



**GLOBAL
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THE FUTURE OF INTERNATIONAL COOPERATION AGAINST TRANSNATIONAL ORGANIZED CRIME

THE UNDOING OF UNTOC?

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Summary

Success in addressing transnational organized crime hinges on multilateral cooperation. However, existing cooperation regimes are ineffective at countering the rapid changes in the organized crime landscape and countries increasingly tend to turn to national solutions. The diminishing support for multilateral cooperation means the international criminal justice system has become disjointed, insufficient and reactive. This paper sets out five possible scenarios that could affect the future of international criminal justice cooperation, and raises thought-provoking questions about possible outcomes and impacts on transnational organized crime. To be useful as planning tools, any scenario or vision of the future must be connectable to decisions in the present, and therefore the scenarios described here are presented in the framework of current challenges. It is hoped that civil society organizations will take the lead in formulating a comprehensive international criminal justice cooperation strategy, built on what works. Such a strategy should also be supplemented with new ideas to address shortcomings and to facilitate effective reforms of the multilateral institutions needed to implement such a strategy.



WHY A MULTILATERAL COOPERATIVE FRAMEWORK IS NEEDED

The growing transnational nature of crime, partly the result of globalization, digitalization and ease of movement, introduces diverse and growing security and development challenges.¹ This has made multilateral cooperation an indispensable part of the international crime prevention and criminal justice agenda. However, the relative importance that policymakers attach to international criminal justice cooperation often depends on how much of a threat transnational organized crime is perceived to be and on their resolve to counter such threats. Effective action – whether it involves investigating or prosecuting crimes across borders, transferring fugitives, protecting witnesses, exchanging evidence or forfeiting assets – typically hinges on cooperation, yet there is a pervasive political tendency to prefer purely national solutions.

Effective multilateral criminal justice cooperation must be supported by multilevel governance structures to address the complex associated political, legal and logistical challenges. In addition, systems should be complemented by wider crime prevention and socio-economic measures to broadly prevent and counter transnational crime, and also rigorous monitoring and evaluation to measure effectiveness and identify areas for improvement.² Effective international cooperation can shape the future of crime control by building on what works.

However, instead of greater cooperation to fight crime, multilateral responses are currently disjointed, insufficient and reactive,³ which often hampers attempts to combat transnational crime more effectively. The legacy tools and mechanisms on which international criminal justice cooperation relies are slow to adapt to the pace of technological evolution and changing patterns in transnational organized crime. For example, mutual legal assistance for the transfer of evidence remains painfully slow compared with the speed at which criminal investigations develop, and digital data can be moved, tampered with or deleted.⁴ Similarly, international agreements for the confiscation of proceeds of crime and the return of confiscated assets rarely serve their purpose: assets often have to be linked to an offence for which an individual was convicted, which means criminals are not urgently deprived of their ill-gotten gains. More broadly, a report by the Conference of the States Parties to the United Nations Convention against Corruption found ‘no extradition cases in relation to which the Convention had been used as a legal basis’ nor any statistics kept in that regard. The report further noted that states typically had little experience in handling requests for mutual legal assistance, thus preventing effective assessment of the extent to which the relevant provisions of the Convention (article 55, paragraphs 1–2) had been implemented.⁵

Because the complexities of formal cooperation avenues often render them ineffectual, they are increasingly replaced by informal or unilateral measures. However, many of these are very problematic. Unilateral alternatives, such as government-sponsored hacking instead of relying on digital data exchanges or ‘lure-and-capture’ operations rather than extradition help states reaffirm their sovereignty even if it is at the risk of undermining the rule of law and human rights.⁶ Some of these alternatives operate outside of existing legal frameworks and are not subject to independent oversight or effective scrutiny. False or misleading arguments about the rule of law and national sovereignty are frequently used to defend them, and clear legal standards have yet to be properly formulated,



despite commentators noting that 'effective, as opposed to perfunctory and impotent, oversight and controls are as indispensable today as they were thirty years ago'.⁷



