



CHAPTER 1

INTRODUCTION

1. IDENTIFICATION OF THE RESEARCH THEME

Within the Western context, intelligence collection during the Cold War primarily focused on the Soviet Union. Some of the major threats which need to be addressed presently are terrorism, transnational organised crime in all its manifestations and crimes related to weapons of mass destruction (WMD). In respect of methodology, the focus in many countries was on signals intelligence (SIGINT), rather than on human intelligence (HUMINT). The events of 11 September 2001 in the United States of America (US) were watershed events, exposing the weaknesses of a lack of intelligence-sharing both nationally and internationally and the over-reliance on SIGINT (Johnson & Wirtz, 2004: 33).

The adoption by international organisations of a large number of international instruments dealing with crimes ranging from terrorism, to corruption and war crimes, resulted into what is referred to as 'international criminal law' (Van den Wyngaert, 1996: ix). This study has been undertaken with reference to 'international crimes', meaning those crimes which countries need to enact in their national legislation under obligations emanating from international instruments. The term includes terrorism; transnational organised crime, including drug offences and money-laundering; war crimes; genocide; crimes against humanity; crimes relating to the proliferation of WMD; mercenary offences; crimes against the environment; piracy; and corruption.

The term 'international crime' as opposed to 'transnational crime' is preferred for purposes of this study, in view thereof that for instance, war crimes and crimes against humanity, committed during a civil war are regarded as international crimes, but are not necessarily transnational, in other words, cross-border, in

nature. Many international crimes, such as terrorism might be committed within the national context: Therefore the term 'international crime' or 'crimes' is more descriptive. The focus of this study is on international crimes with major security implications. The term 'international crime' as used in this study therefore comprehends transnational organised crime; terrorism crimes; crimes relating to the proliferation of WMD; war crimes, genocide and crimes against humanity; piracy and crimes relating to mercenary activities.

Where reference is made to transnational organised crime, it is done within the context of the *United Nations (UN) Convention against Transnational Organized Crime* and its three supplementary Protocols. Although there are separate international conventions dealing with drug offences (such as the *Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988)*), those crimes, committed within transnational context, are also covered by the *UN Convention against Transnational Organized Crime*.

The combating of terrorism differs from other international crimes, in the sense that exclusive military options, and covert actions, are sometimes opted for to combat terrorism, rather than the criminal law option. This in itself complicates global intelligence cooperation in respect of terrorism, in view of diverse political views; a lack of a universally accepted definition of terrorism; and the fact that political, religious and ideological motives are inherent to terrorist activities.

In combating transnational organised crime and in particular drug trafficking, there is already a high degree of international cooperation in respect of law enforcement, but which still needs to be much improved in respect of intelligence cooperation and sharing. In the US, covert actions or operations may be used by law enforcement in respect of terrorism as well as other crimes such as drug trafficking. Both terrorism and transnational organised crime are increasingly viewed as impacting on national security. In the past the two phenomena were, however, seen as distinct. There are numerous links between transnational

organised crime and terrorism. Combating terrorism and transnational organised crime cannot be separated from each other. By focusing on the crime element of terrorism, it can be detected in ways which are not possible otherwise (US, 2005(d): 76).

Special investigative techniques may be employed to investigate international crime, which techniques bear close resemblance to some civilian intelligence gathering techniques, such as the use of agents and informers. The biggest common factor between the respective functions of law enforcement, including crime intelligence, and civilian intelligence, is clandestine intelligence gathering.

This in itself provides a common basis for intelligence cooperation. These special investigative techniques include undercover operations and controlled delivery and surveillance, including electronic surveillance. Cooperation between civilian intelligence, law enforcement (crime) intelligence and even military intelligence in combating crime was first evident in counter-drug operations. It is clear that this cooperation should be extended to all international crimes.

In the post-Cold War era, targets of law enforcement and civilian intelligence began to merge. To remain relevant, the broader Intelligence Community (IC) must have the ability to provide intelligence to all customers who can make use of it. Good, actionable intelligence is a force multiplier (Vetter, 1995: 2, 11). The intelligence target for both law enforcement and civilian intelligence, grew to such an extent that intelligence cooperation became a necessity to provide adequate coverage (Clough, 2004: 607). Intelligence cooperation is essential in technology transfer regimes, sanctions monitoring, the pursuit of potential war criminals, but most important regarding global terrorism and WMD (Clough, 2004: 608).

The failure of the respective law enforcement and intelligence agencies in the US to share available information timely is regarded as cause for a lack of advance knowledge and ability to prevent the 11 September 2001 terrorist attacks in

Washington, D.C., Pennsylvania and New York (US, 2001: 3). The lessons learnt from the Madrid train bombings prior to the Spanish elections in 2004, are that the three methodologies of intelligence analysis, namely: trends and patterns, frequency and probability, must be integrated. Furthermore, the success of intelligence analysis lies in the structure of each intelligence agency, and its relations with other government and non-governmental entities (Segell, 2005: 235).

In view of the international nature of international crime, there is a need for improved cooperation between positive intelligence (which includes both military and civilian intelligence) and law enforcement agencies. This need is valid both on the national and international level (Wilkinson, 2006: 205). Such cooperation is hampered and challenged by various factors, such as sovereignty between nations, the differences in methodologies of respectively law enforcement (crime intelligence) and positive intelligence, their legal and constitutional mandates and functions. Furthermore, some states provide a safe haven to criminals, and their civilian intelligence and law enforcement institutions are corrupted or at least infiltrated by criminal elements or manipulated by such elements by means of terror (narco-terrorism) on political, executive and judicial level.

National governments are willing to allow other governments' intelligence services and police only limited access to their secret intelligence. This is to protect sources of information, as a result of a lack of trust from fear of action against the government, and of fear to reveal weaknesses in their intelligence system (Wilkinson, 2006: 175). Intelligence is sometimes not releasable to any other nation, for reasons of national interest (Clough, 2004: 605). Alternatively there could be a general breakdown or lack of order or stability in a country, making cooperation with that country impossible. The methodology of civilian intelligence agencies in respect of their traditional role is in many instances not acceptable to law enforcement in terms of human rights standards, and legal requirements for admissibility of evidence.

Cooperation between positive intelligence and law enforcement (crime intelligence) could realise the primary objective of any intelligence agency to be efficient, namely, to prevent actions such as terrorism from developing beyond its incipient stage (Wilkinson, 2006: 73). Cooperation between law enforcement (crime intelligence) and positive intelligence (military and civilian intelligence) could be mutually beneficial. Police, in enforcing the law and their contact in combating crime within all levels of the community give them an “unrivalled bank” of information from which contact information can be developed (Wilkinson, 2006: 73). Police in many countries do have sophisticated intelligence services, gathering, analysing and using crime intelligence. Specialist anti-terrorist units seem to be a necessity (Wilkinson, 2006: 77). The same is probably valid in respect of other forms of international crime.

The view is held that serious intelligence cooperation is reserved for bilateral and trilateral level and not within regional, for example, European Union (EU), level. This is especially true of sharing raw intelligence data. The sharing of analyses and assessments on such regional level is, however, deemed important to elicit action from governments, where action is required (Wilkinson, 2006: 175).

Rivalry and duplication of functions between various intelligence agencies nationally is another challenge (Wilkinson, 2006: 73). Reference is made to “walls of separation“, between law enforcement and civilian intelligence, within the US context, to prevent the use of intelligence techniques against citizens and legal residents of the US without obtaining court orders (US, 2001: 10).

It is predicted that intelligence relationships will continue to proliferate adding benefits of liaison, but increasing the possibility of compromise (Clough, 2004: 612).

It is clear that the particular international crimes, such as piracy, terrorism and crimes related to the proliferation of WMD pose specific challenges for cooperation. Intelligence within the UN similarly poses its own challenges.

2. STUDY OBJECTIVES

The main objective of the study is to identify ways of improving cooperation between law enforcement (crime intelligence) and positive intelligence (civilian and military intelligence), in combating international crime, on the following levels:

- At national level, namely between the respective law enforcement agencies and positive intelligence agencies within a state.
- On regional level, between particular regional organisations and their member states.
- On international level, between member states and particular international organisations and their member states, as well as between such organisations and regional organisations.

A secondary objective is to identify and analyse the respective challenges which inhibit intelligence cooperation between law enforcement and positive intelligence in combating international crime. With intelligence cooperation is meant broad cooperation and not only intelligence sharing. The challenges, and how they are dealt with, will be analysed on national, regional and international levels, also through the use of selected case studies.

In this study, these challenges are identified and analysed on the national level, with reference to particular case studies, notably the US, and the United Kingdom (UK). On national level the cooperation between the respective agencies in the countries involved in combating international crime through intelligence sharing and cooperation are assessed.

The intelligence fusion concept as it is being applied in the US, as well as the new approach to transnational crime as it manifests in the UK are analysed. Brief reference is made to relevant practices in other countries, such as Canada and the Netherlands. The fusion model is aimed at an even broader intelligence sharing within the IC, inclusive of law enforcement (crime intelligence), and military and civilian intelligence on the one hand, and information within the civil society, on the other. Attention is in particular given to the different objectives of crime intelligence and civilian intelligence, and the different methodologies employed. The commonalities are highlighted in order to find common ground for cooperation between law enforcement (crime intelligence) and positive intelligence agencies in combating international crime.

The countries referred to here have been selected in view of their particular experiences in combating international crime; and official inquiries launched after 11 September 2001 in those countries, with the mandate to investigate intelligence failures or problems. These inquiries revealed specific weaknesses relating to intelligence cooperation and sharing and led to wide-ranging proposals and initiatives taken in order to address the identified deficiencies.

On regional level, the example of cooperation between law enforcement and positive intelligence (military and civilian intelligence) within the EU and the Association of South East Asian Nations (ASEAN) are analysed, including the ASEAN Chiefs of Police (ASEANAPOL). In respect of the EU the Berne Group, the Counter-Terrorist Group, and Europol are studied and analysed.

Recent developments on the African continent are analysed, in particular the various law enforcement cooperation initiatives, and positive intelligence cooperation. The establishment of a Continental Early Warning Centre of the African Union (AU), and the AU centre to coordinate information on terrorism in Algiers, Algeria, are analysed. The Committee for Intelligence and Security Systems in Africa (CISSA) is another example of intelligence cooperation on

regional level, serving as platform also for broader international intelligence cooperation.

On the international level the examples of the International Criminal Police Organization (ICPO)-INTERPOL, commonly referred to as INTERPOL, and the UN are discussed and analysed. INTERPOL had to face challenges in playing an increasing role in combating terrorism, in view of the political nature of terrorism and the fact that the INTERPOL Constitution prohibits the participation by the organisation in any activities relating to politics (Article 3). Recently the Secretary-General of INTERPOL stated that the UK, amidst continuing terrorist threats, is totally under-utilising the INTERPOL database of 11 000 suspected terrorists (Dodd, Norton-Taylor, 2007).

Relationships between INTERPOL and ASEANAPOL are also investigated, in view of the historic agreement recently concluded between ASEANAPOL and INTERPOL.

