“The International Diffusion of Power and its Impact on the Global Governance of Transnational Crime”

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Abstract

The United Nations Convention against Transnational Organized Crime, also known as the Palermo Convention, is the main international instrument to fight this transnational crime. Since 2008, there have been several negotiations for the creation of its review mechanism. However, it has not been possible to reach an agreement. The obstacles that have impeded the agreement the source for financing the mechanism and the participation of civil society in it are related to changes in the structure of international power, in the role of multilateral institutions, and in the structure of transnational organized crime. In this paper we analyze how these changes have influenced the role of the European Union in the global governance of the fight against transnational crime, and in the strengthening of the Palermo Convention.

Keywords: transnational organized crime, European Union, emerging powers, global governance.

Introduction

After the end of the Cold War, the focus of the debates on international regulations against organized crime expanded to issues related to its transnational dimension, such as trafficking in human beings, weapons smuggling and cybercrime. Until then,
regulations on organized crime had been designed to deal with specific crimes, such as maritime piracy, slavery, prostitution, and drug trafficking, but there was no universal legal instrument covering all kinds of crimes. Several states began to propose the creation of a legally binding international instrument that would include different manifestations of transnational crime, and that could provide a common definition of this phenomenon. In November 2000, after several years of debates and negotiations, the United Nations General Assembly (UNGA) adopted the text of the United Nations Convention against Transnational Organized Crime and its Protocols (UNTOC), also known as the Palermo Convention.

Globally, the UNTOC is the legal basis for international cooperation against transnational organized crime (TOC). The Convention has three additional protocols: the “Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children”, the “Protocol against the Smuggling of Migrants by Land, Sea and Air”, and the "Protocol against the Illicit Manufacturing and Trafficking in Firearms, their Parts and Components and Ammunition”. The UNTOC came into force in September 2003, when the fortieth state submitted its ratification instrument. In June 2014, 179 countries were Parties to the Convention, including the European Union (EU) which is Party as a regional organization.4

With the creation of the UNTOC and its Protocols, the international community took a significant step forward in the global fight against transnational organized crime because, for the first time, a universally shared definition of this phenomenon was established.5 Additionally, states commit themselves to criminalize participation in organized criminal groups, money laundering, corruption and obstruction of justice; to eliminate “safe havens” for TOC around the world; to strengthen the protection of

4 Article 36 of the UNTOC provides that regional economic integration organizations can also be Parties of the Convention (UNODC, 2004).
5 According to Article 3 of the Convention, an offence is transnational in nature if: (a) It is committed in more than one State; (b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State; (c) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or (d) It is committed in one State but has substantial effects in another State (UNODC, 2004). As will be discussed below, this complex definition is due to the difficulties of finding a common definition among different legal systems (Jakobi, 2013: 97).
victims and witnesses; and to facilitate the investigation and prosecution of cross-border crimes (UNODC, 2004).

To improve the implementation of the Palermo Convention, since 2008 the states Parties to the Convention proposed the adoption of the review mechanism integrated in the text of the UNTOC (Art. 32). The objectives of this review mechanism are the evaluation of the capabilities of states to implement the UNTOC, and to determine the degree of international aid that each state needs to increase the implementation of the Convention. However, since 2012 this process is in a deadlock due to the lack of agreement on two key points: the funding of the review mechanism and the possible participation of non-governmental organizations in it.

Between 2008 and 2012 three groups of states were formed around the negotiations on the review mechanism. One group, formed by the EU, the United States (US) and some countries of Latin America and Asia, wanted a swift negotiation process. A second group, calling for the funding of the mechanism to be guaranteed by the UN regular budget and not by the voluntary contributions of the countries that are part of the UNTOC, was integrated mainly by Russia, China and the developing countries members of the Group of 77 (G-77). Finally, a third group, led by Russia, China, Iran and Pakistan, has opposed the participation of civil society in the review mechanism. What is relevant is that the formation of these groups does not follow a straightforward north-south logic, in which Western industrialized countries oppose the largest group of developing countries in the UN. While the Western powers (mainly the US and the EU) have always been in the same group, some of the so-called emerging powers (Brazil, China, India, South Africa and Russia, among others), have not always been aligned in the same coalition, as will be discussed latter on. Therefore, we are before a complex set of coalitions that show the complexity of today’s international politics in the fight against transnational organized crime.