The president of the Conference of the States Parties to the United Nations Convention against Corruption, addresses the Special Session of the General Assembly on Challenges and Measures to Prevent and Combat Corruption and Strengthen International Cooperation. © UN Photo/Eskinder Debebe

The World Economic Forum's global risks reports have repeatedly raised the alarm about the intensification of global risks and the lack of collective will to tackle them in recent years.⁸ Similarly, the 2020 UNODC World Drug Report concluded that drug trafficking has never been more international in nature, observing that '[d]espite the fact that international cooperation is the foundation of the international drug framework, its effectiveness is barely measured at the global level'.⁹ The growing threats of organized crime and corruption, to some extent facilitated by the diminishing counter-measures offered by states, are the result of state-centred politics and dwindling support for multilateralism. Although the Kyoto Declaration,¹⁰ adopted at the most recent UN Congress on Crime Prevention and Criminal Justice, notes the importance of multilateral cooperation, what social theorist Franco Berardi describes as the 'impotence of political will' continues to prevent meaningful progress.¹¹ This sentiment is echoed by former UK prime minister Gordon Brown, who writes that 'the case for international cooperation has to be made' if our world is to be changed for the better.¹²

What future?

This paper identifies five scenarios for the future of international criminal justice cooperation based on observed trends. The goal is not to map out the currents or tidal changes that may affect international cooperation, nor to speculate on potential future events (political or other) that may disrupt current trends and create entirely new scenarios, but rather to share possible outcomes with readers. Although some of the suggested scenarios can appear preferable, or more probable than others, readers are left to draw their own conclusions in that regard, while recognizing that, to be useful as planning tools, any scenario or vision of the future must be connectable to decisions in the present.¹³

The five proposed scenarios are distinct but not necessarily incompatible:

1. **Together** forecasts a situation where states forge the political will and willingness to refashion the existing cooperation mechanisms.
2. **Unbound** reflects a world in which states increasingly rely on bilateral or regional cooperation frameworks, possibly leading to new cooperation zones.
3. **Going alone** anticipates states preferentially using unilateral actions to achieve their aim, bypassing existing cooperation mechanisms and agreements.
4. **Retreat** sees the accelerated use of informal cooperation arrangements or alternatives – to the potential detriment of the rule of law and human rights.
5. **Renewal** posits that states could be compelled to reimagine the international cooperation regime and undertake radical reform efforts, including establishing a binding arbitration mechanism to resolve bilateral disputes.

Whereas the ‘Together’ scenario suggests refurbishing the existing cooperation architecture, the ‘Renewal’ scenario forecasts its abandonment in favour of novel tools and mechanisms that may better meet the challenges that criminal justice agencies encounter. One may hope that civil society organizations will lead the formulation of a comprehensive international criminal justice cooperation strategy and support reforms of the multilateral institutions needed to implement such a strategy.

When thinking about the future of international criminal justice cooperation, we must relinquish the comfortable assumptions of the past and abandon the illusion that strong international cooperation will emerge spontaneously out of the antiquated existing regime. Given the growing menace of transnational crime and the perils linked to organized crime groups’ control over both licit and illicit markets, the stakes are just too high to stick with legacy mechanisms and simply hope for the best.

The world is clearly going through a period of considerable turbulence, with complex and uncertain trends unfolding in an ambiguous and volatile environment. Our reflex, or perhaps the wisest choice in such a turbulent and uncertain environment, may be to distrust all predictions.¹⁴ However, rejecting foresights outright as meaningless can only lead to myopic planning and flawed strategies.¹⁵ Although breakthroughs or a major disruption in existing patterns cannot always be anticipated, careful extrapolations from observed trends are possible. These can identify scenarios that, at the least, can help policymakers to approach emerging challenges more competently.

It is certainly not futile to attempt to predict the kind of changes that may affect international criminal justice cooperation in the foreseeable future.¹⁶ It does not require much foresight to predict the continuing deterioration and growing irrelevance of the existing international cooperation regime in criminal matters; we cannot afford not



to try to imagine a different future for international cooperation in criminal matters. In fact, the real question may be: what is stopping us from imagining a better path forward?

