**Establishing the Constituent Elements of Trafficking in Persons:
Conceptualizing ‘transnationality’ and ‘involvement by an organized criminal group’**

Nicole Siller¹ and Kathryn E. van Doore²

Abstract

The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children established an internationally agreed upon definition of the crime of ‘trafficking in persons’ under its Article 3. By virtue of this definition, the crime of trafficking in persons is substantiated when an ‘act’ (recruitment, transportation, transfer, harbouring or receipt of persons) is committed by way of a ‘means’ (the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person) for a purpose of exploitation. This protocol is subject to its parent instrument, the United Nations Convention against Transnational Organized Crime (CTNOC). The CTNOC notes that it extends to offences which are transnational in nature and involve an organized criminal group. It therefore appears that the CTNOC, imposes additional elements forming part of the crime of trafficking: that the offense be transnational in nature and involve an organized criminal group. Whether these are required elements is a discrepancy found throughout trafficking scholarship and has been identified as a point of unresolved contention. The lack of clarity regarding the definitional contours of this offense mean that there is potential for issues in the investigation and prosecution

N. Siller (n.siller@deakin.edu.au)

Deakin Law School, Deakin University [Melbourne, Australia] SHOULD BE AT THE TOP SEE FORMAT

K. van Doore (k.vandoore@griffith.edu.au)

Griffith Law School, Griffith University [Brisbane, Australia]

of trafficking. In an effort to bring clarity to the constituent elements of trafficking, this contribution uses a textual analysis to show that, despite some language suggesting that trafficking is strictly a transnational organized crime, the codified definition is *not* limited to offenses which are transnational, and nor does it require the involvement of an organized criminal group.

Key words Palermo Protocol, organized crime, trafficking in persons, transnational, definition of trafficking

1. Introduction

The widespread international adoption of the United Nations Convention against Transnational Organized Crime (CTNOC) and its Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol) established the international legal framework with which to address the crime of ‘trafficking in persons’.³ As codified in its Article 3, the Palermo Protocol defines ‘trafficking in persons’ as:

The recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

Article 3 enumerates three elements of this offense: the perpetration of (1) an ‘act’ (recruitment etc.) by the use of (2) a ‘means’ (threat or use of force etc.), for (3) the ‘purpose’ of exploitation.

The codification of the ‘act’ and ‘means’ elements are rather finite while the third element is open

³ The official name of this offense is ‘trafficking in persons’, however this paper uses the terms ‘trafficking in persons’, ‘human trafficking’, and ‘trafficking’ interchangeably.

to interpretation since the term ‘exploitation’ is left undefined. Instead, Article 3 identifies several types of exploitation which ‘at a minimum’ satisfy this element.

The Palermo Protocol is bound to the CTNOC as explicitly codified under its Article 1 which states that it ‘shall be interpreted together with’ the CTNOC and that all of the CTNOC’s ‘provisions...shall apply, mutatis mutandis’ to the Palermo Protocol ‘unless otherwise provided’. The CTNOC explicitly applies to offenses that are ‘transnational in nature’ and ‘involve an organized criminal group’, conditions also articulated within the Palermo Protocol’s scope of application as indicated in its Article 4.

Considering the interplay between these instruments, the interpretation of the definitional construct of trafficking varies amongst scholars refs? For example, there are those who maintain that trafficking under international law is only trafficking per the Palermo Protocol when the conduct expressed in Article 3 is perpetrated by an ‘organized criminal group’ and is ‘transnational in nature’, as suggested by the language of the CTNOC (Allain 2013: 353; Brand 2010: 24-26; Elliott 2015: 91; Hathaway 2008: 9). Alternatively, others conclude that ‘trafficking in persons’ is exclusively comprised of the act, means, and purpose elements contained in Article 3 of the Palermo Protocol (Gallagher 2009: 812-813; Mattar 2013: 137; Roth 2010: 97). Whether the crime requires transnationality and involvement by an organized criminal group is thus a subject of confusion and conflict regarding the confines of the crime of trafficking and its application in practice.

This definitional issue is a legitimate cause for concern since most State Parties have implemented the Palermo Protocol’s construct (or language inspired by it) in their respective domestic laws criminalizing human trafficking (Gallagher 2010: 79). The extent of this legal uncertainty has already resulted in the publication of a UNODC Issue Paper on the links between organized criminal activity and the crimes of human trafficking and migrant smuggling.

Additionally, the United Nations Working Group on Trafficking in Persons made a formal request for clarity on the role of ‘transnationality’ concerning the trafficking offense. It also been raised in academic research discussing the interpretation of the Palermo Protocol (see Jansson 2014: 71; McClean 2007: 15). However, the definition, context, and/or scope of this crime beyond the confines of the Palermo Protocol’s Article 3 has not yet been exposed to deeper academic scrutiny. This chapter aims to provide that scrutiny and come to a clear conclusion regarding what the constituent elements of the offense of trafficking are as codified in the Palermo Protocol.