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6 The Group of 77 (G-77), established in 1964, is the largest intergovernmental organization of developing countries in the United Nations. Although group members have increased to 133 countries since its creation, the original name has been maintained because of its historical relevance. China and Russia are not part of the G-77, neither both the United States and the members of the EU.
The negotiation process on the creation and implementation of the UNTOC review mechanism is relevant for the EU for various reasons. Firstly, the strengthening of this Convention is part of the EU’s stated commitment to multilateral processes in the field of international security.\(^7\) Secondly, the EU wants to remain a major player in global efforts against TOC.\(^8\) Thirdly, the fight against transnational organized crime is a central element in the EU’s attempts to create an “area of freedom, security and justice” in its territory.\(^9\) Finally, the obstacles in the negotiations on the review mechanism reveal some of the challenges for global governance emerging from the ongoing global redistribution of power; a global process that the European Parliament has recognized as not being favorable for the EU.\(^10\)

If we understand global governance as the sum of informal and formal ideas, values, norms, procedures and institutions that help all actors — states, intergovernmental organizations, civil society and transnational corporations — to identify, understand and address trans-boundary issues (Weiss and Wilkinson, 2014: 211), we can argue that today we are in a crisis scenario of global governance. A crisis characterized by the increasing ineffectiveness of international institutions; caused by the lack of representation of emerging powers and civil society in these institutions, and by the problems associated with low levels of democracy and transparency in multilateral processes around the world. As we will discuss below, all these elements are currently present in the debate on the strengthening of the Palermo Convention through the development of its review mechanism.

In this scenario we ask: how has the EU acted on the development of global governance to fight transnational organized crime? And what strategies has the EU followed to promote the strengthening of the Palermo Convention? To help answer these two questions we will use the analytical framework proposed in the research project entitled

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\(^10\) See, the European Parliament Report on the EU foreign policy towards the BRICS and other emerging powers: objectives and strategies (2011/2111(INI)).

This framework has been developed to answer a set of related questions: “How is international structural change shaping the attitude of the EU regarding multilateral institutions? Is any adjustment taking place, and in what terms? How does the EU act, under unpropitious international contexts, concerning multilateral institutions and global governance mechanisms?” This analytical framework “conceptualizes change in the international structure by drawing on a definition of international structure that includes power, institutions and ideas, and explores the consequences of different patterns of alignment among these three factors”. Additionally, “the framework looks at how adverse changes in the international structure trigger decisions by the EU concerning its foreign policy”, pointing out two main dispositions or strategies: accommodation or entrenchment (Barbé, et al., 2014).

In the analysis of the structure of a specific issue area of the international agenda, it is critical to identify the alignment (or lack thereof) between power, institutions and ideas. The analytical framework we are using “recognizes five different international structures: three possible combinations of resonance between two of the three corners of the triangle (formed by power, institutions, and ideas), congruence between all of them and its opposite. Each of these five structures has its own differentiated features and offers different options and challenges to the EU (and the other international actors)”. These five configurations are: normative congruence, material congruence, institutional lag, hegemonic structure and dysfunctional structure (Barbé, et al., 2014). For the purposes of this paper we are using only two of these characterizations: hegemonic structure and normative congruence.

In the case of international hegemonic structures, “power, institutions and ideas are mutually aligned with each other.” “A structure is hegemonic if there is a coherent fit between the three corners of the triangle... Under such circumstances, institutions are able to channel the exercise of power by key actors and to do so in a way perceived as legitimate. A hegemonic structure is, ideally, the type of structure that enables a most effective governance of a particular issue area in international relations” (Barbé, et al., 2014). With regards to normative congruence, in this structure there is an alignment
between ideas and institutions, both misaligned with the distribution of power. “Ideas and institutions (namely, the normative component of the structure) are not sustained by any coalition strong enough to allow for their reproduction in the long term. The lack of synchronization between an institution and power can take place in two different ways: the lack of correlation between the distributions of power within and without the institution, and the endorsement by the institution of norms antagonized by the dominant coalition. In turn, the incongruence between ideas and power has to do with the fact that the ideas perceived as legitimate do not fit with those sustained by the actors whose power is needed to make international institutions effective and international norms implemented” (Barbé, et al., 2014).

This paper also looks at the strategies employed by the EU to cope with adverse changes in the international structures of different issue areas of international relations. As was previously mentioned, the analytical framework we are using identifies two strategies that can be adopted when the EU confronts adverse changing circumstances: accommodation or entrenchment. “Accommodation is the disposition that tends to adjust one’s own behavior (objectives, instruments, norms) to the new context. Thus, an adverse international structure will compel an accommodating EU to concede and compromise with the actors or ideas for which the new structure is more favorable than the preceding one. On the other hand, we understand entrenchment as the tendency to maintain and even harden the positions held before the structural change, with the aim to resist in the face of adversity” (Barbé, et al., 2014).