Tetlock and Gardner propose distinguishing between the 'big questions' and the 'small questions' about the future.¹⁷ They argue that we are mostly interested in the big questions – the things that really matter – but that these questions cannot be quantified or scored. Trying to apply probabilistic forecasting, a typical forecasting method that calculates realistic odds to arrive at plausible futures, would be futile in this case given the absence of publicly available data and the typical covert nature of international cooperation in criminal matters. Nevertheless, other forms of forecasting and scenario-based planning are possible, and potentially valuable.

Considering the future of international cooperation in criminal matters, a cluster of questions come to mind. First, one may wonder about the sustainability of the current cooperation regime, its architecture and the mechanisms and institutions that support it. What is worth saving from the current regime? What are its crucial missing elements?

There are also questions about how the UN and other multilateral institutions can contribute to reversing states' growing disinvestment from the current regime and promote more effective international cooperation. What would it take for states to invest or reinvest in more effective multilateral mechanisms of international cooperation in criminal matters? What kind of event or action, political or other, could serve as a wake-up call for states and break the current lethargy? Can a discussion of the future on international criminal justice cooperation lead to concrete action without it being grounded in a better understanding of emerging forms of crime, the accelerating impact of technology on both crime and crime control, and some insight into the future of transnational organized crime?



Pro-Trump protesters gather in Washington, DC in an attempt to overturn the 2020 US election results.

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FIVE SCENARIOS FOR INTERNATIONAL CRIMINAL JUSTICE COOPERATION

Scenarios are narrative descriptions of possible futures based on an analysis of current trends. None of the forecast outcomes – whether grim or optimistic – are inevitable, but change has undoubtedly already been seeded. Today, imaginable scenarios are even harder to define because of the various international relations and geopolitical trends currently at play, some converging and others diverging. Nevertheless, reverting to the old order is improbable.

As the next geopolitical era is being shaped, many uncertainties persist, and it is hard to predict where the distribution of power will settle. To the extent that the world order is influenced by the global superpowers, it remains ambiguous which state, if any, will lead the reforms. Those who bide their time, waiting for a return of past arrangements, will be ill-prepared for what lies ahead, and it is likely that their own vulnerability to transnational organized crime will be exacerbated.¹⁸

Of the many possible approaches to the challenges associated with effective criminal justice cooperation, what is likely to be the prevalent one? Will most states build on long-standing efforts and substantial progress in international cooperation and attempt to modernize and strengthen multilateral mechanisms (the 'Together' scenario)? Or will they explore new pathways for cooperation at the bilateral, regional or sub-regional levels ('Unbound')? Will more countries, particularly powerful ones, disengage from existing multilateral mechanisms and decide to go their own way, pursuing extraterritorial jurisdiction, relying on informal and often problematic alternatives to current mechanisms, and using their power and influence to coerce others into bilateral informal or formal cooperation arrangements ('Going alone')? Will the growing tendency of states to retrench from the rule of law and the global cooperation regime signal the end of these regimes ('Retreat')? Or what if the social and economic costs of organized crime and corruption become so steep and so politically damaging (for example, in relation to cybercrime, environmental crime, state capture by organized crime groups or financial crime) that the international community is shaken out of its current lethargy and urgently rethinks and retools international cooperation within multilateral institutions ('Renewal')? What follows are further descriptions of these five possible scenarios.



TOGETHER

Perfecting the existing international cooperation regime

The present international criminal justice cooperation regime is under great stress, but most states understand that fully retreating from it is not possible. Perfecting that regime, within the multilateral institutions that support it, therefore may appear to be a reasonable response to current challenges. Can states, as GI-TOC senior adviser Peter Gastrow has suggested,¹⁹ agree that it is time to update and reinvigorate the regime with measures that consider both the lessons learned and the global changes since the institution of UNTOC? Could the current limitations of global criminal justice cooperation mechanisms – or, to put it another way, the factors that lead countries to bypass