First, this paper will briefly discuss why clarification of the constituent elements of trafficking is important. Secondly, it will discuss the codification of transnational crimes under international law through the introduction of the CTNOC and its Palermo Protocol. Thirdly, the definitional contours of the concepts of ‘transnationality’ and ‘involvement of an organized criminal group’ within these instruments are examined. Finally, the relevant articles within the CTNOC and Palermo Protocol contributing to the interpretational tension of elements of the crime of trafficking are analyzed. Based on a strict textual reading of the instrument, its preparatory works, the Commentary and interpretation by countless UNODC publications, it is argued that transnationality and commission involving an organized criminal group are not constituent elements of the offense.

2. The Purpose of Clarification

The CTNOC and Palermo Protocol and their preparatory works produce conflicting interpretations because they appear to simultaneously require and reject transnationality and the involvement of organized crime groups as elements of the construct of trafficking. This chapter clarifies the crime of trafficking in this regard by engaging in a textual analysis of these international instruments (see Hutchinson and Duncan 2012: 83). A textual analysis reveals how

the interpretational conflict has arisen, and offers a systematic approach to resolve the question. Orakhelashvili (2008: 286) explains that this process involves examining the instruments themselves, as well as their preparatory works and associated commentary, in order to ‘deduce the meaning exactly of what has been consented to and agreed’. This approach accords with Article 31 of the Vienna Convention on the Law of Treaties, which states ‘a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose’. This methodology reveals how ‘transnationality’ and ‘organized crime’ may be considered as elements of trafficking under international law.

The goal of this exercise is to aid in the harmonization of the legal interpretation of trafficking. This contribution aims to bring clarity to an understanding of the international definition of trafficking for governments who have implemented it in their domestic law, and perhaps even for those using it in international(ized) criminal courts and tribunals, should prosecutions of traffickers at this level eventuate (see Siller 2016).

3. The Codification of Transnational (Organized) Crimes under International Law

Transnational criminal law is generally understood as a classification of offenses, codified via multilateral ‘crime suppression conventions’, but enforced and prosecuted within domestic systems under states’ respective domestic criminal laws (Boister 2015: 11-12). ‘Transnational crimes’ are understood to ‘identify certain criminal phenomena transcending international borders, transgressing the laws of several states or having an impact on another country’ (Boister 2015: 11-12). Specifically, Albanese (2012:2) categorizes transnational crimes according to at least one of three ‘broad objectives’ including the:

- (1) Provision of illicit goods (i.e., drug trafficking, stolen property, counterfeiting)
- (2) Provision of illicit services (i.e., human trafficking, cybercrime and fraud, commercial vices)
- (3) Infiltration of business or government (i.e., extortion and racketeering, money laundering, corruption).

International criminal law is said (Cassese and Gaeta 2013) to be distinguishable from transnational criminal law because the former is concerned primarily with addressing the so-called ‘core crimes’ (genocide, war crimes and crimes against humanity). While there are, of course, substantive and contextual differences between most international and transnational crimes, Boister (2015: 12) contends that the primary distinguishing feature is the manner in which these crimes can be addressed in practice (e.g., indirect for transnational and direct for international).⁴

Putting theory to practice as it concerns the codification of transnational criminal law was enabled by the efforts of the United Nations, which took an active role in facilitating international meetings, sponsoring conferences, and the establishing a commission during the 1990s (see McClean 2007: 2-3). Specifically, General Assembly Resolution 53/111 of 1998 decided to

establish an open-ended intergovernmental ad hoc committee for the purpose of elaborating a comprehensive international convention against transnational organized crime and of discussing the elaboration, as appropriate, of international instruments addressing trafficking in firearms, their parts and components and ammunition, and illegal trafficking and in the transporting of migrants, including by sea.

An *ad hoc* Committee was tasked with drafting the proposed convention and its protocols. Representatives from over one hundred nations attended the drafting sessions of this committee (see McClean 2007: 12; Roth 2012: 80). Remarkably, in just two years, the CTNOC and its three protocols — the Palermo Protocol; the Protocol against the Smuggling of Migrants by Land, Sea and Air; and the Protocol against the Illicit Manufacturing and Trafficking in Firearms⁵ — were

⁴ In the context of trafficking however, this conclusion is not so clear, since ‘trafficking in persons’ has been inserted into the definition of ‘enslavement’ as a crime against humanity in the Rome Statute of the International Criminal Court (see Siller 2016: 2).