In the 1990s the structure of global governance for the fight against TOC was characterized by a situation of quasi-hegemony. The context of the distribution of material capabilities, and of the institutional architecture in which the new international norm against TOC was developed (the UNTOC) clearly privileged the Western powers. However, at that moment a large group of developing countries had the will and the ability to question the efficacy and legitimacy of the normative approach advocated by the West (which favored a regional approach to fight TOC). This group of developing nations managed to redirect the normative debate towards the need to adopt a universal norm to fight transnational crime. In this scenario, during the negotiation process on the
UNTOC, the EU resorted to a strategy of accommodation. This strategy allowed the EU to influence the development of the new norm to fight transnational organized crime.

However, in the second half of the 2000s, while negotiating the creation of the UNTOC review mechanism, the EU shifted to a strategy of entrenchment. This happened in a context in which the governance structure for fighting TOC had changed from a quasi-hegemonic structure to a structure of normative congruence that was adverse for the EU. Apparently, the entrenchment strategy regarding the review mechanism of the UNTOC is directly related to the negative experience for the EU while pursuing a strategy of accommodation in other international negotiations. This perhaps indicates the interconnection between the negotiation strategies that the EU has used in different issue areas. And these strategies seem to change depending on the achieved results; in other words, the strategies are not solely the result of the prevailing international structure in each issue area, as the analytical framework presupposes.\footnote{It is important to highlight that institutions have a major role in the transmission and perpetuation of the behaviors of an actor. This argument has been raised by an approach in Political Science called “historical institutionalism”, which incorporates in its analysis the concept of ”path dependence”. This last concept is related to the idea that the decisions taken by an actor are directly related to decisions that same actor has taken before; in this sense decisions are dependent of previous paths (Pierson and Skocpol, 2002).}

Before examining in detail the evolution of global governance against transnational organized crime, and prior to analyzing the debates on the implementation of the review mechanism of the UNTOC, we need to briefly address the evolution of this phenomenon in recent decades.

After the end of the Cold War, the global impact of transnational organized crime rose to unprecedented levels, and today it is an industry in constant evolution, adapting to markets and creating new forms of crime; it is an illegal business that transcends cultural, social, linguistic and geographical boundaries. According to the United Nations Office on Drugs and Crime (UNODC), it is estimated that the profits of transnational crime in 2009 reached 870 billion US dollars, corresponding to 1.5% of world’s GDP (gross domestic product). The International Monetary Fund (IMF) estimates that globally the amount of money laundered each year accounts for between 2% and 5% of world’s GDP. And some research suggests that there is a relationship between money laundering and declining rates of economic growth. Specifically in the case of the...
countries of the Organization for Economic Cooperation and Development (OECD), for every billion dollars that is laundered, economic growth is reduced by between 0.4 and 0.6 percent of its GDP (Bąkowski, 2013).

Drug trafficking remains one of the most lucrative forms of business for transnational crime, with an estimated annual value of 320 billion US dollars. In 2009 the UN reported that the estimated annual value of the global market for opiates and cocaine was 85 billion and 68 billion US dollars respectively (UNODC, 2014). It is worth mentioning that this report does not include profits from trafficking in persons, smuggling of migrants, illegal trade in firearms, trafficking of all kinds of natural resources, the sale of counterfeit drugs, cybercrime, the traffic of industrial waste, or theft and illegal sale of cars, among other criminal activities. Transnational organized crime also penetrates government agencies and institutions in many countries, fuels corruption, infiltrates politics and the economy, and greatly limit governance, democracy and development. The UN and other international organizations have established various instruments to fight transnational crime, ranging from regulations that directly attack criminal groups and their activities to regulations that punish money laundering and the obstruction of justice (Jakobi, 2013: 96). However, international efforts to fight TOC are still weak. International strategies have not really addressed the growing interaction between transnational crime and politics, or the deep roots of this phenomenon, such as world poverty, growing global inequalities and the market dynamics of illicit products (Council on Foreign Relations, 2013).

In the remainder of this paper I will first discuss the creation of the Palermo Convention, which is the main normative pillar of global governance against TOC, and the role of the EU in this process; then, I will examine the negotiations for the creation of the review mechanism of the Convention, and the EU’s strategies in this process; and finally, I will present some general conclusions.
1. Creation and evolution of the global regime against transnational organized crime

In the early 1990s organized crime increasingly began to be seen as a global problem, and several measures to counter it at the international and regional level were adopted. In the framework of the UN several meetings were held, and an important number of recommendations and resolutions were issued. All of this work reached a peak in 1993 with a resolution from the Economic and Social Committee of the UN (ECOSOC), which called for an international conference to assess the possibilities of creating a new international legal instrument against the various manifestations of TOC (Jakobi, 2013).