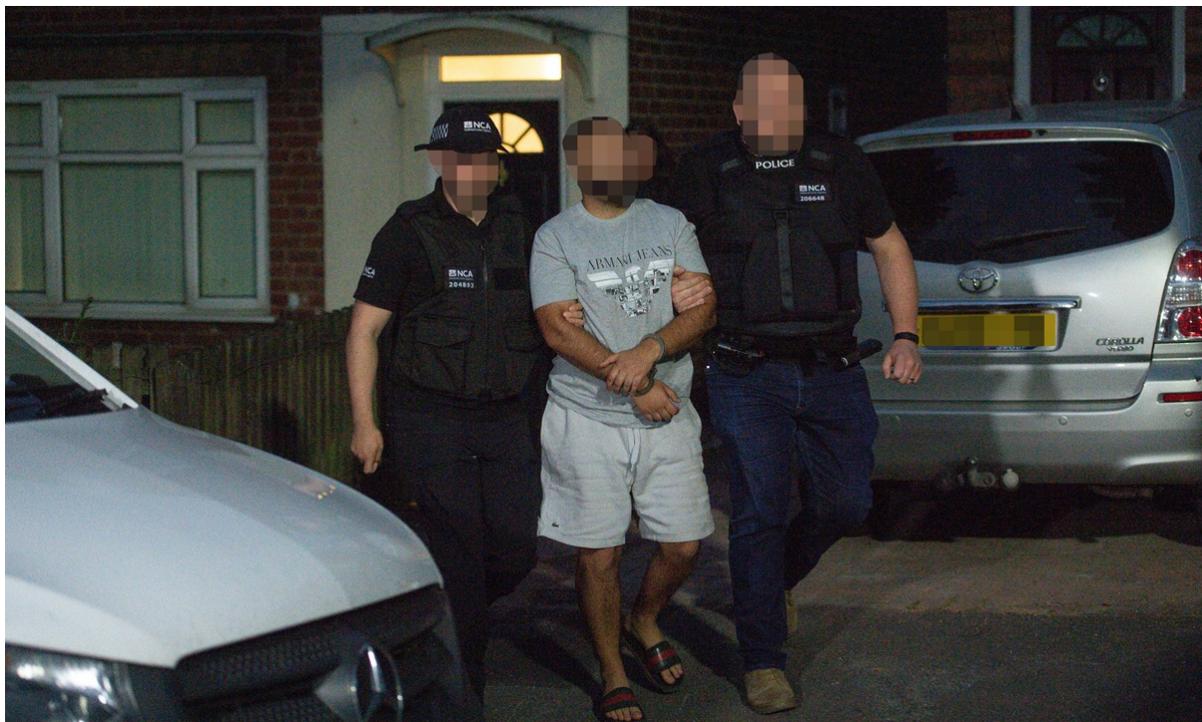


formal processes and procedural protections – be addressed? Would perfecting existing cooperation mechanisms prevent states from resorting to problematic, informal and sometimes unilateral alternatives?²⁰

State parties to UNTOC are currently engaged in a review of the implementation of that convention, whose main goal is to promote international cooperation. The process will be a long one and strangely seems to skirt around the crucial issue of effective multilateral cooperation.

By its very nature, criminal justice cooperation is necessarily political. However, the prevailing polarization, stemming in part from the rise of nationalism, conflicting policy paradigms, asymmetries in states' capacities and geopolitical uncertainties, continues to thwart efforts for effective cooperation. In an increasingly polarized world, the main axes of international cooperation will be redefined along different lines, which is likely to fuel the tendency of some states to tear down anything that constrains national sovereignty and, if necessary, retreat from the rule of law and the respect for human rights.

Reinventing and future-proofing the international cooperation regime's architecture might be a monumental undertaking, although it is an indispensable one. It will not be easy to navigate the complicated swirl of geopolitical changes, competing interests, limited multilateral capabilities and external trends in an era of unrelenting change and complex challenges. At present, the global international criminal justice cooperation regime is essentially rudderless. In the absence of competent leadership and an actionable strategy, it is not clear where credible initiatives to improve the current situation may come from. Unless strong new leadership emerges, the 'Together' scenario is unlikely to unfold. What direction will powerful countries adopt and does policy convergence require some form of hegemony? Will the necessary visionary leadership emerge to make this reform process possible?