The UN performs functions in respect of peace support operations, weapons monitoring, (Clough, 2004: 609), the monitoring of compliance with UN Security Council arms embargoes and obligatory sanctions relating to terrorism. The manner in which the UN, as an organisation consisting of Member States inclusive of most countries in the world, deals with intelligence, is important as a case study, in view of the challenge to balance interests of the collective as opposed to a single Member State – a problem which needs to be addressed by any organisation on international level.

The aim of the study is therefore to analyse these challenges and to identify means to improve cooperation both on national level, regional level and international level. Models in this respect, both in terms of structures and process have been studied, in order to make recommendations on how the cooperation between law enforcement (crime intelligence) and positive intelligence could be

improved. Best practices are identified. Possible solutions to improve intelligence cooperation on international, regional and national level are investigated, to determine models which could be applied. Ways of improving intelligence cooperation in a broad sense, namely not limited to intelligence sharing are proposed. One of the inhibiting factors is the admissibility of intelligence in courts of law.

A further secondary objective has been to compare the intelligence gathering techniques employed by law enforcement (crime intelligence), such as undercover operations, controlled delivery and surveillance, to the techniques employed by positive intelligence. Coercive intelligence operations are not restricted to the military and, without reference to any particular country, could include satellite reconnaissance, psychological operations/disinformation, proxy invasion, interdiction, assassination, industrial espionage, false-flag operations, covert ownership of assets, information system penetration and destruction, raids, break-ins, blackmail and entrapment, sabotage, electronic countermeasures, and *coups* support (Reismann & Baker, 1992: 11- 13). Many of the above actions imply actions which are legally untenable and unacceptable to courts and law enforcement. Nevertheless, covert action is allowed and regulated, with parliamentary oversight in many democracies. It is called the ultimate paradox to allow covert actions in a democracy (Treverton, 1987: 222). The use of covert action by positive intelligence as a possible obstacle in the way of cooperation between law enforcement and positive intelligence is investigated in this study. The Central Intelligence Agency's (CIA) covert actions during the 1960's and 1970's are examples in this regard, exposed in the recently released so-called "Family Jewels" Dossier (US, 2007(c)).

The 11 September 2001 events in the US are regarded as a watershed which served as a driver for closer intelligence cooperation between law enforcement (crime intelligence) and civilian intelligence on all levels described above. This study therefore primarily focused on the period between 11 September 2001 up

to the end of 2007. Some more recent developments regarded as of importance to the study has, however, also been included.

During the post-Cold War era, intelligence services were redirected to a large extent to focus on terrorism, transnational organised crime and WMD, in addition to their more traditional role relating to intelligence gathering on national interest issues. Within international organisations such as INTERPOL and the UN, the focus also shifted to these crimes. Although the issue of intelligence sharing was topical within INTERPOL, Europol and on national level, the critical value and need therefore was acutely underlined by the 11 September 2001 events and led to numerous initiatives on the various levels to enhance intelligence sharing and cooperation.

3. LITERATURE SURVEY

The Council of Europe expresses the opinion that the convergence of security intelligence, meaning positive intelligence (military and civilian intelligence) and crime intelligence is problematic and “interlinking of networks will not be achieved without difficulty, if it is ever achieved at all.” (De Koster, 2005: 39).

Numerous sources confirm the difficulties of intelligence sharing and cooperation. In addition, challenges to intelligence cooperation or factors inhibiting intelligence cooperation, such as mistrust, are dealt with separately in various sources, or only challenges to cooperation in respect of a particular type of intelligence, such as strategic intelligence, or challenges to intelligence cooperation only in respect of a particular international crime, such as terrorism, are discussed (Clough, 2004) (Canada, (No date): par 3.2.) (Walsh, 2006) (Ryan, 2006: 120-146).

There is a need for a comprehensive study in which all possible such challenges are determined and in which comprehensive proposals are made to address those challenges.

International organisations, law enforcement and the IC over a long period of time tended to deal with international crimes separately. An example is the development of international instruments on terrorism. As terrorist threats permutated from the hijacking of airplanes to bombings in public places, destruction of fixed platforms at sea, to the latest threat, namely that of possible access to and criminal use by terrorists of nuclear material, international organisations developed *ad hoc* international instruments in respect of each threat (UN, 2007(a)). After adopting 13 such counter-terrorism instruments to ensure maritime and aviation safety; to suppress nuclear terrorism and terrorist bombings and the financing of terrorism; to protect diplomats against violence and to criminalise hostage-taking, the UN structures have still been unable to complete the drafting of a comprehensive convention on terrorism.

In a similar fashion, the respective international crimes have been addressed in separate international and regional instruments with a huge overlap in respect of a number of areas of cooperation relating to mutual legal assistance; extradition; intelligence sharing and cooperation; technical assistance and assistance with special investigative techniques in law enforcement (Van den Wyngaert, 1996).

On national level there are in numerous instances a proliferation of law enforcement and intelligence structures, each with a limited mandate in respect of a particular crime or threat, also leading to a silo approach in relation to intelligence.

From the myriad of international instruments there is a need to identify common provisions in order to develop general principles for and obligations in respect of intelligence cooperation covering international crimes in general.

The adoption of the *UN Convention against Transnational Organized Crime* and its supplementary Protocols relating to trafficking in persons, trafficking in

migrants and trafficking in firearms heralded a new era of addressing international crime in a more holistic fashion. On an operational level, the development of units or capacities to address at least organised crime in a comprehensive manner is a trend that followed suit (Canada, (No date) (Das & Kratcoski, 1999).

Intelligence failures led to the institution of various commissions of inquiry in respectively the US and the UK, to establish the reasons for such failures and to address the same. In each instance this was done with reference only to a particular crime, such as terrorism or intelligence relating to WMD and within the context of a particular country with its unique composition of law enforcement and intelligence structures (UK, 2004) (US, 2003(c)) (US, 2004(b)) (US, 2005(c)) (US, 2008(d)) (Segell, 2005)). The bombings which took place in London, during 2005, led to further reviews of intelligence activities of both law enforcement and intelligence agencies in the UK, which are of importance with reference to interagency relationships (UK, 2006(b)) (UK, 2009(c)). The practice of rendition by the US led to a review of this practice in the UK, which review indicates important principles to protect human rights in intelligence cooperation (UK, 2007(a)). The said practice of rendition by the US also led to a report by the Special Rapporteur to the UN on the promotion and protection of human rights and fundamental freedoms while countering terrorism. This report proposes 35 good practices on legal and institutional frameworks for intelligence services and their oversight (UN, 2010).

Comprehensive plans, structures or strategies have been developed to address the particular failure within the particular country, with reference to a particular international crime, for example the *National Criminal Intelligence Sharing Plan* (US, 2003(a)); the *National Intelligence Strategy of the United States of America* (2005(b)); the *National Strategy for Information Sharing: Successes and Challenges in Improving Terrorism-Related Information Sharing* (US, 2007(a)); United States Intelligence Community: *Information Sharing Strategy* (US,

2008(a); Department of Homeland Security Information Sharing Strategy (US, 2008(b)); *Department of Defence Information Sharing Strategy* (US, 2007(b)); the *National Security Strategy of the United Kingdom: Security in an Interdependent World* (UK, 2008(a)); the *United Kingdom Strategy for Countering International Terrorism* (UK, 2009(a)).

Logically such plans, structures or strategies will not all be applicable to other countries. However, there are best practices and strategies proposed in the various reports, which could be used universally. There was therefore a need to identify such best practices and strategies.

Only recently, studies pertaining to the convergence of certain crimes, such as transnational organised crime and terrorism identified common focus areas, which could lead to a holistic approach to both transnational organised crime and terrorism (De Koster, 2005). There was a clear need to investigate whether those focus areas could not also be used on an intelligence level to address all or most other international crimes.

In respect of special investigative techniques, namely undercover operations and controlled deliveries; and surveillance, including electronic surveillance, a compilation has been made by means of a questionnaire, of such techniques in Member States of the EU and a number of other countries (De Koster, 2005). These special investigative techniques are largely intelligence-based (use of surveillance, informants and agents). The research in this regard showed wide-ranging terminology and practices in the various laws and legal systems. In order to enhance international intelligence cooperation in this regard, a common understanding needed to be developed of the respective techniques. There was therefore a need in this study to develop, from the available laws, common terminology.

The available literature focuses respectively on the national level (US, 2001) (US, 2003(a)) (US, 2005(d)) (Vervaele, 2005) (Wilkinson, 2006) (UK, 2004); the regional level (Walsh, 2006) (Ryan, 2006); or the international level (Deflem, 2004, 2006) (Wilkinson, 2006), of intelligence cooperation. The main advantage of this study is that by describing and analysing all three levels in the same study, a novel approach could be followed in order to make proposals on how to improve intelligence sharing and cooperation on all levels.

Various reports of the UN, such as that of international commissions of inquiry into Darfur (UN, 2005(b)) and the fact-finding mission on the Gaza conflict ((UN, 2009(c)) provide insight into the investigation of war crimes, genocide and crimes against humanity. Manuals drafted by international tribunals, such as the *Best Practices Manual for the Investigation and Prosecution of Sexual Violence Crimes in Situations of Armed Conflict: Lessons from the International Criminal Tribunal for Rwanda* (ICTR, 2008) and the *Manual on Developed Practices of the International Tribunal for Yugoslavia* (ICTY-UNICRI, 2009) provide valuable guidelines on how to deal with information, intelligence and witnesses in investigations into war crimes, genocide and crimes against humanity.

Manuals and codes of practice in the UK and the US on intelligence practices are available, such as the *Guidelines on the National Intelligence Model* (ACPO, 2005); *Covert Human Intelligence Source Code of Practice* (UK, 2002(a)); *Covert Surveillance Code of Practice* (UK, 2002(b)); *Interception of Communications Code of Practice* (UK, 2002(c)); *Acquisition and Disclosure of Communications Data Code of Practice* (UK, 2007(b)); *Investigation of Protected Electronic Information Code of Practice* (UK, 2007(c)); The Attorney General's *Guidelines on Federal Bureau of Investigation Undercover Operations* (US, 2008(b)); *Fusion Centre Guidelines* (US, 2006(c)); and the *Attorney General's Guidelines for Domestic FBI Operations* (US, 2008(e)).

Information on the activities, mandates, and functions of the respective law enforcement and intelligence agencies, international organisations such as the UN and INTERPOL and regional organisations such as ASEAN, ASEANAPOL, and the AU are available on the Internet, especially on the home websites of these organisations.

This study was aimed at issues which are not covered in the available literature, namely to comprehensively identify and analyse challenges or blockages to intelligence cooperation on national, regional and international level; to make proposals to address such challenges; to identify from the various international instruments the common provisions relating to intelligence and law enforcement cooperation and obligations in that regard, in order to develop principles for intelligence cooperation; to develop common terminology relating to special investigative techniques; and to determine whether the intelligence focus areas developed from the convergence of terrorism and organised crime can be used in respect of other international crimes.

