criminal organization”.

Faced with this legal omission, one could argue for the possibility of the term being defined by the doctrine, though this would offend *the principle of legality*, as “it is impossible to extract requisites for the definition of criminal conducts not already contained in pre-existing penal law from any doctrinal considerations, however coherent or well-grounded these may be.” (ibidem)

Perceiving the gravity of the problem, the Commission in charge of drafting the bill for the reform of the special part of the Penal Code, presided over by the late minister Evandro Lins e Silva, proposed a definition of criminal organizations and their crimes along similar lines to that in the Italian legislation, which defines the crime of *mafia association* as follows:

Art. 290. When two or more people form a group or association with the intent of committing crimes and neutralizing the effectiveness of action by public officials through the use of threatened or actual violence, corruption or fraud:

Sentence – four to eight years imprisonment.

However, as we all know, the bill was never approved by the National Congress.

The Palermo Convention<sup>1</sup>, however, duly integrated into the Brazilian legislation, defined an organized criminal group 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 offences established in accordance with this Convention in order to obtain, directly or indirectly, a financial or other material benefit”.

As such, whether we want this legal concept or not, criticize it or

not, the fact is that the obstacles that could be said to have stood in the way of the application of legislation to combat Organized Crime in Brazil were definitively overcome in 2003.

The concept as set forth in the Palermo Convention recognizes the ends that guide the operations of criminal organizations, namely the pursuit of financial or moral gains, thus confirming the assertion made above that the expression “Organized Crime” is usually construed as meaning the exploitation of illicit means to secure financial gain.

### **Characteristics**

According to Gomes & Cervini (1997), in order to warrant the definition of Organized Crime, the organization must fulfill all the prerequisites of a gang or mob<sup>2</sup> plus at least three of the following: a) objective of accumulating wealth; b) structured hierarchy; c) “businesslike” planning; d) sophisticated technology; e) functional division of activities; f) structural connection with public authorities; g) offer of social services; h) territorial division of illegal activities; i) serious power of intimidation; j) diffuse capacity to defraud; k) local or international connections with other organizations.

Oliveira speaks along very similar lines (2004):

The Federal Bureau of Investigation (FBI) defines organized crime as any group having some manner of a formalized structure and whose primary objective is to obtain money through illegal activities. Such groups maintain their position through the use of actual or threatened violence, corrupt public officials, graft, or extortion. The Brazilian National Federal Police Academy, on the other hand, lists the following 10 characteristics: 1) Businesslike planning; 2) anti-juridicality; 3) diverse scope of activity; 4) longevity of membership; 5) chain of command; 6) large number of agents; 7) compartmentalization; 8) code of honor; 9) territorial control; 10) pursuit of profit.

Winfried Hassemar states that the characteristics of criminal organization activity include the corruption of the Judiciary and the political apparatus [Ziegler, 2003, p.63] Tokatlian (2000: p.58-65] notes that, in Colombia, the criminal organizations behave in a businesslike manner, look to establish circles of influence, even within institutions of the State, and, consequently, relentlessly pursue financial and political power.

Mingardin (1996,p.69) identifies fifteen characteristics of organized crime: 1) practice of illicit activities; 2) clandestine activities; 3) organizational hierarchy; 4) pursuit of profit; 5) division of labor; 6) use of violence; 7) symbiosis with the State; 8) illicit merchandise; 9) corporate planning; 10) use of intimidation; 11) sale of illicit services; 12) cronyism; 13) law of silence; 14) monopoly of violence; 15) territorial control...

Of the various sources above, it is curious to note that the only one that failed to mention connections with public authorities was the Brazilian Federal

Police.

One way or another, the fact remains that of all the abovementioned traits, there can be no doubt that *connection with public authorities* is the hallmark of truly organized criminality, followed by capacity to carry out diverse types of fraud, a high degree of operationality and constant mutation, all of which shall be examined more closely in the following pages.

### *Connection with public authorities*

For a long time Organized Crime was viewed as an attempt on the part of a group to create a “Parallel State”.

Under the influence of Hollywood movies, the popular image was of an Organized Crime with its own rules, rapid and violent executions and internal judgments; a kind of shadow of the three powers of the state, with the ability to create laws, enforce them and judge from them.