The UK's National Crime Agency and police take part in raid on a property in June 2020 in relation to an investigation on Encrochat, a military-grade encrypted communication system used by organized criminals trading in drugs and guns. © Jacob King/PA Images via Getty Images



UNBOUND

Growing preference for bilateral and regional agreements

An accelerating shift towards bilateralism (or regionalism) is also a probable scenario. This future would reflect a pragmatic and realistic adaptation to exigent circumstances, including increasing polarization, the growing weakness of the global cooperation regime and the continued retreat of key participants from that regime. Without a broad-scale initiative to simplify international criminal justice cooperation at the global level, reconsider the legal basis of existing tools and mechanisms or transform the administrative process, bilateral or regional solutions become attractive to countries that are eager to proceed with like-minded partners. In fact, among some like-minded countries with previous experiences of successful cooperation, as is the case between several European countries, there is a discernible trend towards simplifying the extradition process to make addressing transnational crime more effective.²¹ Some experts have indeed suggested that bilateral treaties or equivalent functional agreements should be encouraged as a means to prevent unilateral action or other problematic alternatives to more conventional forms of cooperation.²²

This scenario does not necessarily represent weak cooperation. International asymmetries translate into 'state preferences'. Identifying these preferences may help explain the motives behind states' policies and practices with regard to international criminal justice cooperation. Money and Lockhart observe that most states' policies are strategic and that they pursue or refuse cooperation to the extent that it serves their interests.²³ The authors interpret states' choices from an economic point of view by considering not only the perceived costs of transactions, inaction and negotiation, but also the burden of multilateral agreements compared with that of bilateral or regional agreements. For example, considering the costs and benefits of cooperation on readmission is clearly a factor that can shape the proliferation of bilateral agreements over expelling individuals who are not allowed to stay on the territory of a country (for example, irregular migrants, rejected asylum seekers or stateless persons), whether in a coercive manner or not.²⁴

States' growing preferences for informal, non-binding agreements may be explained in context of their facing uncertainty and a shift of power.²⁵ States often use unilateral non-compliance as a renegotiating strategy, and informal arrangements make such renegotiating easier and less costly in the short term. States may anticipate that acting in ways that others consider unlawful may bring about change to legal rules going forward, as such unilateral action 'can disrupt the status quo and prompt renegotiation that would not have occurred through purely collective decision-making processes'.²⁶ However, as Meyer argues, these international dynamics prevent formal renegotiation and create long-term costs for states that can inhibit short-term cooperation.²⁷ This leads to incentives for engaging in long-term, multilateral and rule-based formal agreements progressively vanishing.

The power distribution of the past is reflected in the major international criminal justice cooperation agreements. As power shifts across many important areas of international cooperation, long-term international agreements become less attractive to rising powers, with states wanting flexibility to obtain better cooperative terms in the future. They attempt to respond to this fluctuating power by relying increasingly on informal, more easily renegotiable bilateral agreements. Meyer explains that this turn of events does not necessarily represent a retreat from cooperation. Rather, 'it reflects an effort to cooperate under conditions that make long-term agreements difficult to reach'.²⁸ Informal agreements are subsequently preferred because they are the best available option under the current and uncertain circumstances.



COALITIONS FOR COOPERATION

Since taking office in January 2021, US President Joe Biden's multilateral agenda has involved the establishment of new coalitions or pathways for cooperation, notably the Australia-UK-US (AUKUS) pact on advanced technologies, which may signal a growing reliance on issue-specific alliances with like-minded countries, as forecasted in the 'unbound' scenario.²⁹ In the field of cybercrime, for instance, # Biden is accelerating cooperation against ransomware and the illicit use of cryptocurrencies in a new multilateral initiative, reportedly called the counter-ransomware initiative, involving approximately 30 countries to facilitate law enforcement collaboration and prosecute cybercriminals without requiring the Russian government's cooperation.³⁰ These new transnational cooperation 'bubbles' do not necessarily indicate a weakened cooperation regime, but respond to geopolitical shifts and shared crime control interests. It is possible that in the future, will we see more cooperation bubbles emerge.