4. IDENTIFICATION AND DEMARCATION OF THE RESEARCH PROBLEM

Within the context of international crime, the study aims at identifying and analysing the challenges to cooperation between law enforcement (crime intelligence) and positive intelligence and to make recommendations in order to improve such cooperation. The study focuses on international crimes with major security implications, namely terrorism; transnational organised crime, including drug offences and money-laundering; war crimes; crimes relating to the proliferation of WMD and protection of nuclear material; mercenary offences; crimes against humanity; piracy; and corruption. The motivation for this selection is that especially transnational organised crime; terrorism, and crimes related to the proliferation of WMD, are regarded as serious threats to the security of

states. It is also clear that the intelligence and investigation methods required to combat these crimes have much in common.

The basic research question is: What can be done nationally and internationally to improve cooperation between crime intelligence and positive intelligence? Inquiries into intelligence failures revealed that a lack of cooperation between crime intelligence and positive intelligence contributed to such failures and that improved cooperation between crime intelligence and positive intelligence can be mutually beneficial to prevent and combat crime.

Secondary research questions emanating from this are:

- What are the challenges, blockages or factors inhibiting or preventing cooperation between law enforcement (crime intelligence) and positive (military and civilian) intelligence? The identification and analysis of particular challenges or blockages to intelligence cooperation will enhance the finding of solutions to remove such challenges or blockages, or mitigating their negative effects on intelligence cooperation.
- What has the recent response (post-11 September 2001), to these challenges been on national (interagency), regional and international levels in respect of intelligence cooperation and sharing? Following post-11 September 2001 resolutions were adopted by the UN Security Council, with an emphasis on complying with international obligations regarding cooperation to combat terrorism and crimes related to the proliferation of weapons of mass destruction. Countries such as the US and the UK responded on an unprecedented scale in respect of intelligence policies, structures and methodology.
- Are there best practices which on their own or in combination could be used to benchmark solutions for improved cooperation between crime intelligence and positive intelligence? The identification of best practices and determination of their applicability can be used to formulate solutions to improve intelligence cooperation on different levels.



- How can the sharing of intelligence, including “raw intelligence”, be improved on operational level? The sharing of “raw intelligence” seldom takes place, except amongst the most trusted parties, mostly on bilateral level. For operational reasons “raw intelligence” is often required timeously to respond to a threat and it is therefore important to find ways to improve the sharing of raw intelligence on operational level.

This study is based on the following assumptions:

- Although the events of 11 September 2001 have led to increased emphasis on intelligence cooperation at the various levels, certain factors such as sovereignty and mistrust are still preventing more effective cooperation between crime intelligence agencies and positive intelligence agencies.
- Broad intelligence cooperation and sharing in respect of covert action and covert operations are highly unlikely.
- Intelligence cooperation needs to be very focused in terms of methodology, mainly clandestine intelligence gathering methods, especially human intelligence, within the context of special investigative techniques of controlled deliveries; undercover operations; and surveillance, including electronic surveillance.
- By operating in an incremental fashion, and on a project basis, trust can be built between the respective actors in order to promote future intelligence sharing.

5. METHODOLOGY

The approach to the study is descriptive and analytical. Given the aim of the study, namely to identify and develop guidelines and methods to improve cooperation between crime intelligence and positive intelligence in combating international crime, the theoretical approach to the study is based on a conceptual framework and analysis of international crime and intelligence

(Johnson & Wirtz, 2004). International crimes are largely defined in international instruments, but on a political level the definitional issue remains relevant in that there still is no universally accepted definition of terrorism and even of organised crime. The respective international instruments will be utilised as a common basis in this regard. Whilst it was realised that on international level intelligence sharing is mostly on the strategic level, the study was aimed at identifying methods and a framework for cooperation in the broadest sense, between crime intelligence and positive intelligence, and on how to develop confidence to share raw intelligence material in order to combat international crime effectively (Clough, 2004) (Walsh, 2006).

The primary sources which have been utilised include the US *National Criminal Intelligence Sharing Plan*, setting out solutions and approaches to improve the ability of the US to develop and share crime intelligence (US, 2003(a): 3); the *Report of the National Commission on Terrorist Attacks on the US*, which have been studied against the background of recent criticism regarding the recommendations of the report itself, and the manner in which the recommendations were actually implemented (US, 2004(b)); the report on the review of intelligence on WMD (UK, 2004); various reports to the US Congress on intelligence sharing and other intelligence issues (US, 2001) (US, 2003(b)) (US,2003(c)); the *National Intelligence Model* developed in the UK, establishing the concept of intelligence-led policing (ACPO, 2005); and the *Fusion Centre Guidelines* developed to enhance information sharing in the widest possible manner (US, 2006(c)). The above primary sources all deal with intelligence failures and deficiencies and propose remedial actions. These proposals have been described and analysed and from that a generally applicable framework for improving intelligence cooperation has been developed.

In respect of international crime, all the relevant international instruments on terrorism, organised crime and drugs are available electronically (United Nations Office for Drugs and Crime). Other relevant international instruments have been

compiled by Van Wyngaert (1996). The regional counter-terrorism instruments have been compiled by the UN (2001).

A compilation of the legislation of countries in the EU, the US and Canada pertaining to special investigative techniques to investigate terrorism provides a basis for analysing these techniques as understood in these countries. It has been used to develop common definitions of the respective techniques (De Koster, 2005).

An important secondary source was the research on intelligence analysis done by Shelley *et al*, (US, 2005(d)). In this source recognition is given to the problem that intelligence analysts are in effect overwhelmed by the sheer volume of intelligence. Intelligence methods, which relate to intelligence sharing and cooperation are analysed to determine the general application thereof in respect of the combating of all international crimes.

Other important secondary sources include the evaluation done by Ryan (2006) on criminal (*sic*) intelligence in the EU; the research of Deflem (2004, 2006) on international police cooperation, and that of Gerspacher (2002; 2005) on police cooperation institutions responding to transnational (cross-border) crime.

In respect of the role of intelligence within the UN, important secondary sources were Dorn (1999), Heide & Perreault (2004), Carment and Rudner (2006), and Champagne (2006).

6. STRUCTURE OF THE RESEARCH

Chapter 1: Introduction

This chapter introduces and outlines the study objectives, the need for the study, the structure thereof and the research problems that are addressed.

Chapter 2: International crime and intelligence: A conceptual framework

In this chapter the concepts used within the context of this study are explained. Concepts such as international crime, transnational organised crime, intelligence, civilian intelligence, human intelligence, domestic intelligence, foreign intelligence, military intelligence, signals intelligence, technical intelligence, crime intelligence, strategic intelligence and terrorism, are defined for purposes of the study. The importance of intelligence cooperation is specifically also discussed.

Chapter 3: Imperatives for intelligence cooperation

A short historical background on intelligence cooperation is provided and the watershed events such as the effect of the post-Cold War era and the 11 September 2001 events are discussed. The international obligations in the various conventions and resolutions of the UN Security Council; the African Union (AU); the Southern African Development Community (SADC) and the ASEAN pertaining to international information sharing and cooperation in respect of special investigative techniques are discussed in this chapter. Drivers for intelligence cooperation and sharing such as globalisation, the value for money concept, and the enrichment of intelligence, are discussed.

Chapter 4: Challenges for intelligence/law enforcement cooperation

The challenges for cooperation between law enforcement and civilian intelligence are identified and discussed in this chapter. Main challenges which have been identified are sovereignty; jurisdiction; lack of standards for communication and information technology; technical advances; secrecy and fear of compromise;

mistrust; the difference in focus and structure between law enforcement and positive intelligence; states which have no effective government; corruption in governments; and the rise of private intelligence and private security.

The different oversight mechanisms for law enforcement and positive (military and civilian) intelligence are also described.

Chapter 5: **Methodologies of law enforcement and positive intelligence**

The methodology of respectively law enforcement (special investigative techniques), and positive intelligence practices are analysed. The common areas, upon which cooperation between law enforcement and positive intelligence could be based, are identified.

Chapter 6: **Models for cooperation on national (interagency level)**

This chapter includes a number of case studies on national level. Firstly a case-study of the US post-11 September 2001. This includes an analysis of the 9/11 Commission, the *National Criminal Intelligence Sharing Plan*, the *Fusion Centre Guidelines* and how the 9/11 Commission's recommendations have been implemented.

In respect of the case study of the UK, the changing roles and functions of intelligence agencies enabling them to be able to combat terrorism and organised crime are analysed, including the role of MI5, the National Crime Intelligence Service, the Crime Squads and the recent establishment of the Serious Organised Crime Agency (SOCA).

Chapter 7: **Models for cooperation on regional level**

The models presented by intelligence cooperation within Europol, ASEANAPOL and the African Centre for the Study and Research of Terrorism (ACSRT), which is intended as an Early Warning Centre on terrorism, are analysed in this chapter, as well as the role of CISSA on the African Continent, linking with intelligence agencies globally.

Chapter 8: **Models for cooperation on international level**

In this chapter the models presented within INTERPOL and the UN are analysed.

Chapter 9: **Evaluation**

This chapter summarises the study; tests the main assumptions of the study, and presents the main findings and recommendations of the study. Recommendations on how intelligence cooperation on the national, regional and international level could be improved are made.



CHAPTER 2

INTERNATIONAL CRIME AND INTELLIGENCE: A CONCEPTUAL FRAMEWORK

1. INTRODUCTION

In this chapter, concepts such as international crime, transnational organised crime, intelligence, civilian intelligence, human intelligence, domestic intelligence, foreign intelligence, military intelligence, signals intelligence, technical intelligence, crime intelligence/criminal intelligence and strategic intelligence are defined within the context of, and for purposes of the study. In respect of many concepts there are no universally accepted definitions, making it even more important to outline what is understood in respect of such concepts. A proper definition of the respective phenomena regarded as international crimes is critical for legal regulation thereof and legal responses thereto. It is stated that without precise definition, ambiguities are created that allow terrorists and organised crime members to “slip through the cracks”, and states may take advantage of uncertainties to expand room for maneuver in terms of targets and methods used against targets, in order to pursue other unrelated ends (Orlova & Moore, 2005: 61). In view of the importance of intelligence cooperation as focus of this study, concepts relating to intelligence cooperation are explained.

2. INTERNATIONAL CRIME

The term “international crime” had evolved over a period of time, initially referring to crimes by states. Crimes by states are now referred to as “serious breaches of obligations owed to the international community as a whole” (Amnesty International, 2001: Introduction: 2). Crime intelligence focuses on crimes

committed by persons or groups, whilst civilian intelligence also focuses on breaches of international law by states. A distinction is made between those crimes that reached the status of becoming part of customary international law, as *ius cogens* (“the compelling law”), and crimes over which universal jurisdiction needs to be established in terms of obligations stemming from conventions. In respect of crimes reaching the status of *ius cogens* all states are under an obligation to establish and exercise universal jurisdiction (Bassiouni, 1996: 65). Under universal jurisdiction is understood the ability to investigate or prosecute crimes committed outside the state’s territory which are not linked to that state by the nationality of the suspect, or of the victim or by harm to the state’s own national interest (Amnesty International, 2001: Introduction: 1). The term international crime is popularly used, “sometimes loosely”, by scholars, governments and courts. (Amnesty International, 2001: Introduction: 2). There has been skepticism about the term ‘international criminal law’ or a discipline by that name. The counter-argument is that in recent years so many ‘instruments’ (dealing with the various aspects of international criminal law) “have been drafted that it has become very difficult to find one’s way in the labyrinth of international criminal law treaties” (Van den Wyngaert, 1996: ix).