Today, one could say that criminal organizations that operate in that way are exceptions<sup>3</sup>, as it is precisely through infiltrating the apparatus of power and by co-opting its officials that Organized Crime looks to neutralize the repressive actions of the State; tactics, it would be no exaggeration to say, that have all but replaced violence and intimidation as the criminal organization’s modus operandi of choice <sup>4</sup>.

This characteristic did not go unnoticed to an astute Hassemer (1993, p. 85 ss), according to whom:

organized criminality requires more than just a well-run organization, or an international organization, but revolves, in the last analysis, around *the corruption of the legislative branch, the magistrates, the Attorney General’s office, the police; in short, the paralyzation of the state in its combat of criminality...* it is a diffuse criminality characterized by the absence of individual victims, the near-invisibility of the damage caused, and by a new modus operandi (careerism, division of labor, the participation of people “above suspicion”, sophisticated methods, etc.). More worrying still, for many it is the fruit of an individual choice and integrates certain cultures...

Along similar lines, though more emphatically, Gomes et al. (2000, p.8) note that:

force and violence are methods of no interest to them, basically because they end up attracting undesired attention from the press, the authorities and the population itself, which always exercise influence over policy initiatives. While they have unquestionable aptitude for intimidation, they can also generate repulsion, unpredictable revolt and unexpected backlashes. As such, criminal organizations are much better served by adopting less radical measures, opting for more discreet and subtle forms of interference in order to preserve

their capacity to operate. Injuring or killing, even from the juridical/penal perspective, results in material evidence, *corpus delicti*, a corpse or an injured individual, while infiltration, the exchange of favors, the offering of certain benefits and other lighter techniques have the same practical effect while leaving far fewer visible traces.

We can therefore see that maintaining direct or indirect connections with the State is, without doubt, the key characteristic of Organized Crime and, it is safe to say, its main means of ensuring operability, as it is only by infiltrating the governments, parliaments, police administrations and courts of justice that they can paralyze the hand that, theoretically, is supposed to strike them down and therefore achieve real impunity<sup>5</sup>.

### *Diffuse criminality*

Another strong characteristic of Organized Crime is that most of its activities do not directly point toward an individual victim. In fact, one can never immediately identify any single individual compromised by unmasked acts of drug trafficking, money laundering, cigarette contraband, arms dealing, corruption, etc.

Evidently, if we broaden the time-span, we readily observe that these criminal activities are vastly more prejudicial to society and to the State than those with immediate effect on a victim (such as theft, robbery, swindling, and so forth), as they interfere in the taxes levied by the State, the keeping of the peace and public order, the economy and free competition, etc.

However, it is a fact that this characteristic – allied with a culture, particularly observable in Brazil, which treats affairs on the public level as somehow otherworldly or detached from the social situation on the ground – helps to ensure that, in some respects, such behaviors attract little opprobrium from the public in general, thus facilitating both the criminal practice itself and the free circulation of macro-delinquents in the social environment. Diffuse criminality is, effectively, transindividual and, as such, indivisible, with only indeterminate victims. This raises an important aspect: as there are no immediately identifiable victims, nor are there any instantly visible losses, not even in the medium-term. In other words, by the time we realize the perpetration of the crime, the damage is already immense and usually irreparable.

Hence it is that the recovery of funds/products siphoned off by criminal organizations through illicit practices is, as yet, an incipient measure, especially when it comes to assets outside the country. One thing that is certain is that organized crime has sought to operate in spheres in which state control is precarious, such as the pensions fund, in which various cases of fraud have come to light - always with the involvement of people from inside the state apparatus itself –, inflicting enormous losses on society (diffuse victims) and



showing negligible rates of recovery.

On this point, it seems needless to say that the damage done by these criminal organizations is devastating, but it is nevertheless important to underscore that their deeds often go undiscovered for lengths of time, if not forever<sup>6</sup>. This comes down to the characteristics of the organized criminal group itself, as mentioned above, which acts under the cover of the very people who are invested with the powers to fight it, i.e. public officials, duly corrupted, coopted and infiltrated. The lack of direct individual victims, aggrieved and denouncing their losses, further complicates the identification and investigation of the felony, a context exacerbated by the power of intimidation wielded by organized crime.