⁵ The Palermo Protocol and the Protocol against the Smuggling of Migrants by Land, Sea and Air are closely related to each other, but they draw a distinction between migrants who provide consent to be moved illegally across borders, which constitutes smuggling, and migrants and other persons who are coerced or fraudulently moved for the purpose of their exploitation, which constitutes trafficking.

finalized culminating with the signing conference held in Palermo, Italy in December 2000. Considered as a ‘parent’ instrument to the protocols, the CTNOC entered into force on 29 September 2003.

The CTNOC articulates that its purpose ‘is to promote cooperation to prevent and combat transnational organized crime more effectively’. This broad goal has been implemented through two main strategies: (1) ‘eliminate differences among national legal systems’ and (2) create guidelines for domestic legislatures in order to foster national action against transnational organized crime (see Schloenhardt 2015). Gallagher (2010: 74) explains that this ‘Convention seeks to eliminate “safe havens” where organized criminal activities or the concealment of evidence or profits can take place by promoting the adoption of basic minimum measures’.

Codified in its Article 3, offenses within the CTNOC’s ‘scope of application’ include the ‘participation in an organized criminal group’, money laundering, corruption, obstruction of justice, and ‘serious crimes’. In addition to the specific definition of each crime, the CTNOC also requires that the commission of those enumerated offenses be ‘transnational in nature’ and involve an ‘organized criminal group’.

The fundamental notion of conduct considered ‘transnational in nature’ is that the offense involves more than one state. This is seen in Article 3(2) of the CTNOC which defines an offense as ‘transnational in nature’ if:

- (a) It is committed in more than one State;
- (b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;
- (c) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or
- (d) It is committed in one State but has substantial effects in another State.

It is clear from this Article, that cross-border action is not necessary for an offense to be ‘transnational in nature’; all that is required is that the offense in question includes some form of ‘tenuous potential extraterritorial impact’ (see Boister 2015: 13).

In addition to the transnational component, the CTNOC identifies a set of specific transnational *organized* crimes, offenses within its purview that involve an organized criminal group. Under Article 2(a), the CTNOC defines ‘organized criminal group’ as:

a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.

As Schloenhardt (2015: 414) explains, this definition ‘combines elements relating to the structure of criminal organizations with elements relating to the objectives of the group.’ Boister’s (2015: 11-12) examination of this definition reveals that it can be understood as comprising of four parts: (1) structured group of three or more persons (acting in concert), (2) existence for some period of time; (3) aiming to commit serious crime; and, (4) for a financial or material benefit.

First, the group must comprise three or more persons acting in concert. The concept of a ‘structured group’ has also been defined in the Convention under Article 2(c), 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’. As McClean (2007: 38, 41) notes, this characterization ‘proceeds by excluding factors rather than including them.’ In the Interpretative Note (UNODC 2006: 17), the preparatory works explain that:

[t]he term ‘structured group’ is to be used in a broad sense so as to include both groups with hierarchical or other elaborate structure and non-hierarchical groups where the roles of the members of the group need not be formally defined.

The concept of ‘acting in concert’ was not further elaborated upon within the CTNOC or its preparatory works. In utilizing common definitions of these terms, McClean (2007: 38-41) explains

his Commentary on the CTNOC and its protocols (Commentary) that ‘the phrase in the text means no more than that this must be a group activity, not merely the simultaneous acts of some of its members each acting on his or her own account.’

The second element requires that the group’s existence be for ‘a period of time’. This element has been characterized in the Commentary as ‘remarkably imprecise’ (see also McClean 2007: 38-41). While Schloenhardt (2015: 414-418) concludes that this means ‘single, ad hoc operations’ are thereby excluded by this element, McClean (2007: 38-41) proffers instead that ‘[a]cting with a view to committing a single offence may suffice’ so long as the structured group element is also satisfied.

McClean (2007: 38-41) describes the third and fourth elements as ones which ‘speak of motivation’. Specifically, the third element requires that the aim of the group be ‘to commit one or more serious crimes’ or those offenses specifically articulated within the instrument. Article 2(b) of the CTNOC defines ‘serious crime’ as: ‘conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty’. Interestingly, it is the crime’s potential punishment (under domestic law) which determines its qualification as ‘serious’ as opposed to the actual conduct committed.