Following the terrorist events of 11 September 2001, in the US, “additional status” and impetus were given to the existing counter-terrorism instruments in terms of binding Chapter 7 of the United Nations Charter resolutions taken by the UN Security Council, such as Resolution 1373/2001, of 28 September 2001. This Resolution calls on states to become parties to the respective conventions and protocols. Some of these Conventions, such as the *International Convention for the Suppression of Terrorist Bombings, 1997*, require at least an extended or extraterritorial jurisdiction. This extraterritorial jurisdiction is not really universal in the sense that it is still linked to offences committed in the territory of the state, vessels flying the flag of the state, aircraft operated by the government of the state, committed by a national or stateless person who has his or her habitual residence in the territory of that state, or if the victim is a national of the state, the

offence was committed against a state or government facility of the state, or to compel that state to do or not to do something. (UN, 2001(a): 103, 104, Article 6) Extraterritorial jurisdiction in respect of the predicate offences mentioned in the *UN Convention against Transnational Organized Crime* is also limited.

In this study the term 'international crime' is used as a collective for those crimes which need to be established in national laws of states in terms of obligations under international law. For purposes of this study it is irrelevant whether those obligations emanate from *ius cogens* or instruments such as international conventions or protocols. The jurisdictional issue, namely whether a particular international crime had been enacted in the national law of a particular country is, however, of importance, as it impacts on cooperation and providing safe havens for criminals in countries which have not enacted the legislative framework required by international law.

In respect of some international crimes, there is truly universal jurisdiction, in the sense that those crimes may be prosecuted in national courts, or in international courts or tribunals, such as the International Criminal Court (ICC), established by the *Rome Statute of the International Criminal Court*. Crimes which may be prosecuted in the ICC are war crimes, crimes against humanity, and genocide.

Although international instruments have been adopted in respect of international crimes, defining those crimes and requiring the enactment of those crimes in the national laws of States Parties to those conventions, by institutions such as the UN, not all Member States of the UN are parties to those conventions. In many instances even states who are parties to such conventions have not yet enacted the required offences or provided through legislation for the required jurisdiction.

International crimes include war crimes, genocide and crimes against humanity, transnational organised crime, terrorist crimes, mercenary crimes, piracy, corruption, crimes relating to the proliferation of WMD and environmental crimes.

This study is focused on crimes which relate to or may impact on the security of states, and therefore include all the abovementioned crimes, with the exception of environmental crimes.

2.1. War crimes, genocide and crimes against humanity

This category of crimes is clearly defined in international law, with the adoption of the *Rome Statute of the International Criminal Court* on 17 July 1998 (UN, 1999-2003). The *Statute* establishes the ICC, permanently seated in The Hague, but which may sit elsewhere, where provided for in national legislation. The States Parties to the *Rome Statute of the International Criminal Court* are also obliged to criminalise in their national laws the crimes in the *Rome Statute of the International Criminal Court* and to establish jurisdiction in their own courts in respect of the crimes provided for. States Parties must also adopt measures in their national law to ensure cooperation with the ICC in respect of investigation and prosecution, the tracing, handing over and transit of suspects who have allegedly committed crimes under the *Rome Statute*.

In terms of the *Rome Statute* the jurisdiction of the ICC shall be limited to “the most serious crimes of concern to the international community as a whole” namely the crime of genocide, crimes against humanity, war crimes, and the crime of aggression (UN, 1999 -2003: Article 5).

In respect of the crime of aggression, there is not yet an agreed upon definition and the *Rome Statute* provides that the ICC shall exercise jurisdiction over the crime once a provision is adopted defining the crime (UN, 1999-2003: Article 5(2)). A definition of such crime has stirred considerable debate under the States Parties to the *Rome Statute*. The development of such definition is work in progress by a special working group established by the Assembly of the States Parties in 2002. The main issues focused on by the special working group are under which circumstances the ICC may exercise jurisdiction over such crime

and whether there should be a requirement that an outside body such as the UN Security Council must make a determination of a state act of aggression before the ICC may exercise jurisdiction over the crime. The special working group focused on three elements of the crime, namely the leadership requirement, the individual's conduct, and the state act of aggression (Coalition for the International Criminal Court, 2007:1). In view of the fact that the international law is still in the process of developing aggression as an international crime, no specific attention will be given to aggression as an international crime in this study, although intelligence on aggression by states is of importance to civilian and military intelligence.

Crimes such as terrorism and drug trafficking are not included in the jurisdiction of the ICC. It is foreseen that such a step might in future follow if the States Parties to the *Rome Statute* could reach an agreement on that (UN, 2002).

The *Rome Statute* defines genocide as any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (UN, 1999-2003: Article 6)

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

The *Rome Statute* defines crimes against humanity as any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (UN, 1999-2003: Article 7)

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

Various terms used in the definition, namely ‘attacks directed against any civilian population’, ‘extermination’, ‘enslavement’, ‘deportation’, ‘torture’, ‘forced pregnancy’, ‘persecution’, ‘the crime of apartheid’ and ‘forced disappearance of persons’ are defined in the *Rome Statute* (UN, 1999-2003: Article 7(2)).

The Rome Statute defines 'war crimes' particularly when committed as a plan or policy or part of a large-scale commission of such crimes, elaborately with reference to: (UN, 1999-2003: Article 8)

- (a) Grave breaches of the Geneva Conventions of 12 August 1949;
- (b) Other serious violations of the laws and customs applicable in international armed conflict within the established framework of international law;
- (c) In the case of an armed conflict not of an international character, serious violations of Article 3 common to the four Geneva Conventions of 12 August 1949, namely;
- (d) Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature;
- (e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts....
- (f) Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

The definition of war crimes is much more elaborate, and the above is an extract, as it is not deemed necessary to include the full definition in the text (UN, 1999-2003: Article 8).

Although there are already 105 States Parties to the *Rome Statute*, some very important countries are not States Parties, such the Peoples' Republic of China, the US, and the Russian Federation.

The next international crime of particular relevance for the security of any state and which is described hereunder, is international terrorism.

2.2. International terrorism

International terrorism is often claimed to be one of the most serious challenges facing the international community (Orlova & Moore, 2005: 1).

There is not yet a comprehensive international instrument dealing with terrorism. At present there are 30 instruments, 16 universal (13 instruments and 3 recent amendments) and 14 regional, pertaining to the subject of international terrorism. The topics of the 13 instruments referred to, include offences in relation to aircraft, civil aviation, airports, crimes against protected persons, including diplomatic personnel, hostage taking, crimes in respect of the protection of nuclear material and acts of nuclear terrorism, crimes against the safety of maritime navigation, crimes committed on fixed platforms, and crimes involving plastic explosives, terrorist bombings, and terrorist financing. These instruments can be viewed as *ad hoc* interventions by the international community against various forms of terrorism used by the perpetrators through the years and in response to particular instances or series of events of terrorism, such as hijacking of aircraft or ships, hostage taking or bombings (UN, 2006: 19).

The 13 universal instruments on terrorism are as follows: (UN, 2007(a))



- 1963 *Convention on Offences and Certain other Acts Committed on Board Aircraft*;
- 1970 *Convention for the Suppression of Unlawful Seizure of Aircraft*;
- 1971 *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*;
- 1973 *Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons*;
- 1979 *International Convention against the Taking of Hostages*;
- 1980 *Convention on the Physical Protection of Nuclear Material*;
- 1988 *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Extends and supplements the Montreal Convention on Air Safety (Airport Protocol))*;
- 1988 *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (Maritime Convention) and the Protocol thereto- Protocol to the Convention for the Suppression of Unlawful Actions against the Safety of Maritime Navigation*;
- 1988 *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf and 2005 Protocol thereto*;
- 1991 *Convention on the Marking of Plastic Explosives for the Purpose of Detection (Plastic Explosives Convention)*;
- 1997 *International Convention for the Suppression of Terrorist Bombings (Terrorist Bombing Convention)*;
- 1999 *International Convention for the Suppression of the Financing of Terrorism (Terrorism Financing Convention)*;
- 2005 *International Convention for the Suppression of Acts of Nuclear Terrorism (Nuclear Terrorism Convention)*.

The General Assembly of the UN established an *Ad Hoc* Committee tasked to draft a *Comprehensive Convention on International Terrorism*. The *Ad Hoc* Committee progressed to the point where a consolidated draft comprehensive convention had been produced (UN, 2005(a): 7). The draft *Comprehensive Convention on International Terrorism* could not yet be finalised, due to a number of political issues that are highly contentious, and on which consensus could not yet be reached. The first issue is that of motive, and whether it should be an element of a definition of terrorism. Motive relates to the inducement, cause or reason why a thing is done (Orlova & Moore, 2005: 276). This further relates in particular to the question whether peoples' struggles against foreign occupation, aggression, colonialism and hegemony aimed at liberation and self-determination in accordance with the principles of international law shall be excluded in the convention as terrorist crimes. This proposed exclusion is based on the recognition of the legitimacy of such struggles by various UN General Assembly resolutions (Orlova & Moore, 2005: 277). Various recent UN resolutions, however, reaffirmed that no terrorist act can be justified in any circumstances (UN, 2008(b): 2).

The proponents of the exclusion of such struggles from the scope of the draft *Comprehensive Convention on International Terrorism* argued that the requirement that the struggle must be "in accordance with the principles of international law", provided a safeguard against abuse (Orlova & Moore, 2005: 277). One of the counter-arguments is that the International Humanitarian Law (IHL) applies to all combatants and that blurring the distinction between combatants and civilians is unacceptable (Orlova & Moore, 2005: 278).

Understandably this debate is a lively one also in respect of legislation on national level. The definition of 'terrorist act' in the Canadian legislation (Clause 83.01(1)(b)(i)(A)) had as required element a political, religious or ideological motive. The Superior Court of Justice found that there is no compelling benefit or justification for such motive requirement. Jurisdictions such as Australia, New

Zealand and South Africa have similar 'motive' requirements in their counter-terrorism statutes (Canada. 2006: paragraphs 69, 80).

The second issue in dispute is that of 'state terrorism', which effectively stalled the negotiations on the draft *Comprehensive Convention on International Terrorism*. The dispute is basically between the Western nations and the Organisation of the Islamic Conference (OIC). The Western nations argued that there is no need to include crimes committed by a state's military forces as they fall under other corpora of international law such as the IHL or human rights law. The OIC's proposal is to provide a back-up to cover such crimes. At the moment the result of the abovementioned disputes is that the negotiations have stalled (Orlova & Moore. 2005: 280, 281). There are new proposals on the table in a bid to resolve this impasse, but it is not clear whether consensus in this regard might be reached soon (UN, 2007(b): 7, 8).