### *Mutation*

Considering that the tentacles of Organized Crime reach into the very state organs entrusted with investigating its activities, which tend to leave neither individual victims to raise the alarm, nor traces that could lead back to the true perpetrators, one can naturally understand the enormous difficulty police organs in particular face in tackling organized criminal groups. Indeed, investigating criminal activity of this nature is painstaking work that involves personal risk to those involved and is highly prone to “leaks”. Given all these difficulties, mapping and detailing the actions of these criminal groups requires lengthy periods of investigation, the success of which largely depends on the liberation of sufficient funds to equip the police accordingly, which we all know rarely occurs. As if that were not enough, we can also see that organized criminal groups constantly and intentionally alter their methods and procedures in order to ensure against predictability in their modes of operating. In order to do this, they use various companies as “fronts”, which they constantly change over time, as well as countless different “stooges”, bank accounts, etc.

After a time, just as the authorities are becoming familiar with these initiatives, they change the accounts, the companies and even the people who exercise certain “transferrable” functions. This gives rise to another key characteristic of Organized Crime – the fungibility of non-strategic personnel inside the group. When this occurs, an investigation that has reached an advanced stage at enormous cost to the state and to the agents involved can be seriously compromised by the shift in *modus operandi*, another factor that makes it so difficult to map the organizational structure of these groups.

### **The Brazilian reality**

While it is not a unanimous position, it would seem that Brazil has yet to see a criminal group attain the same level of complexity as is observable in groups elsewhere, although this by no means prevents us from recognizing that Organized Crime already extends throughout the entire national territory.

It is present, and frighteningly powerful. Its infiltration, in some states more so than in others, is clearly notable. In a certain sense the Brazilian State has been watching these developments with its arms folded. We might well recall countless much-publicized cases in which federal intervention would have been appropriate but was not forthcoming.

Be that as it may, the fact remains that the Brazilian reality is highly propitious to the growth of criminal organizations just as complex, if not more so, than those we have seen in Europe, the United States and Asia. Firstly, because of the enormous ease with

which companies can be opened, many of which manage to never actually operate without ever attracting suspicion. Added to this is the fact that the anti-money laundering organs and mechanisms are utterly insufficient and statistically inoperative, although, in fairness, we must recognize a concerted effort to rectify this situation. Furthermore, clandestine currency exchange is scarcely repressed in Brazil. Currency can be exchanged in broad daylight, in full view of the police, with the greatest of ease, another aspect that facilitates the operations of these groups.

Another Brazilian reality that must be considered is that the country is a major producer of the chemical materials the laboratories use to produce drugs and many of these products find their way to neighboring narcotics-producing countries like Colombia and Bolivia. It is therefore no surprise that Brazil has undeniably become a safe haven for some of the Colombian and European *capos* of the drugs trade, partly in virtue of its geographically

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*Colombian drug trafficker Juan Carlos Ramirez Abadia, arrested in Greater São Paulo, chose Brazil as a safe haven.*



strategic position as a connection between the Americas and Europe.

### **Measures for fighting Organized Crime**

First and foremost, it is essential to observe that none of the measures suggested herewith can be implemented unless there is a genuine political will to change the present context. Any such measure must, by necessity, start by distancing the state organs and their officials from organized criminal groups. In other words, the promiscuity between Organized Crime and the State has to be public enemy number one in this respect. The observation made, let us examine some of the legal instruments available.

Initially, Law no. 9034/95 allowed the use of certain investigative means for targeting criminal organizations that were withheld in relation to crime in general. These measures, which we could call exceptional, were set down in article 2, and, contrary to the recent rulings of the Supreme Federal Court, the device stipulated in clause III (“access to fiscal, banking, financial and electoral data, documents and information”) actually requires no prior judicial authorization. However, in relation to bank privacy, article 2, § 1 of LC 105/01 allows the Central Bank to breach the banking secrecy of anyone suspected of involvement in organized crime, while article 6 empowers the Inland Revenue Service to do the same with both banking and tax records.