In 1994 the World Ministerial Conference on Organized Transnational Crime, was held in Naples, Italy, and prior to the conference the UN General Secretariat prepared a report stating that organized crime had dramatically changed, particularly in the developing world, and that it could not be understood anymore as a local or national phenomenon (Ratnasabapathy, 1994). The report also acknowledged several obstacles to international cooperation in the fight against transnational crime, including, among others, cultural differences, different languages, diverse laws and judicial practices, the desire to safeguard national sovereignty, and the reluctance to share resources and information. During the Naples Conference it became clear that developing countries were seeking swift progress in the standardization of the mechanisms for international cooperation against transnational organized crime; and also that these countries wanted to promote the consensus towards the creation of a common definition of this phenomenon. It was also clear that most developed countries, including the EU member states and the US, were not prepared to agree with the proposals put forward by the developing countries (Jakobi, 2013; Vlassis, 2002).

The negotiations for the final declaration of the Naples Conference were difficult, especially because it was unclear whether or not the document should issue a clear mandate for the development of a new convention (Vlassis, 2002: 481). Given the relevance of the threat posed by transnational crime, the Latin American and Eastern European countries (plus Italy, which had a serious problem with mafia organizations) wanted to move faster towards a new international convention. Additionally, many of
these countries experienced a strong feeling of vulnerability because they lacked the
technical, human, and financial means to estimate the impact caused by TOC on their
societies and economies (Jakobi, 2013: 99; Vlassis, 2002: 482). Another incentive for
developing countries to support starting negotiations for a new convention was the fact
that being a multilateral process among peers within the UN framework, they believed
they had greater chances of including their considerations and concerns in the new legal
instrument (Vlassis, 2002: 482).

As we said before, the members of what in the UN is known as the “Western European
and Others Group” (a regional group that includes all Western European countries,
Australia, Canada, New Zealand and the United States) were opposed to a new
convention. They felt that this issue was complex, especially because it involved several
problems of conceptual and legal definitions. Also, they believed that multilateral
negotiations presented serious obstacles, and that the whole negotiation process risked
having a final document that was only a simple representation of the lowest common
denominator (Vlassis, 2002: 481-2). Another concern of this group of countries was
related to its perception that their networks of regional and bilateral agreements against
organized crime were functional enough, and that a new convention could undermine
these networks (Jakobi: 2013: 99; Vlassis, 2002: 482).

The final document of the Naples Conference was a compromise between the positions
of developing and industrialized countries. Therefore, the drafting of a new convention
did not start after the Conference; instead, it was agreed to promote greater international
cooperation against transnational crime, and to send a request to the Commission on
Crime Prevention and Criminal Justice (CCPCJ) of the UN to consider the possibility of
developing a new international instrument (Jakobi, 2013: 99; UNODC, 2008; Gastrow,
developing states and Italy continued to advocate for rapid progress towards a new
convention, however it was not until the US government changed its position on the
relevance of the threat posed by TOC that other industrialized nations also changed
The Naples Conference was held in a context of growing international concern regarding the illicit trafficking of nuclear materials, especially from the former Soviet space, and this issue was one of the elements that provoked the change in the position of the developed countries (Vlassis, 2002, Waddington, 1994). In October 1995, US President Bill Clinton gave a speech to the UN General Assembly in which he noted that transnational crime had become a global threat. In his presentation Clinton urged world political leaders to make a global effort to combat terrorism, organized crime, drug trafficking and the smuggling of nuclear materials. The President stated that these were the main problems of the post-Cold War world, and announced a series of unilateral measures to fight them (such as freezing the financial assets of some people related with drug cartels, and imposing sanctions against countries that give cover to criminal activities) (Reuters, 1995). With this, the US was offering the UN a new agenda for the post-Cold War era: fighting crime and weapons trafficking (including weapons of mass destruction). The US justified its change of position on the grounds that the deep economic and political changes since the end of the Cold War, especially in Central Europe and the former Soviet Union, had created a fertile ground for criminal gangs and therefore it was essential to stay alert to what was happening in that part of the world (U.S. Newswire, 1996). Since the demise of the Soviet Union, the US had sought to find new focuses for its foreign policy, which meant finding new threats and new enemies, and the fight against transnational organized crime became one of those new focuses (Baird, 1995).

In June 1996, during a session of the CCPCJ, it became clear that an international consensus on the need for a convention against TOC was starting to develop. However, there was still no agreement on how to define or conceptualize this activity in a universal way (Ratnasabapathy, 1996). Nevertheless, later that same year it became obvious that pressure from developing countries was achieving some change in the positions of the developed countries. Industrialized nations not only began to accept the merits of having a convention against TOC, they also began to realize that the political cost of rejecting the new instrument was growing (Vlassis, 2002: 486).