The following 'offence' is provided for in the draft *Comprehensive Convention on International Terrorism*: (UN, 2005(a): 9, Article 2)

Any person commits an offence within the meaning of the present Convention if that person, by any means, unlawfully and intentionally causes:

- (a) Death or serious bodily injury to any person; or
- (b) Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility, or to the environment; or
- (c) Damage to property, places, facilities or systems referred to in paragraph 1(b) of the present article resulting in or likely to result in major economic loss.

This definition of the offence in international law is, however, not legally binding, in view of the fact that the Convention had not been concluded or adopted yet. It

is regarded as an 'operational' definition, but criticised as being too wide in scope (Orlova & Moore, 2005: 272). A person who, for example, merely expresses sympathy for the aims of a terrorist group, could commit an offence under the proposed definition (Orlova & Moore, 2005: 273).

The offences which states are required to enact in national legislation in terms of the obligations in the 13 international instruments adopted by the international community in response to particular manifestations of terrorism, are therefore the most definitive crimes which are 'universally' accepted. Not all states are yet States Parties to these instruments, but a huge majority of states are States Parties thereto.

A general definition describing the offence of terrorism which is favored is the definition of 'terrorist activity' in the Canadian Criminal Code, save for the clause relating to motive being deleted. This definition provides that terrorist activity includes an act or omission that is committed in whole or in part with the intention of intimidating the public, or a segment of the public, with regard to its security, including its economic security, or compelling a person, government or a domestic or an international organisation to do or refrain from doing any act, whether the public or the person, government or organisation is in or outside (Canada or for that matter any country in respect of which the definition is applied) (section 83.01(1)(ii)) and:

that intentionally-

- (A) Causes death or serious bodily harm to a person by the use of violence,
- (B) Endangers a person's life;
- (C) Causes a serious risk to the health, or safety of the public or any segment of the public;
- (D) Causes substantial property damage, whether to public or private property, if causing such damage is likely to result in the conduct or harm referred to in

- any of the clauses (A) to (C); or
- (E) Causes serious interference with or serious disruption of an essential service, facility or system, whether public or private, other than as a result of advocacy, protest, dissent or stoppage of work that is not intended to result in the harm referred to in clauses (A) to (C).

A conspiracy, attempt or threat to commit an act or omission described above is also criminalised. Acts or omissions committed during an armed struggle in accordance with customary international law or conventional international law, or the exercise of official duties by military forces of a state are, however, excluded (Canada, 2006(b): 6, 7).

Transnational organised crime, like terrorism, enjoys attention at the highest international level as an international crime which needs to be addressed by means of international cooperation.

2.3. Transnational organised crime

In order to analyse the concept of transnational organised crime, the phenomenon organised crime needs to be described. There is no universally accepted definition of organised crime. (Symeonido-Kastanidou, 2007: 83).

Even the *UN Convention against Transnational Organized Crime* (UN: 2004(a)) does not contain a definition of organised crime as such. The *UN Convention against Transnational Organized Crime* defines 'organized criminal group' as a structured group of three or more persons, existing over a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with the *UN Convention against Transnational Organized Crime* in order to obtain directly or indirectly, a financial

or other material benefit. 'Structured group' is defined as a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure. It defines a serious offence as an offence punishable by a maximum deprivation of liberty of at least four years. Within the context of the *UN Convention against Transnational Organized Crime* organised crime boils down to the commission of a serious offence involving an organised criminal group.

There are literally dozens of definitions on organised crime. The following definition of organised crime, which is also in consonance with the *UN Convention against Transnational Organized Crime*, is supported:

Organised crime is the planned commission of criminal offences determined by the pursuit of profit and power which, individually or as a whole, are of considerable importance and involve more than two persons, each with his/her own assigned tasks, who collaborate for a prolonged or indefinite period of time-

- (a) by using commercial or business-like structures,
- (b) by using force or other means of intimidation; or
- (c) by exerting influence on politics, the media, public administration, judicial authorities or the business sector.

This definition originates from the German *Bündeskriminalamt* (BKA) (Von Lampe, 2005).

The *UN Convention against Transnational Organized Crime* is clear on what 'transnational' means. It states that an offence is transnational in nature if it is committed in more than one state; if it is committed in one state, but a substantial part of its preparation, planning, direction, or control takes place in another state; if it is committed in one state, but involves an organised criminal group that

engages in criminal activities in more than one state; or if it is committed in one state, but has substantial effects in another state (UN, 2004(a): Article 3(2)).

The following characteristics of transnational organised crime are relevant to motivate its inclusion in this study, namely transnational criminal organisations operate as enterprises that merge corporate and criminal cultures and have developed into sophisticated transnational business generating huge profits. Their resources rival those of multinational corporations and their disregard for holidays, working hours, borders and legal systems gives them an edge over national law enforcement efforts. Such organisations threaten national security and economic growth, jeopardise the political and economic stability of states, threaten domestic and global economics, and alter the fabric of society (Gerspacher, 2002: 1, 2).

Transnational organised crime, as defined above, encompasses a wide variety of cross-border crimes, such as human trafficking, money-laundering, trafficking in drugs, firearms, explosives, illegal conventional arms trade, trafficking in migrants, illegal trade in protected species of fauna and flora. In respect of each of these categories, there are legal obligations in international instruments in respect of cooperation among states, and enactment of appropriate crimes in their national legislation

Another category of international crimes of direct concern from a security point of view is 'mercenary crimes', which includes acts such as *coup d'états*.

2.4. Mercenary crimes

There is only one global instrument dedicated to addressing mercenary and mercenary-related activities, and one regional convention within the African region, placing obligations on States Parties to act against mercenary activities.

2.4.1. *International Convention against the Recruitment, Use, Financing, and Training of Mercenaries*

This global Convention was adopted on 4 December 1989, but has been ratified or acceded to by only 30 countries. It provides that States Parties shall take steps to legislate against mercenary activities, including recruitment and financing of mercenary activities; cooperation to combat mercenary activities; arrest of suspected mercenaries; and extradition where applicable. The Convention has numerous gaps and ambiguities and is silent on the issue of private military companies. Despite the fact that the UN is continuing to foster the ratification of, or accession to the Convention, the UN is seeking support for a process towards an additional protocol to the Convention to address newer forms of mercenarism such as the activities of private military and security companies (UN, 2008(e): 5).

The *International Convention against the Recruitment, Use, Financing, and Training of Mercenaries* defines a ‘mercenary’ as any person who is specially recruited locally or abroad in order to fight in an armed conflict, is motivated to take part in the hostilities by the desire for private gain and, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar rank and functions in the armed forces of that party (International Committee of the Red Cross, 1989: Article 1).

In situations other than in an armed conflict, a mercenary is defined as any person motivated by the desire for significant private gain and prompted by the promise or payment of material compensation; who is recruited locally or abroad, for the purpose of participating in a concerted act of violence aimed at overthrowing a government or otherwise undermining the constitutional order of a state; or undermining the territorial integrity of a state (International Committee of the Red Cross, 1989: Article 1).

In respect of both scenario's it is further required, to fall within the ambit of the definition of a mercenary, that a person is neither a national nor a resident of the state against which such an act is directed; has not been sent by a state on official duty; and is not a member of the armed forces of the state on whose territory the act is undertaken (International Committee of the Red Cross, 1989: Article 1).

It is clear that the above Convention, through the requirements that a person sent 'on official duty' or, being a member of the armed forces, are effectively excluded from being a 'mercenary' creates a loophole for governments to employ mercenaries through private military and private security companies, who are contracted by the armed forces, and performs duty alongside members of the armed forces. An example in case is the rise of the private military and security companies acting in support of or sometimes as an integral part of government forces. This development is described as the privatisation or corporatisation of war, with the deployment of thousands of private military or private security personnel in Iraq in situations where they actively participated in hostilities, under immunities granted to them (Scahil, 2007: Chapter 19).

2.4.2 Organization of African Unity (OAU) Convention for the Elimination of Mercenarism in Africa

This Convention was adopted at Libreville on 3 July 1977 (AU, 1977). It came into force on 22 April 1985, following a slow rate of ratification of, or accession to, the Convention. To date only 24 Member States of the African Union have ratified the Convention. The contents of the Convention is very similar to that of the *International Convention against the Recruitment, Use, Financing and Training of Mercenaries*. Without detailing the contents of the OAU Convention, it should be mentioned that, following the Equatorial Guinea *coup* attempt, the African Union's Peace and Security Council mandated and requested: "the necessary steps to find a global solution to the phenomenon of mercenary activities on the Continent

through the harmonization of existing legislation and measures within the context of a review of the *OAU Convention on the Elimination of Mercenarism in Africa*” (AU, 2004(b)).

Both the *International Convention against the Recruitment, Use, Financing and Training of Mercenaries* and the *OAU Convention on the Elimination of Mercenarism in Africa* have therefore been identified for review and improvement in order to address emerging developments such as the “privatisation of war” and the widespread use by countries of private military and private security companies in conflicts, acting as combatants for private gain and are actually extensions or proxy forces of the armed forces of those countries. Some movement has already taken place in this regard, with the adoption by 17 states on 17 September 2008 of the *Montreux Document on Pertinent International Humanitarian Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict* (UN, 2008(d)).

An international crime that has been the first such crime to be recognised as requiring international cooperation to combat, is piracy, which has emerged in a modern form as important to address as ever.

2.5. Piracy

This is one of the few international crimes of which a generally accepted definition exists. The *United Nations Convention on the Law of the Sea* (UNCLOS), provides in Article 101, that piracy consists of any of the following acts: (UN, 1982: Article 101):

- (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
 - (i) on the high seas, against another ship or aircraft, or

- against persons or property on board such ship or aircraft;
- (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
- (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
- (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

Although this is one of the oldest international crimes, it is as relevant as ever, as there is a convergence of piracy and terrorism. There is also an overlap between the crime of piracy and the acts provided for in Article 3 of the *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, which is regarded as one of the international counter-terrorism instruments. Piracy, can, in terms of UNCLOS only be committed on the high seas, whereas the *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation* is not restricted to the high seas.

Linked with high-technology, and one of the latest threats relating to terrorism, is the issue of WMD. This issue received the attention of commissions of inquiry, both in the UK and US investigating intelligence failures related to a perceived threat of WMD posed by Iraq (UK., 2004) (US, 2005(c)) (US, 2008(c)).

2.6. Crimes relating to weapons of mass destruction

Nuclear, biological and chemical weapons are regarded as WMD: “Designed to terrify as well as destroy, they have the potential to kill thousands and thousands of people in a single attack, and their effects may persist in the environment and in our bodies, in some cases indefinitely” (Sweden, 2006: 22).