One way or another, it is understood that the Attorney General’s Office cannot breach banking secrecy directly, a fact that, without doubt, constitutes an obstacle in tackling Organized Crime, the infamous swiftness of whose actions, including those that give an air of legality to the capital proceeds of crime, demand equal celerity from the official organs encumbered with tracking them down. The paradox is even greater when we consider that the Parliamentary Investigative Commissions, the so-called CPIs – are constitutionally entitled to breach any form of privacy, except through phone tapping (see article 58, § 3 and item XII of article 5, both in the Federal Constitution of 1988).

The issue surrounding rights of privacy is therefore a huge hindrance in the fight against Organized Crime. In this respect, one recalls Hans Jurgen Fatkinhauer’s interesting comment (apud Zeigler, 2003, p.255) that “the crime lords of today are the only true cosmopolitans. They are citizens of the world”. Indeed, borders restrain the judiciary, but not the criminals. We can therefore note that the first obstacles the State must face are its own territorial limits, and thus the limits of its sovereignty, while, for organized crime, whose strong point is its transnationality, no such borders exist.

Thus we can agree with Gomes et al. (2000,p.15-20) when they say that, although the legislation does contain devices for combating organized criminal activity, none of these will ever come close to being effective so long as the connection between Organized Crime and the Authorities continues to be overlooked. In fact, the struggle against organized criminality would

not be so difficult were it not for the symbiosis between the crooks and public officials<sup>7</sup>. The first step would seem to be to establish an educational measure capable of filling in the blanks left behind by decades of State negligence in relation to education and economic policy concerning the attainment of constitutional ideals. One cannot seriously hope to eradicate Organized Crime when there are certain areas of State territory, like the shantytowns, in which the authorities do not have free transit, thus leaving room for Organized Crime to exercise the power effectively abdicated by the State. The shaping of a true spirit of citizenship based on respect and human dignity is, therefore, paramount.

Other urgent measures are the *prevention* and *repression* of symbiosis between the State and Organized Crime. Prevention starts with greater attention being paid in the recruitment of state officials, especially those who will be involved in combating Organized Crime, so as to reduce the number of infiltrations. Once hired, the State must remain vigilant in its monitoring of these public agents, whether during a probationary stage or throughout the individual's career. Signs of undeclared wealth should be swiftly investigated and, in the case of wrongdoing, severely punished. One means of doing this would be to create a penal type, as has been done in other countries, like Spain, on the "illicit enrichment of public functionaries", under which all that need be proved is that the agent's patrimony is incompatible with his or her declared income. Another important move would be the implementation (and observation) of a code of ethics across the civil service as a whole that prohibits third-parties from offering courtesies, presents, trips, etc. Recent events also testify to the importance of greater rigor in controlling electoral campaign donations, which open a considerable channel for money laundering and the corruption of public agents.

On the side of repression, the state apparatus badly needs a counter-intelligence sector geared towards rooting out infiltrations. In addition, a change of mentality is also required on the part of the relevant organs to avoid a spirit of 'keeping things within the family', so to speak, when they do discover that agents within their ranks have allied themselves, however briefly, with the enemy.

## Notes

- 1 Ratified by Legislative Directive 231/2003.
- 2 Crime typified in article 288 of the Penal Code.
- 3 Recently, however, the 2<sup>nd</sup> Regional Federal Court heard a case which brought to light the existence of a group called "Clube Barrão Drummond" which, according to the dispatch of Federal Magistrate Abel Gomes, was set up to adjudicate on situations resulting from territorial disputes for control of the illegal "jogo do bicho" lottery

and the slot-machine market. This item can be read (in Portuguese) at the site [www.portalaz.com.br/noticia/policia/83305](http://www.portalaz.com.br/noticia/policia/83305), accessed on Sept. 9, 2007.

- 4 This connection with the State can be forged directly or indirectly by the following means: a) financing of electoral campaigns; b) corruption of public officials (financially or through other favors); c) infiltration of members of the organization into strategic areas of the state apparatus, such as the police forces, Attorney General's Office and Judiciary. For more details, see Gomes et al. (2000, p.8-14).
- 5 On this issue, see Ziegler (2003,p.64).
- 6 It would seem to be a consensus in the specialized literature that the "dark number", that is, the deficit between the crimes practiced and those discovered, is far higher for those practiced by organized criminal groups.
- 7 According to Mingardi (1994, p.144, apud Gomes et al., 2000, p. 16).

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