A turning point came during the sixth session of the CCPCJ, in May 1997, when the members of the UN were asked to implement the Naples Declaration of 1994 and to
discuss a new convention against TOC. Following this decision the UNGA established an intergovernmental group of experts, which met for the first time in Warsaw, Poland in February 1998. The Warsaw meeting was important because it was the first time that all the countries agreed to put an end to the debate on whether or not it was relevant to develop a new legally binding instrument against TOC (Vlassis, 2002: 187-89). An example of this emerging consensus came a few months later, in May 1998, during the meeting of the Group of Eight (G8) (formed by Canada, the US, France, Italy, Japan, the UK and Russia) held in the UK. At that meeting it was agreed to fully support the efforts to negotiate, within the next two years, an effective convention against transnational organized crime (Xnews, 1998).

In December 1998 the UNGA approved the creation of an ad hoc intergovernmental committee to draft a new convention against transnational crime. The ad hoc intergovernmental committee met for the first time in Vienna in early 1999, and after that meeting more than ten gatherings came between January 1999 and October 2000. During those meetings the text of the new convention was negotiated and drafted. In addition to government delegations, these meetings were attended by representatives of other entities of the UN system (such as the UNODC), as well as representatives of other intergovernmental organizations (such as the Council of Europe, the European Commission, Europol or Interpol). It is perhaps this multi-stakeholder dialogue which made it possible for the norms against transnational crime — including the Convention and its Protocols — to enjoy such broad consensus (Scherrer, et al., 2009: 12-13).

During the meetings of the ad hoc committee some country delegations pointed out that certain crimes should be addressed in a more specific framework and not in the main text of the Convention. Because of this, the development of three additional protocols was agreed. These additional protocols would deal with: human trafficking (the negotiations were led by Argentina; the US joined the leadership of this issue later on), smuggling of migrants (the negotiations were led by Australia and Italy) and the smuggling of firearms (the negotiations were led by Canada and Japan) (Jakobi, 2013: 101). As a result of the workings of all these groups, the UNGA adopted the text of the

12 Statements of the G-8 in favor of the Convention were repeated in the next two years. During the negotiation and drafting of the UNTOC, the G-8 asked to move as quickly as possible to complete all the work by 2000 (ITAR-Tass: 2000).
United Nations Convention against Transnational Organized Crime (UNTOC) on November 15, 2000 (UNGA Resolution 55/25). This Convention became the first legally binding global instrument to combat transnational organized crime. On December of that same year a UN summit was held in Palermo, Italy for the signing of the UNTOC and two of its Protocols. The Palermo Convention establishes membership of a criminal group, money laundering, corruption of civil servants, and the obstruction of justice as international crimes. In addition, the UNTOC simplified extradition procedures and created a permanent system of cooperation between states. The Palermo Convention also provides for assistance to victims, witness-protection mechanisms and actions to defend international trade from infiltration by criminal groups (Antonini, 2001).

2. The role of the EU in the creation of the international regime against transnational crime.

Based on the analysis of the creation and evolution of the global regime against transnational organized crime, and taking into account the analytical framework we have adopted in this paper, we argue that the international governance structure of the fight against transnational crime that prevailed in the early 1990 was a quasi-hegemonic structure. In a hegemonic structure, power, institutions and ideas are aligned with each other. Under these conditions, ideally the institutions (in our case the United Nations, its various forums, and the decision-making structure established for its operation) channel the exercise of power from the key actors in terms of material capabilities (in our case the US and the EU), and do so in a way that is perceived as legitimate by most of the other members of the structure. Our analytical framework presupposes that a hegemonic structure allows more effective governance in a specific area of international relations. However, what we see in the case of the creation of the UNTOC is that hegemony is weak in terms of the alignment of institutions and ideas.

While it was not until the US and the EU countries agree to create a new universal norm that the process of negotiating the UNTOC really began, this clearly would not have been possible without all the previous “norm entrepreneurship” efforts made by the developing countries and Italy. These efforts were based on the premise that not having
a legally binding universal norm against transnational crime was totally non-effective and also very dangerous for the international community. Industrialized states changed their position because they also concluded that the dimension of the problem posed by transnational crime was of such magnitude that a universal instrument was needed in order to combat it. In other words, in a situation where hegemony was weak in the normative axis, a quasi-hegemonic structure was developed. In this scenario, the EU and the US resorted to a strategy of accommodation when it was evident that the prevailing norms against TOC were not universally perceived as legitimate or effective. And this accommodation strategy allowed them to contribute to the UNTOC being perceived as legitimate, to promote the compatibility of the new norm with the liberal vision on which their values are based, and to ensure that the UNTOC was consistent with the standards and practices for the fight against transnational crime previously developed by the EU and the G8.