A number of international instruments deal with WMD, by placing obligations on states to prevent the proliferation of WMD, including the development, production and stockpiling thereof. The main instruments in this regard are the following: (Sweden, 2006: 34)

- *Treaty on the Non-Proliferation of Nuclear Weapons (NPT)* - in force since 1970, joined by 189 Parties (UN, 2000). The NPT represents the only binding commitment in a multilateral treaty to the goal of disarmament by the nuclear-weapon states. There is, however, no universal comprehensive prohibition on the use of nuclear weapons in either customary or international humanitarian law. The principal judicial organ of the UN, namely the International Court of Justice (ICJ), on 8 July 1996, gave an advisory opinion about the 'Legality of the threat of the use of nuclear weapons'. The 14 judges of the ICJ concluded unanimously that the principles and rules of international humanitarian law applied to the use of nuclear weapons. They added that the use of nuclear weapons would generally be contrary to the principles of international humanitarian law (ICRC, 2003), (ICJ, 2006: 266, 267).

The opinion, however, stated an exception that in an extreme circumstance of self-defence in which the state's very survival may be at stake, the use of nuclear weapons may be permissible. This exception must still be viewed against the general principles of the IHL relating to proportionality; necessity; the existence of an armed attack; the lack of any steps by the UN Security Council; use of weapons indiscriminately of civilian and military targets; causing wide-spread and permanent damage to the environment; unnecessary and aggravating suffering of combatants; and affecting other states not involved in the conflict.

- *Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (BTWC)* - in force since 1975, with 155 States Parties which have ratified or acceded to the Convention. It bans the development,

- production, stockpiling, acquiring, retention and use of microbial or other biological agents or toxins. It also bans weapons or equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict. The Convention requires States Parties to take measures to give effect to the Convention (OPBW, 2005: Article (IV)).
- *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (CWC)* - in force since 1997, with 177 States Parties. The CWC bans the development, production, stockpiling, transfer and use of chemical weapons (OPCW, 2005).

According to customary international humanitarian law that is binding on all states and on all parties to an armed conflict, the use of biological and chemical weapons is prohibited (ICRC, 2003). Furthermore, employing poison or poisoned weapons or poisonous or other gasses or all analogous liquids, materials and devices are regarded as 'war crimes' (UN, 1999-2003: Article 8(2)(b)(vii) and (viii)).

The combating of the proliferation of WMD is closely linked to the missile delivery systems that could be used to deliver WMD. Without venturing into the definition of WMD, the Committee for the Review of Weapons of Mass Destruction regarded missiles with a range greater than 150 kilometers and related major parts, and repair and production facilities as WMD (UK, 2004: 4). The Committee of Privy Counsellors chaired by Lord Butler were appointed by the UK prime minister to review the accuracy of intelligence on Iraqi WMD up to March 2003 and in particular discrepancies between intelligence available before the Iraqi war and the findings survey made after the war (UK, 2004).

The above instruments were, however, drafted with the primary objective of preventing the proliferation of WMD among states, and save for possibly the CWC, they are not suitable to deal with non-state actors. After the 11 September

2001 events, as well as the revelation in 2003 of the existence of a private network of suppliers of sensitive nuclear technologies, led by the Pakistani scientist Abdul Qadeer Khan, it was realised that the focus should be widened to include non-state actors as recipients, as well as suppliers of sensitive goods and technologies (Frantz & Collins, 2007: xiii, xiv). The UN Security Council opted to utilise Chapter VII of the UN Charter and adopted Resolution 1540 of 2004. Such a resolution is binding upon all Member States of the UN. The adoption of the Resolution is viewed as a controversial step in respect of a general threat as opposed to a specific threat in a specific situation (Ahlström, 2007: 460, 461). Operative paragraph 1 of the Resolution provides that Member States shall not provide support to non-state actors to develop, acquire, manufacture, possess, transport, transfer, or use nuclear, bacteriological or chemical (NBC) weapons and their means of delivery. In terms of operative paragraph 2 of the Resolution, Member States of the UN, are obliged to adopt and enforce effective domestic law that would prohibit the activities mentioned above.

In terms of operative paragraph 3 of the Resolution, Member States are also required to establish and maintain effective accounting systems, physical protection measures, border controls, law enforcement measures, and national export controls that would also cover transshipment. These elaborate measures could seem unrealistic and affects the implementation of the Resolution, as is clear from the poor response from Member States on reporting progress with the implementation thereof (Ahlström, 2007: 466-469). Only one third of UN Member States have never reported on the implementation of the Resolution (Ahlström, 2007: 437). In practice, the most common international crime where intelligence cooperation would be required relating to WMD would be in respect of contravention of the control measures which Member States need to adopt in respect of WMD.

Most UN Member States have export control legislation in place and have adopted national lists of controlled items (including technologies), such lists are

not uniform and some Member States control goods and technologies not listed in any control list (catch-all controls) (Ahlström, 2007: 471). Only a limited number of Member States control transport, transfer of technologies, end-user, transfer, transshipment or re-export of dual-use items.

It is clear from the above that, in respect of numerous international crimes, there is a lack of universally accepted definitions, despite the existence of numerous international instruments. War crimes, genocide and crimes against humanity are well defined, in international law, with reference to the *Rome Statute of the International Criminal Court*. A number of the most important countries are, however, not party to the *Rome Statute*. In respect of terrorism, the drafting of a *Draft Comprehensive Convention on Terrorism* has virtually stalled. Specific forms of terrorism, such as bombings, hijacking of aircraft and ships or interference with the safe navigation thereof, hostage-taking, attacks on diplomatic personnel, and even acts of nuclear terrorism are quite well defined in what can be referred to as the main counter-terrorism instruments. Defining terrorism as such is, however, a political dilemma, which affects the adoption of national legislation in order to enforce the relevant international instruments.

Transnational organised crime is not defined, in international law, but by using existing definitions of 'organized criminal group' and 'transnational' in the *United Nations Convention against Transnational Organized Crime*, it is possible to draft effective national legislation to combat transnational organised crime. Especially in respect of mercenary offences, international law needs to be reviewed and updated to effectively address the extensive use of private military and private security companies in armed conflicts in a combat role, often participating as combatants during armed hostilities. The crime of piracy, as one of the oldest international crimes is well defined in international law. Crimes related to WMD are required in terms of UN Security Council Resolution 1540 to be adopted by UN Member States in their national legislation, but the implementation thereof is

difficult and controversial in view of the manner in which the powers of the UN Security Council are used to 'legislate' in international law.

It is also necessary to describe what is understood within the context of this study under the term 'combating of international crime', as 'intelligence and intelligence cooperation'- is the focus of this study and also key elements to the successful combating of international crime.

3. COMBATING OF INTERNATIONAL CRIME

The following responses are possible in combating international crimes:

— **Law enforcement response.** Effective law enforcement requires an appropriate legal response to international obligations in providing for the required crimes, legal powers such as criminal and civil asset forfeiture, special investigative tools or techniques, as well as the freezing of assets, deportation, extradition and international assistance in criminal matters. The usual response to crime in law enforcement context is a reactive response, namely the investigation of crimes already committed and the prosecution, arrest, trial and punishment of the offenders. The preferable option, however, would be to prevent those crimes from being committed in the first place, something which is possible by means of timely intelligence in combination with appropriate preventive action (Wilkinson, 2006: 77-79). The bulk of the responsibility for combating international crime rests with police services, but law enforcement includes the totality of law enforcement, including local police agencies, justice, immigration, customs and revenue services. Intelligence support and cooperation is important in respect of both the investigation and prevention of crime. In most countries formal processes in respect of mutual legal assistance are required to use measures such as surveillance, including electronic surveillance of communications, or other special investigative techniques, such as undercover operations in the investigation of crime, whether already committed or in the

incipient phase. Many special investigative tools/techniques, such as controlled deliveries, whether performed nationally or across international borders require continuous physical and electronic surveillance in order to be successful.

— **Military response.** The international crimes relating to the security of countries, as described in this chapter are all of such a nature, that a military option might be the only possible response in the circumstances (US, 2001: 16). The terms ‘global war on terror’ and ‘war on drugs’, are often used, in describing responses to terrorism and drug trafficking. Especially in respect of war crimes and crimes such as genocide and crimes against humanity, military intervention in the form of peacekeeping and peace enforcement operations mandated by the UN Security Council are required (US, 2001: 3). Military responses to international crimes may range from an all-out military response, such as Russia’s aerial bombing on Grozny to crush the separatist Chechen movement at a huge cost to civilian life or the use of the military in supporting civil power, such as in Northern Ireland (Wilkinson, 2006: 70-72). The US military response to the Taliban terrorist threat in Afghanistan is another example of a military response to crime (US, 2001: 30). Military assistance, is often indispensable, such as for interdicting aircraft or ships involved in piracy or arms or drug trafficking. However, the use of military force or covert actions to interdict drug production and shipments within the territorial borders of other countries cannot be advocated as it can have significant drawbacks and damaging effects on other important interests (US, 2001: 9).

— **Intelligence response.** High quality intelligence is required to prevent crimes such as terrorism and to bring criminals to justice. Although police services themselves normally have intelligence capabilities, they share the tasks of gathering, collating and analysing intelligence with domestic and foreign intelligence services and technical agencies responsible for SIGINT and other sources (Wilkinson, 2006: 73). What is referred to as ‘covert action’ in US literature and in NATO countries, is called ‘dry affairs’, ‘wet affairs’, ‘dirty tricks’ ‘black operations’ or ‘covert operations’ in some countries- including even assassination (Jansen van Rensburg, 2005: 22). Covert action may further

range from propaganda to political interventions in the political process of the target nation, the use of economic measures against a state, the instigation of a *coup* in another country, support of paramilitary actions, secret participation in combat, and especially within the context of terrorism, the much criticised use of extralegal rendition (Lowenthal, 2006: 162-165). Covert action by nature is highly controversial and different opinions exist as to whether it indeed could be regarded as part of intelligence (Shulsky & Schmitt, 2002: 96). The use of covert action to combat crime remains a controversial issue.

— **Combined response.** In some instances combined responses of law enforcement, intelligence and military have been used, not only to combat drug trafficking, but also war crimes and terrorism. In respect of terrorism ‘rendition’ (in effect abduction of suspects against the laws of a country, and against international law) has been performed by law enforcement and intelligence agencies in various countries ((Wilkinson, 2006: 164). The Mossad, Israel’s Secret Intelligence Service, abducted a Second World War Nazi war criminal, Adolf Eichmann from Argentina to stand trial in Israel (Eisenberg, Dan & Landau, 1978: 25-40). In the ‘war on drugs’ the head of state of Panama, General Manuel Noriega was captured by the US military and Drug Enforcement Agency (DEA) in Panama to stand trial in Miami. This happened during an invasion of Panama and Noriega evading the US forces in his country for 22 days. He was convicted of drug trafficking, money-laundering and racketeering and sentenced to 40 years imprisonment (US, 2001: 25, 26). Such responses are only possible in countries where the courts allow jurisdiction to be established in this manner, such as the US (the Ker-Frisbie-doctrine) (US, 2001: 27).

The intelligence response is one of the most important responses to international crime, and consequently the following definition of key importance for this study, is ‘intelligence’, which term is analysed hereunder.