Some states have little to offer others with regard to cooperation, yet have a dire need for the cooperation of others, especially their neighbouring states. One can imagine the proliferation of transnational cooperation 'bubbles' based on particular criminal threats or localized strategies to control crime (or a particular type of transnational crime). New cooperation zones may emerge, which, depending on the type of transnational crime targeted, may be defined in terms of a shared interest in addressing a specific threat rather than taking a geographical approach.



In the short term, unilateralism may be an attractive option, particularly for powerful states that can make it work and are less concerned about long-term consequences of such an approach. Participation in and compliance with multilateral agreements, including their specific terms, are in many ways imposed by powerful states on others. However, these multilateral obligations quickly fall into desuetude when these same powerful states lose interest, decide to proceed unilaterally or bilaterally, or signal their indifference to other states. Multilateral obligations are also hampered by a lack of external scrutiny and meaningful evaluation of their implementation.

In addition to formal and informal bilateral or regional agreements, under this scenario powerful states may opt for unilateral action to fight certain kinds of organized crime, with methods often being illegal and problematic for the world order, human rights and the rule of law. That, too, is part of the strategic calculations in which states engage. In the future, powerful states will continue to leverage their material capabilities, relationships and information in a more rapid, integrated and adaptive mode than in the past.³¹ In doing so, they will shape the future of international cooperation and this, in effect, may take place largely outside of multilateral institutions and mechanisms. In some cases, unilateral methods go directly against Article 4(2) of the UN Convention against Transnational Organized Crime (UNTOC), according to which parties agree that sovereignty forbids the unilateral use by one party of its law



enforcement authority in another. However, some countries have circumvented the convention by creating extraterritorial jurisdictions to enable their law enforcement agencies to operate abroad.³²

It is also interesting to note that, in a world where the United States has long exerted territorial jurisdiction over major technology companies while the majority of internet users permanently reside elsewhere, states have responded to the US hegemony over electronic evidence by enacting data localization laws, deploying government-sponsored hacking and adopting other, unilateral alternatives for data access. Experts have started to sound the alarm on the grave unintended consequences of such unilateral measures for the functioning of the internet, civil liberties and cybersecurity, but these calls appear to remain unheard. In fact, UN member states have agreed on a process to elaborate a new cybercrime convention, yet states continue to demonstrate incompatible cyberpolicy paradigms, including divergent positions on whether the new treaty is even needed in view of the Council of Europe's Convention on Cybercrime and other regional frameworks, which will foreseeably frustrate future negotiation and cooperation efforts.³³ At the time of writing, Russia submitted a draft convention to the Ad Hoc Committee, which is responsible for elaborating the new treaty, as a basis for the negotiations. The proposed draft convention, however, reflects a marked departure from existing agreements, including inconsistent and vague terms, limitations on international cooperation, and lacks a grounding in human rights norms and standards.³⁴ Referring to the future UN-sponsored cybercrime treaty, cybersecurity expert Andrew Woods predicted that 'if it is good, it will not be signed by all relevant parties, and if it is signed by all relevant parties, it will not be good'.³⁵



RETREAT

Increased reliance on informal arrangements and alternative methods

Uncertainty affects international criminal justice cooperation in many of the same ways it affects the effectiveness and efficiency of national criminal justice systems.³⁶ When uncertain about the response of other states, the outcomes of their own cooperation efforts or the future of international cooperation agreements, states predictably look for alternatives. This scenario assumes that the current trend, which sees states increasingly relying on informal cooperation arrangements (and often problematic methods), will not only continue but also accelerate out of the need to respond to the localized impact of transnational crime.

When frustrated with the cost, burden and inefficiencies of the global cooperation regime, why would states not try to rely on simpler, more informal and non-binding arrangements at bilateral or regional levels? According to Money and Lockhart,³⁷ informal cooperation arrangements may be preferred by many states because they would be able to:

- avoid any unnecessary loss of national sovereignty and limiting their policy choices through binding agreements;
- avoid publicity and transparency, including the national scrutiny that formal cooperation agreements would attract, and allow the executive branch of government to act without legislative or judicial authorization;
- modify or nullify agreements fairly quickly, with fewer detrimental consequences, and avoid enforcement mechanisms or penalties for non-compliance with formal agreements; and



- avoid having to make formal, public pledges to states with which they are not necessarily aligned or in a positive relationship.