Once EU member states agreed to support the creation of UNTOC, a process inside the Union was initiated to define what mechanisms would allow them to maintain a coherent position and, in turn, promote that their own norms be incorporated into the new Convention. In March 1999 the EU members agreed to develop a Common Position in the negotiations on the UNTOC, and they gave the European Commission a central role to ensure coherence between the provisions of the Convention and the norms and agreements developed by the EU (Common Position 1999/235/JHA). In the Common Position it is argued that the EU should contribute as much as possible to the negotiation of the draft Convention, and that it was essential to avoid incompatibility between the Convention and existing legal instruments in the Union. The document recalled that the European Council of Amsterdam in 1997 had approved an Action Plan against organized crime; that in December 1998 a Joint Action was agreed that included a common definition of organized crime (98/733/JHA); and the European Council, in its conclusions of October 5, 1998, had already requested one or more common positions in relation to the draft of the UNTOC. In addition, the Common Position established that the EU should ensure that the measures on money laundering in the new Convention were consistent with those of the EU, the Council of Europe and the Financial Action Task Force (FATF) (Common Position 1999/235/JHA).
While the EU actively participated in the drafting of the UNTOC, European legislation in turn has been modified to adapt it to the Convention and its Protocols. In other words, the UNTOC was inspired by some essential features of the 1998 Joint Action of the Council of the EU, and after the Convention became the global benchmark in the fight against TOC it was incorporated into the legislation of the EU and its member states (Bąkowski, 2013). It is also worth noting that in the construction of the EU’s international identity the UNTOC is a very relevant component, because it represents a set of internationally agreed principles, norms, and rules to fight transnational crime. In this sense, the creation, defense and strengthening of the UNTOC is an example of the successful multilateralism promoted by the EU to generate governance in different issue areas of the international agenda.

In the early 2000s an international process of redistribution of power started. This process was not favorable for the EU (Resolution of the European Parliament, 2012). Meanwhile, criminal organizations adapted to the new international conditions and strengthened their capabilities for acting globally (UNODC, 2014). In this context, the quasi-hegemonic structure of the global governance against TOC of the 1990s began to evolve into a structure of normative congruence.

3. The process of strengthening the Palermo Convention.

The UNTOC states that in order to improve the ability of states to combat transnational organized crime and to promote and review the implementation of the Convention, a Conference of the States Parties (COP) to the Convention was to be established. Since 2004 this body meets every two years in Vienna, Austria. During the sixth session of the COP, held in October 2012, several delegations raised the issue that it was time to move forward in the consolidation of UNTOC through the creation of the review mechanism provided by the Convention (Art. 32). However, there was no consensus on two key issues: the financing structure of the mechanism (funding through a combination of regular UN budget and voluntary contributions from states, or financing it solely by voluntary contributions), and the participation of civil society in the assessment process (GAATW, 2012). Consensus is a key factor, because according to the rules of procedure of the COP of the Convention, States Parties shall endeavor to take their decisions by
consensus (Art. 56), and in the case of budgetary issues, a unanimous vote is required (Art. 58) (UNODC, 2005: 18-19).

A few more words should be added with respect to the financing mechanism. Some developing states and the so-called “emerging powers” have pointed out that financing the mechanism through voluntary contributions jeopardizes the continuity of the review process, because it will be dependent on the whims of such contributions. This creates uncertainty and in a certain way conditions the results of the review, because usually the most developed states are the ones with the means to assign complementary resources to their regular contributions to the UN budget (GAATW, 2012). In other words, some developing states and emerging powers consider that if the review mechanism is financed by the contributions from developed countries it will be dominated by the interests of these countries.

On the question of the participation of civil society in the review mechanism, throughout the negotiations some delegations, including those of the “Western Europe and Others Group”, argued that it should meet the minimum requirements of transparency and inclusion. However, one group of states, including Russia, China and Pakistan, blocked all the initiatives involving the participation of civil society and the requirement to publish the results of the assessments, arguing defense of its sovereignty and of the norm of non-intervention in internal affairs. How did the signatories of the UNTOC reach this deadlock situation?

3.1. The fourth COP of the UNTOC: the decline of consensus

The need for the creation of the review mechanism of the Palermo Convention was first introduced in 2008 by Argentina and Norway during the fourth COP of the UNTOC. At that time there was enough consensus to form a group of government experts to analyze the review mechanisms of other international treaties. The experts group met in September 2009 and January 2010 to prepare a report with recommendations that was presented at the fifth COP of the UNTOC in October 2010.
Accordingly to a news wire from the US State Department, during the 2009 meeting of the experts group the majority of delegations agreed to create the review mechanism. However, the representatives of China and Russia emphasized the importance of a gradual approach and the need to avoid setting a definitive timetable for the creation and implementation of this mechanism (U.S. Delegation Vienna, 2009). Finland, supported by Canada, proposed that “international experts” could undertake the assessment and that, as a general rule, these experts would visit the countries under examination. Finland also suggested that the evaluation reports should be made public and that information provided by civil society, research institutions and the private sector ought to be part of the evaluation process (Semanario Proceso, 2010). The EU proposed that in the fifth COP of the UNTOC, to be held in 2010, an intergovernmental working group should be created to draft the terms of reference of the review mechanism. However, some states mentioned that it was convenient to wait for the results of the negotiations at the third COP of the UN Convention against Corruption (UNCAC), which at that time was discussing the guidelines of their own review mechanism, in order to assess whether the same kind of mechanism could be applied to the UNTOC. From the point of view of the US diplomats, this situation of uncertainty reinforced the reluctance of many states to move forward on the review mechanism prior to the fifth COP of the Palermo Convention (U.S. Delegation Vienna, 2009).