4. INTELLIGENCE: A CONCEPTUAL FRAMEWORK

The term 'intelligence' will firstly be analysed and described within different contexts, and then the expressions 'combating of international crime' and 'intelligence cooperation' will be analysed.

4.1. Meaning

'Intelligence' in the broadest sense is described as a 'process', as 'a product' and as 'organisation' (Johnson & Wirtz, 2004: 1). 'Intelligence' could also refer to certain kinds of information or activities (Shulsky & Schmitt, 2002: xi, 2).

The different meanings depend on the context within which it is used. One of the uses of 'intelligence' is to refer to the IC, namely the national agencies responsible for security, or to units within the IC, which perform intelligence functions (Cleary, 2006: 7). "Intelligence' in government is based on the particular set of organizations with that name: The 'intelligence services' or (sometimes) 'intelligence communities'. Intelligence activity is what they do, and intelligence knowledge what they produce." (Herman, 1999: 2). In the quest for an appropriate definition of intelligence, it is clear that the dimension in which the term is used, influences the description thereof. For example, intelligence has been defined within the CIA, (a US civilian foreign intelligence agency) as follows: "Intelligence is secret, state activity to understand or influence foreign entities." (Warner, 2003: 7).

4.2. Dimensions of intelligence

There are three different dimensions of intelligence, namely foreign, military and domestic intelligence (US, 2006(b): 5).

Foreign intelligence means that which is collected covertly and overseas, and is provided to policymakers to inform national security decisions and actions (US, 2006(b): 4).

Military intelligence means that which is collected, analysed, disseminated, and possibly acted upon by defence entities (including the intelligence elements) and the combat support agencies and is related to another foreign power's capabilities to attack a state's national interests militarily (US, 2006(b): 5).

Domestic intelligence relates to threats against a government's ability to govern, or against its existence, and which emanates from individuals or groups within the borders of the country. The aims of such groups or individuals could be to overthrow the government by illegal means, the use of violence to change government policies, in other words, for political purposes, or the exclusion from participation in politics or government members of a particular ethnic, racial, or religious group. The perception of such threat may vary from country to country depending on the system of government and level of democracy in the country involved. Domestic intelligence may include foreign links or elements, such as individuals or groups acting as, on behalf of, or at the direction of a hostile foreign power or share and pursue common objectives of a hostile foreign power, with or without any ties to such hostile foreign power (Shulsky & Schmitt, 2002: 4). The definition of 'domestic intelligence' in the South African *National Strategic Intelligence Act 39 of 1994*, for example, includes "intelligence on any internal activity, factor or development which is detrimental to the national stability of the Republic, as well as threats or potential threats to the constitutional order of the Republic and the safety and well-being of its people."

The term civilian intelligence refers to that part of the IC focused on providing accurate, verifiable intelligence to civilian leaders so they can make appropriate political decisions (Bradberry, 2006: 1). Foreign and domestic civilian intelligence

exist to uncover threats, and estimate and warn about the likelihood of their materialising and analysing their effect (Cave, 2002: 10).

A further distinction can be made between positive and crime intelligence.

'Positive intelligence' is used as a term inclusive of all intelligence, except counter-intelligence and 'security (crime) intelligence'. In this study 'positive intelligence' will be used to describe all intelligence exclusive of counter-intelligence and law enforcement intelligence. The product derived from positive intelligence "may be considered as domestic or foreign, in terms of purpose, scope or substance" (Cave, 2002: 13).

'Security intelligence' refers to specialised operational intelligence concerning criminal and illegal activities on both national and international scale such as smuggling, counterfeiting and murder (Kent, 1966, 3, 210). It is further described as the intelligence behind the police function and the knowledge and the activity which defensive police forces must have in order to take specific action against individual criminals (Kent, 1966: 209 -210; US, 2006(b): 7). From a law enforcement perspective, intelligence is defined as information that has been subjected to a defined evaluation and risk assessment process in order to assist with police decision-making (ACPO, 2005: 13).

Some information is defined within a law enforcement context as pieces of raw, unanalysed data that identifies persons, evidence, events, or illustrates processes that indicate the incidence of a criminal event or witnesses or evidence of a criminal event: Information is collected as the currency that produces intelligence. Consequently 'law enforcement intelligence' is defined as the product of an analytic process that provides an integrated perspective to disparate information about crime, crime trends, crime and security threats and conditions associated with criminality (Carter, 2004: 9). Sometimes 'law enforcement intelligence' is referred to as 'criminal intelligence' or 'crime intelligence' (US, 2003(a)).

This definition of 'security intelligence' coincides with the definition of 'law enforcement', 'criminal intelligence' or 'crime intelligence', referred to hereunder. 'Criminal intelligence' is gathered overtly or clandestinely and domestically as evidence to support a prosecution of a criminal act or to learn more of a criminal enterprise (US, 2006(b): 4). There is, however, much communality in the respective definitions, whether it is used in the traditional intelligence environment or within the law enforcement environment. Of particular importance is the place and meaning of information in relation to intelligence. Information should not be equated to intelligence (Warner, 2003: 3). The intelligence activity in respect of police functions is often described as 'crime intelligence' (Cave, 2002: 15). The traditional police functions are the prevention of crime, crime detection and investigation (including collection of information and evidence to ensure a successful prosecution in a court of law), and policing actions in respect of public safety and public order. In this study the term 'law enforcement intelligence', 'criminal intelligence' and 'crime intelligence' are used interchangeably as different terminology is used in the respective countries for the same concept.

Information which could be collected for 'crime' intelligence analysis is informant information, surveillance, travel records, CCTV videotapes, banking transactions, undercover information, pen-register/trap and trace) (communications-related information), documentary evidence, forensic evidence, communications intercepts (wiretaps) (Carter, 2004: 10). Just as information and intelligence should be distinguished from each other, there is also a difference between 'information sharing' and 'intelligence sharing'. Of importance is that intelligence is both 'a process' and 'an end-product', or both 'an activity' and 'a product of that activity' (Warner, 2003: 4). Within the law enforcement environment reference is made to 'source assets', which include victims and witnesses, communities and members of the public, crime-stoppers, prisoners,

forensic information, undercover operatives, surveillance products, and covert human intelligence sources (CHIS) (ACPO, 2005: 32).

4.3. Intelligence as a process

The intelligence cycle refers to the developing of raw information into intelligence products for use in decision-making and formulating policies or actions. The cycle is characterised by the following steps, namely planning and direction; collection of raw data; analysis; dissemination and evaluation. The focus here will primarily be on collection and analysis (US, 2003(a): 3).

4.3.1. Collection

In order to understand the intelligence process, it is necessary to explore the sources of intelligence, also referred to as 'collection disciplines' (Lowenthal, 2006: 89-104). The following are sources of intelligence:

4.3.1.1. Open source intelligence

The most available and easily obtainable source of intelligence is open source intelligence (OSINT). OSINT includes the traditional publicly available sources such as newspapers, books and magazines, as well as the huge expansion of online available sources (Clark, 2004: 66). Online sources, such as commercial databases which are available on subscription, also qualify as OSINT. Online sources are the most commonly used open sources. Most of the online sources are available from the World Wide Web: "The rapid expansion of global information networks provides analysts with large volumes of information that were previously unavailable" (Clark, 2004: 68) - to such an extent that the analyst encounters information overload. Many OSINT sources remain available only in hard copy, obtainable from libraries, commercial database, and from scientists and business people. Valuable sources include telephone books monographs,

journals, patents and technical literature. Classified 'in-house' literature which erroneously lands in libraries or otherwise in the public domain, are regarded as OSINT, but referred to as 'gray literature' (Clark, 2004: 69).

4.3.1.2. Human intelligence

Human intelligence (HUMINT) focuses on people. It includes police informers, recruited sometimes amongst criminals, prison inmates, through police interaction with the community, plea bargains, or sentence reduction, paid informers and neighbourhood watches (Settle, 1995: 28, 38, 68, 149, 153).

It can furthermore consist of liaison relationships between intelligence organisations with other intelligence organisations and law enforcement groups, émigrés and defectors, and clandestine sources such as classical spies, moles or agents. HUMINT is usually the best method in dealing with illicit networks (Clark, 2004: 70-76).

4.3.1.3. Signals intelligence

Signals intelligence (SIGINT) can be broken down into five components, namely communications intelligence (COMINT); electronics intelligence (ELINT); radar intelligence; (RADINT); laser intelligence (LASINT); and non-imaging infrared (Richelson, 1989: 167). COMINT is the interception, processing and reporting of an opponent's communications. Communications includes voice and data communications, facsimile, Internet messages, and any other deliberate transmission of information. COMINT is collected by aircraft, and satellites, overt ground-based sites, a limited number of seaborne collectors, and some covert and clandestine sites. The most common COMINT is surveillance of telephone communications, through 'normal' telephone tap. Some instruments can convey room conversations when the telephone is on its cradle. Telephone conversations can also be intercepted in bulk by COMINT equipment if the

equipment is properly positioned to collect micro-wave point-to-point transmissions from the company's trunk lines. Unencrypted cellular networks can also be intercepted, and remote acoustic monitoring techniques can also be used (Clark, 2004: 76, 79).

4.3.1.4. Technical Intelligence

In respect of 'technical intelligence' or 'specialised technical collection' the most important for law enforcement is biometrics, namely the use of a person's physical characteristics or personal traits for human recognition. Digitised fingerprints and voiceprints, iris and retinal scans, hand geometry and keystroke dynamics are becoming increasingly important both in the investigation of crime and functions such as controlling access to facilities and at border crossing points (Clark, 2004: 93) (Baker, 2007).

4.3.2. Processing/collation and analysis

Evaluating the information's validity and reliability, collation entails the sorting, combining and categorising and arranging data so that relationships can be determined. Analysis connects information in a logical and meaningful manner to produce an intelligence report that contains valid judgments based on analysed information. The process which separates information from intelligence is the process of analysis (Ryan, 2006: 16). A way to distinguish between data, information and intelligence, is the extent to which value has been added to the raw data collected through overt or clandestine means. "Information is collected as 'raw' until its sources have been evaluated, the information is combined or corroborated by other sources, and analytical and due diligence methodologies are applied to ascertain the information's value." (US, 2006(b): 2). There are different methodologies of analysis. Two of these are trends and patterns; and frequency. After the Madrid bombings, of 2004, which took place exactly 911 days after the 9/11 or 11 September 2001 terrorist attacks in the US, it was

suggested that to achieve successful analysis, there must be a determination of the probability of an event based on the risk of latent threat and target vulnerability. This is something which is well-known in analysis, but “experts tend to be quite inept at assigning even roughly correct probabilities to their predictions.” (Segell, 2005: 239, 230).