In addition, proceeding informally can also allow states to limit the scope of their cooperation to modes and forms that suit their interests, or to turn a blind eye to potential human rights abuses, derogations to the rule of law or their own obligations under international law.

Informal arrangements typically do not have any real enforcement mechanism, but rely on political, diplomatic, economic or practical factors to support reciprocity, predictability and coherent application. Cases of states being coerced to cooperate with another, more powerful one in order to avoid detrimental consequences, including the prospect of unilateral action, will continue. The scope of these agreements can also be expected to be limited to the type of criminal activities that parties share an interest in controlling (at least within their respective territories). This is, in part, because different types of cooperation are suited to deal with different kinds of crime, threats and circumstances (including the asymmetries mentioned earlier).

Unfortunately, some of these informal bilateral arrangements, such as the unilateral approaches discussed in the 'Going alone' scenario, rely on methods that circumvent or, in some cases are in direct violation of, existing international treaties. This may have far-reaching implications with regard to criminal justice policy, human rights and the rule of law.



RENEWAL

Radical review and renewal of existing multilateral regimes

To ensure political neutrality, the protection of human rights, and the preservation of the rule of law and international standards of legality, the kind of integrated system called for by the International Bar Association many years ago is as urgently required today as it was then.³⁸ In the 'Renewal' scenario, states would pledge to reaffirm the relevance of the rule of law and the primacy of human rights in international criminal justice cooperation. However, if states continue to concentrate on their individual crime control priorities and targets, or focus on immediate geostrategic goals and advantages, they will surely fail to reimagine or adapt international cooperation mechanisms to the demands of our time. Opportunities for action on key priorities may slip away.

Suprastate mechanisms could be considered to ensure accountability, resolve disputes among participants and ensure compliance. This could include the power to impose sanctions, as the threat of consequences is currently actioned too erratically to have any real impact, except perhaps in the most blatant and defiant cases of non-compliance. Addressing the question of states' non-compliance with their obligations under the relevant treaties might emerge as a priority, but to date efforts to establish consequences for a state's non-compliance have not been very successful.

States may be amenable to the establishment of a binding arbitration mechanism to resolve disputes arising from unilateral action by another or a state's wilful failure to comply with its international cooperation obligations. Sadoff believes that such binding arbitration would be preferable to relying on domestic courts, human rights bodies or the

International Court of Justice, which all have their jurisdictional constraints.³⁹ Sadoff also suggests that, in cases of a dispute over an extradition request involving political offences or extradition of a national, the matter could be submitted for prosecution to a permanent UN-based tribunal established for that purpose.⁴⁰

However, the 'Renewal' scenario does raise a number of questions. What would it take for states to find the motivation to initiate such radical reforms? Can a radically different cooperation regime accommodate a much wider range of views and values than previous regimes were able to integrate? Would states ever accept enforceable legal restrictions on their behaviour, whether at home or abroad? What role can multilateral organizations fulfil in mobilizing state support for a transformation of the current regime? Alternatively, would it be wise for a small group of like-minded states to gradually initiate such reforms, pressuring other states to participate by leveraging trade, humanitarian aid and diplomatic relations over time? Can civil society do anything to exert pressure on states to move towards such a scenario?



CONCLUSION

It is clear that the existing cooperation regime has to be replaced urgently with more effective cooperation measures against transnational crime. Although the five scenarios mapped out here require further exploration, they point to the need for broad and immediate concerted action to give ourselves more effective tools to combat transnational organized crime, prevent corruption and control illicit markets at the global level.

A fresh approach to international criminal justice cooperation is required, but at present the leadership needed to lead states through such a transformation is lacking. As civil society is able to, in part, overcome bureaucratic inertia and exercise imaginative thinking, it may be able to provide some leadership in formulating a comprehensive criminal justice cooperation strategy.



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