During the second meeting of the experts group in January 2010 it became clear that it would be difficult to agree on a timeframe for the negotiations on the review mechanism and to agree on a framework for the participation of civil society. Russia led a group of countries — including China, Iran, and Pakistan — which proposed advancing “step by step”, with a gradual approach, and even questioned the need for a review mechanism beyond the discussions at the COP’s meetings. In other words, this group reopened a debate that many states already considered to have been closed in 2008. Russia also emphasized that it would only accept a review process if it was a strictly intergovernmental assessment, and suggested that non-governmental organizations should not be part of the review process (U.S. Delegation Vienna, 2010). The EU stressed that the participation of civil society in the process was critical, and that it was not willing to make concessions on this aspect; something it had done before, during the negotiation of the review mechanism for the UN Convention on Against Corruption.
(UNCAC). In the debates on the UNCAC, while the EU had a more organized structure for negotiations than other actors did, it was unable to maintain a consistent position that would guarantee it more support from other participants. This happened because sometimes different EU members sent conflicting signals, making the negotiations more difficult for the EU (Joutsen and Graycar, 2012). Therefore, in the debates on the UNTOC’s review mechanism, the strengthening of some ideas such as greater transparency and a bigger role for NGOs was essential for the EU (U.S. Delegation Vienna, 2010).

At the end of the meeting in January 2010, most of the delegations (including those from Argentina, Canada, Colombia, the US, Mexico, and Peru), supported the EU proposal to create a “working group” to develop the terms of reference for the review mechanism. However, due to objections from Russia, China, Iran and Pakistan, there was no agreement on a timeframe for the activities of this working group, or on a possible date for adopting the mechanism (U.S. Delegation Vienna, 2010). The deadlock in the discussion was a surprise for many delegations that did not expect the relevance of the review mechanism to be challenged.

In June 2010, during the special high-level meeting of the 64th UNGA on transnational organized crime, many speakers agreed on the need to strengthen the Palermo Convention. Some delegations, such as the ones from Austria, Canada, Colombia and Korea, restated the urgent need for a review mechanism and that it was very important to secure the participation of civil society in it. Russia insisted that there was no need to accelerate the work on this issue, and that it was better to maintain an approach of gradual steps (United Nations, 2010).

3.2. The fifth and the sixth COPs of the UNTOC: the consolidation of divergences

As agreed at the experts meeting of January 2010, during the fifth COP of the UNTOC a Working Group was established to draft the terms of reference for a “transparent, efficient, non-intrusive, inclusive and impartial” review mechanism (Verville, 2010). The Mexican delegation was entrusted to lead the subsequent negotiations, and the Working Group held its first meeting in May 2011 in Vienna. The negotiations took
place in closed working groups and, according to some observers, the divergent positions increasingly led to a strong polarization between some delegations (GAATW, 2012). During the second meeting in January 2012, the draft of the terms of reference was approved; however, it was not possible to reach a consensus on the participation of civil society and on the instrument for financing the review mechanism. As expected, during the sixth COP of the UNTOC in October 2012, it was impossible to reach an agreement on these two issues. Once more, the international community had lost an opportunity to strengthen the global governance of the fight against transnational organized crime.

One of the official arguments for explaining the failure of the negotiations was that the process collapsed due to a lack of consensus regarding financing issues. “This is a time of austerity. As a result, states seem unwilling to take on new obligations”, said a UNODC spokesman in a statement on the outcome of the sixth COP (Reuters, 2012). It seems that some developed nations refused to accept a review mechanism financed primarily through the regular UN budget, arguing financial problems. However, some observers have pointed out that the argument that the cost of the review mechanism was unaffordable at a time of financial austerity hides a general disappointment with the effectiveness of the Palermo Convention, and with the emergence of considerable obstacles to adopt the review mechanism (GIATOC, 2014).

The question of the financing of the review mechanism has also been addressed in the context of the meetings of the CCPCJ. In April 2012, a large number of developing countries argued that it was essential for funding to come from the regular budget of the UN. The so-called Group of 77 (G-77) and China said that this way to fund the mechanism will allow it to gain stability and continuity; otherwise, they argued, the review mechanism will be controlled by the limited number of donor countries that choose to provide funding (“Statement from the G-77 and China at the 21st Session of the CCPCJ. April, 2012”).