4.4. Intelligence as a product

It has been mentioned above that intelligence is both an activity and a product. The production of intelligence falls into one of five categories, namely: (Ryan, 2006: 17, 18, 19)

- **Warning intelligence-** when the risk of crisis is sufficiently high, policymakers are issued with a warning.
- **Current intelligence or daily reportage-** refers to daily briefings that brings policymakers up to date and make short term predictions.
- **Basic intelligence-** this is the compilation of encyclopedic, in-depth data on various countries or subjects.
- **Estimative or predictive intelligence-** of which National Intelligence Estimates, informal research papers and policy-related judgments in briefings and memoranda are examples.
- **Raw intelligence-** material taken directly from collectors and given to policymakers- it is unevaluated, may be misleading, lacking context and should be marked as non-analysed information upon distribution. The distinction between raw intelligence and intelligence as a product of analysis is most important in respect of cooperation, as the sharing of information (raw data) and sharing intelligence (analysed information) are two distinctly different tasks in the interagency bargaining process (Ryan, 2006: 27).

4.5. Strategic intelligence and tactical intelligence

Strategic intelligence deals with long-range/long term issues. In this case possible scenarios are developed and intelligence takes a long-term, analytical view. For strategic intelligence more sophisticated and analytical techniques are required and are more complicated than those used for tactical intelligence. Strategic intelligence can be further described as a mechanism to predict threats to a nation's stability and security, of military, political environmental or societal nature (Clough, 2004: 602). It may comprise information and response: The collection, analysis and dissemination of information about global conditions, especially potential threats to a nation's security, and based on this information, the use of secret intelligence agencies to help protect the nation against harm abroad (Johnson, 1991: 46). Strategic intelligence may, also relate to domestic conditions and is not confined to 'global' or 'foreign' conditions (Cave, 2002: 11).

Tactical intelligence on the other hand, deals with issues that require immediate action. The intelligence process is fast on the tactical level, as a quick synthesis of data is necessary to support ongoing tactical operations. Additional collection often needs to be done intelligently in a short time. This type of synthesis is called 'fusion' and is aimed at using all available data sources to develop a more complex picture of a complex event, usually with a short deadline. Fusion is common in intelligence support to law enforcement (Clark, 2004: 156, 157).

4.6. The focus of intelligence

Intelligence can focus on the domestic level on political dissent as a security threat; on the foreign level at threats posed by hostile foreign powers, which may be of a military nature or aimed at a nation's fundamental system of government; or it can focus on economic or nontraditional issues such as environmental issues (Shulsky & Schmitt, 2002: 4-6). The 'new priorities' on which intelligence focuses, are terrorism; proliferation of WMD; narcotics; economics; health and

environment; peacekeeping operations; 'information operations', vaguely described as 'the use of computer technology to wage war'; and dominant battlefield awareness (Lowenthal, 2006: 236-252).

Intelligence relating to peacekeeping operations (PKI) is regarded as a new form of intelligence that emphasises open sources of information, multilateral sharing of intelligence at all levels, the use of intelligence to ensure force protection, and interoperability and communality with coalition partners (Carment & Rudner, 2006: 1). The challenges facing PKI are increasingly intertwined with questions of arms control, commercial interests, international crime and ethnic conflict (Aid, 2006: 43).

Central to this study, is the meaning given to the term 'intelligence cooperation'.

5. INTELLIGENCE COOPERATION

Intelligence cooperation, involves the following: (Lander, 2004: 491-492)

- Sharing of intelligence based assessments;
- sharing of assessed, but single-source reporting;
- sharing of pre-emptive intelligence, such as precise reporting of plans or intentions, backed by operational cooperation;
- sharing of the raw intelligence product; and
- operational cooperation, which may involve surveillance; joint agent handling; sharing of linguists; exchanges of technical know-how and equipment; common training; and sharing of analytical staff.

Operational intelligence cooperation includes collection of intelligence, for example the UKUSA agreement, between the UK, the US, Canada, Australia and New Zealand, in terms of which signals collection efforts are divided between the different signatories (Lefebvre, 2003: 530).

In respect of analysis of intelligence, international organisations are important, for example, Europol employs 100 intelligence analysts (Europol, 2006: 15).

International intelligence cooperation can take place at various levels, referred to as the 'agencies' involved and 'granularity'. Granularity refers to complete visibility of the source and product which provides the greatest detail, but carries the most risk; exposing all or part of the raw product, without exposing the source; sharing only a summary of the data; sharing just analysis of the data; and sharing policy conclusions resulting from the intelligence (Clough, 2004: 603).

Intelligence cooperation may take place on local, national and international level, each with its own challenges and modalities. The above areas of cooperation are mentioned within the context of international intelligence cooperation, but could be equally applicable to intelligence cooperation on local, national and regional level. Just as intelligence can be described institutionally, as a process and as a product, intelligence cooperation can be expressed along the same lines.

The types of intelligence of particular interest within the context of intelligence cooperation include travel patterns, profiling of mail and courier services, including analyses of bills-of-lading cross referenced with crime databases; shared illicit nodes linked to fraudulent documents; arms suppliers, financial experts (whose expertise is abused for money-laundering and terrorist financing), drug traffickers and other criminal enterprises; the use of communications networks for criminal purposes; technical and personnel support overlapping between criminal enterprises and groups; abuse of information technology for criminal purposes; use of corruption; suspicious financial transactions, money-laundering and terrorist funding (US, 2005(d): 44-58).

5.1. Models of intelligence cooperation

There are a number of cooperation models in the form of strategies and plans developed for the IC, as well as, for example, crime intelligence and military intelligence. An analysis of these models reveals that, although the focus is the improvement of information or intelligence sharing, the models include measures aimed at improving the whole intelligence process. Examples of national models of intelligence cooperation mainly relating to national intelligence cooperation are:

- *The National Criminal Intelligence Sharing Plan* (US, 2003(a)).
- *Fusion Centre Guidelines: Developing and Sharing Information and Intelligence in a New Era* (US, 2006(c), 2006).
- *The (UK) National Intelligence Model* (ACPO, 2005).
- *Department of Defence Information Sharing Strategy* (US, 2007(b)).
- *Department of Homeland Security Information Sharing Strategy*. (US, 2008(b)).
- *US Intelligence Community Information Sharing Strategy* (US, 2008(a)).

5.2. Products of intelligence cooperation

The combating of international crime is greatly enhanced by the products of international cooperation, especially in the law enforcement environment. In this regard the different notices circulated by INTERPOL can be mentioned, alerting police services globally to persons wanted for extradition in respect of crimes; collecting information about a person's identity or activities in relation to a crime; providing warnings and crime intelligence in respect of persons who have committed a crime and are likely to repeat these crimes in another country; and providing warnings about potential threats from disguised weapons, parcel bombs and other dangerous materials; suspected groups or individuals who are targets in respect of sanctions of the UN against Al-Qaida and the Taliban. INTERPOL also carries lists of wanted persons in a number of countries.

INTERPOL also provides the MIND/FIND mobile service regarding access to databases containing millions of records of criminal information on individuals and property submitted by Member States. This includes a database of passports, identity cards and visas reported stolen or lost by countries all over the world. There is also a database of stolen vehicles. All these databases can now be accessed on a mobile instrument by law enforcement officers (INTERPOL, 2008(j)).

Within the EU, an *Organised Crime Threat Assessment (OCTA)* and *EU Terrorism Situation and Trend Report* were produced by Europol (Europol, 2006: 5) (Europol, 2007(a)) (Europol, 2007(b)).

5.3. Institutions for intelligence cooperation

Institutionally, intelligence cooperation relates to the intelligence interaction and assistance between the agencies respectively responsibly for military, positive and civilian intelligence. Most notable are the fusion centres established in the US, on different levels, integrating intelligence from a wide variety of role-players, including civil society. Following the events of 11 September 2001, the Office of the Director of National Intelligence (DNI) was established in the US, to ensure overall coordination of intelligence. International organisations such as INTERPOL, Europol and ASEANAPOL originated from a need to collect, analyse and distribute information relating to law enforcement.

International organisations exclusively focused on intelligence cooperation have been established on a formal and informal level, such as the Club of Berne in Europe; the Kilowatt Group, including South Africa and Israel; the NATO Special Committee and the Egmont Group of Financial Intelligence Units; and within the African Region, the Committee of Intelligence and Security Services of Africa (CISSA) (Lefebvre, 2003: 530-532) (AU, 2005(b): 12). The AU also established the Continental Early Warning System, focused on security issues and conflict

resolution in Africa, including issues such as arms proliferation and arms trafficking, land-mines, mercenarism and terrorism (AU, 2008).

6. CONCLUSION

In this chapter, the international crimes relating to not only the security of individuals, but also the security of states and in some instances global security, namely war crimes, genocide and crimes against humanity; international terrorism, transnational organised crime, mercenary crimes, piracy; and crimes relating to the proliferation of WMD were described, with reference to the relevant international instruments and principles of international law. In respect of numerous international crimes, there is a lack of universally accepted definitions, despite the existence of numerous international instruments, only war crimes; genocide and crimes against humanity; and piracy are well defined in international law. The drafting of effective national legislation to implement international instruments on transnational organised crime and terrorism, is possible, within the context of existing international instruments, despite the need, in respect of terrorism to define the term in the *Draft Comprehensive Convention on Terrorism*.

International and regional instruments on mercenary activities have been identified in the UN and AU for review to effectively address the extensive use of private military and private security companies in armed conflicts in a combat role. Consequently few countries have effective legislation to act against mercenary activities. Crimes related to WMD are required in terms of UN Security Council Resolution 1540 to be adopted by UN Member States in their national legislation, but the implementation thereof is difficult and controversial in view of the manner in which the powers of the UN Security Council are used to 'legislate' in international law.

The implementation of the various international instruments and consequently cooperation in combating international crime on all levels, including intelligence cooperation, is hampered by this lack of proper definitions as well as the fact that many countries are still not party to many of the key international instruments; or have not ratified or implemented them.

A conceptual framework of the term 'intelligence' is also provided, describing the different meanings of 'intelligence' as well as the dimensions of intelligence, namely foreign, military and domestic intelligence. The terms 'security intelligence' and positive intelligence are also described in relation to law enforcement/crime intelligence. Particular attention is paid to intelligence as a process, with reference to collection of intelligence and the sources of intelligence, as well as an analysis of intelligence. In respect of intelligence as a product, the categories of intelligence products are described, namely warning intelligence, current intelligence, basic intelligence and raw intelligence.

The focus of intelligence is also described, referring to 'new' intelligence priorities, such as terrorism, peacekeeping intelligence and intelligence on WMD. Lastly, the key term to this study, namely 'intelligence cooperation' is analysed and described with reference to models of intelligence cooperation, products of intelligence cooperation and institutions for intelligence cooperation.

In conclusion, it is clear that the international legal framework in respect of key international crimes needs to be improved, especially in relation to defining crimes such as terrorism and mercenary crimes. However, international law is not amended easily, whilst it is important to combat international crime in every possible way, especially in respect of improving intelligence cooperation. It would therefore be more expedient in the shorter term to look at practical and operational means to improve the situation.

In the next chapter a historical background to intelligence cooperation is provided, as well as a description of international obligations in respect of intelligence cooperation. This is an important factor to determine whether intelligence cooperation could be improved through further obligations in respect of cooperation, and when the challenges for intelligence cooperation are analysed to assess the effectiveness of international obligations in respect of intelligence cooperation.