As for the participation of NGOs in the review mechanism, at the sixth COP of the UNTOC the EU and several Latin American countries insisted on the full participation of NGOs, and Norway and Switzerland even sponsored a resolution on this matter.
(Dell, 2012). Yet, another resolution sponsored by China and Russia argued that the mechanism should not include these organizations, and that the assessment of interstate agreements should be the sole prerogative of government officials (ITAR-Tass, 2012). Although not openly mentioned, a key issue on the debate of NGOs’ participation in the evaluation process relates to whether their opinions and criticism of government activities would be officially registered in the assessments on the implementation of the UNTOC. Furthermore, some governments see NGOs as “agents” whose sole purpose is to criticize government strategies; and they also perceive these organizations as actors who could unveil government corruption or the open participation of some government officials in criminal activities (GIATOC, 2014).

4. The conditions of the international structure and the strategy of the EU for strengthening the Palermo Convention

Currently, we perceive a structure of normative congruence — i.e., an alignment between ideas and institutions but not with the distribution of power — in the structure of global governance against transnational crime. In the normative component of the structure (in this case the UNTOC, and the international norms related to it) there is a deadlock condition, because there is no coalition of actors strong enough to create a consensus on the review mechanism of the Convention, and because the decision-making structure delays the whole process (the imperative of consensus). Unlike in the 1990s, today we find more complex and fluid coalitions, and these coalitions are not structured by a logic of “developing countries vs. developed countries” (as evidenced by the heterogeneity of coalitions relating to the financing of the review mechanism and the participation of NGOs in it).

The power distribution outside the UNTOC has changed, and this has resulted in a lack of synchrony between institutions and power in the governance structure of transnational organized crime. The debates on the review mechanism also show that the norms regarding NGOs’ participation in it and the funding of the mechanism through voluntary contributions are norms that antagonize broad coalitions of emerging and developing countries. Mainly because these developing states perceive that behind these initiatives, largely defended by the US and EU, is a clear attempt to control the whole
review process by Western powers. In this sense, we can argue that there is a lack of congruence between ideas and power, because some of the ideas which are perceived as legitimate by EU members (and the US) are not compatible with those supported and promoted by emerging powers like Russia and China, or by many of the G-77 countries.

In a structure of normative congruence the expected behavior by the EU would be to provide emerging actors or coalitions with more influence on the functioning of institutions. In other words, the EU would use an accommodation strategy to give more power to emerging actors in the government of the institutions and, through that, strengthen the legitimacy of those institutions. However, the EU has opted for a strategy of entrenchment. Why? Apparently the entrenchment strategy of the EU is related to the negative experience it had after pursuing a strategy of accommodation in other international negotiations, such as those relating to the review mechanism of the UN Convention against Corruption (UNCAC). This perhaps indicates the interconnection between the negotiation strategies that the EU develops in different issue areas. And these strategies seem to change depending on the obtained results; they are not guided only by the prevailing structure in each issue area. The members of the EU might also consider that the Union must resort to an entrenchment strategy because the material structure is adverse to its position (European Parliament, 2012). A strategy of accommodation towards adverse power structures opens the possibilities of losing influence in the process of creating international norms; something that may negatively affect the norms and identity of the EU.

Final considerations

The Palermo Convention provides a universal definition of transnational organized crime and sets out the legislation and mechanisms for international cooperation to combat this phenomenon. So far, the Convention lacks a review mechanism. This mechanism will allow, firstly, the identification of the level of implementation of the UNTOC measures that each state has achieved; and secondly, it will detect the requirements that each country has in order to apply all the measures provided by the UNTOC. Like any other legal instrument, the Palermo Convention is always at risk of becoming obsolete, and in this case this is especially relevant, because this instrument
has been designed to fight a form of crime that keeps changing and adapting to new local, regional, and global conditions. The development of legal norms is only the first step, to be followed by careful observation and evaluation of its application, and the identification of the political and technical problems that constantly arise in the fight against transnational crime (Betti, 2001: 101).

In October 2014, the seventh meeting of the Conference of the Parties of the UNTOC will be held in Vienna, and the outcome of these debates may mark how this international legally binding instrument will be judged in the future. If country delegations attending the meeting, including those of the EU and its member states, are unable to reach a consensus on the pending issues of the review mechanism of the UNTOC, this will probably be a severe blow to the legitimacy of the global governance against TOC. And perhaps this will push some states to increasingly cooperate in the fight against transnational crime through regional mechanisms, and to gradually set aside universal instruments as the Palermo Convention.

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