Considering these definitions, it is however the Palermo Protocol, not the CTNOC which is responsible for addressing the crime of ‘trafficking in persons’. The Palermo Protocol is not a ‘stand-alone’ treaty; states are required to first ratify the CTNOC and provisions contained within the CTNOC ‘apply, mutatis mutandis,’ to the Palermo Protocol (see Gallagher (2010: 73). The Interpretive Notes (UNODC 2006) outline that the meaning of mutatis mutandis is ‘with such modifications as circumstances require’ or ‘with necessary modifications’, and that where provisions of the CTNOC are applied to the Palermo Protocol, they should be modified or interpreted so as to have the same essential meaning or effect in the Protocol as in the

Convention. The application of *mutatis mutandis* cannot therefore require one's interpretation of the elements of the crime under the parent convention to be so restrictive in order to render those elements non-operational in the child instrument. Therefore the application of *mutatis mutandis* and consequent modification to the Convention does not extend to clarifying the interpretational conflict at issue.

This interaction between the CTNOC and the Palermo Protocol ignites the conflict over the interpretation of the construct of trafficking, which will be discussed in the following section.

4. Interpretational Tension and Identifying the Definitional Contours of Trafficking in Persons

On initial examination, it appears that the Palermo Protocol's relationship to the CTNOC as a supplementary instrument creates an inference that the definition of trafficking only applies to transnational cases (see Gallagher 2001: 983) involving organized criminal groups.

This sentiment seems to be clearly stated in Article 4 of the Palermo Protocol, which outlines its scope as applying:

except as otherwise stated herein, to the prevention, investigation and prosecution of the offences established in accordance with article 5 of this Protocol, *where those offenses are transnational in nature and involve an organized criminal group*, as well as to the protection of victims of such offenses (emphasis added).

In seeming direct contradiction, the Commentary and the UNODC's many publications consistently state that trafficking does not require a 'transnational in nature' component or involvement by an organized criminal group (see UNODC 2010:13). As such, it is necessary to investigate whether the elements of transnationality and organized criminal group involvement are required to prove the offense of trafficking.

In addition to Articles 3 and 4, other articles of the Palermo Protocol are also relevant to the construct of trafficking. Specifically, Article 1(3) of the Palermo Protocol states that 'offenses established in accordance with Article 5' of the Protocol are regarded as offenses under the

CTNOC. Article 5 of the Palermo Protocol requires that states engage in domestic criminalization of trafficking. It reads:

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 of this Protocol, when committed intentionally.
2. Each State Party shall also adopt such legislative and other measures as may be necessary to establish as criminal offences:
 - (a) Subject to the basic concepts of its legal system, attempting to commit an offence established in accordance with paragraph 1 of this article;
 - (b) Participating as an accomplice in an offence established in accordance with paragraph 1 of this article; and
 - (c) Organizing or directing other persons to commit an offence established in accordance with paragraph 1 of this article.

The offense of trafficking is therefore fully articulated in Articles 1(3), 3, 4 and 5 of the Palermo Protocol.

Having delineated the limits of the offense within the Palermo Protocol, the CTNOC provides further interpretational guidance.⁶ Article 34(2) of the CTNOC specifically describes how certain offenses must be established independently of transnational in nature and organized criminal groups elements:

The offenses established in accordance with articles 5, 6, 8 and 23 of this Convention shall be established in the domestic law of each State Party independently of the transnational nature or the involvement of an organized criminal group as described in article 3, paragraph 1, of this Convention, except to the extent that article 5 of this Convention would require the involvement of an organized criminal group.

These offenses are the criminalization of participation in an organized criminal group (Article 5), the criminalization of the laundering of proceeds of crime (Article 6), the criminalization of corruption (Article 8) and the criminalization of obstruction of justice (Article 23). As trafficking is not explicitly mentioned here as being an offense under the CNTOC that should be established independently of transnational in nature and the requirement of an organized crime group, it might

⁶ This paper will mostly rely on the VCLT for recognized sources of international law.

be inferred that these elements should apply in accordance with the CTNOC in the criminalization of trafficking.

The Palermo Protocol does not itself include an Article creating independence of these elements, particularly in relation to its Articles 3 and 4. Therefore, by omission the independence of the two elements established in Article 34(2) of the CTNOC do not extend to the Palermo Protocol. Taking this perspective, Article 34(2) of the CTNOC only applies to the Palermo Protocol by direct reference through Article 5 of the CTNOC which specifically criminalizes participation in an organized crime group.

The Commentary regarding the Palermo Protocol consistently states that the transnational nature and involvement in an organized criminal group elements are *not* required (see UNODC 2010: 13). As McClean (2007: 15) points out, the Commentary explains that the Interpretative Note addressing this point ‘requires the elements of transnationality and the involvement of an organized criminal group in the context of its provisions as to international cooperation, but not so far as the creation of criminal offences is concerned’.

In relation to the transnational component, Hathaway (2008: 11) criticizes the perception that domestic trafficking occurring within the borders of only one country without the involvement of outside parties would be considered beyond the scope of the Palermo Protocol. Gallagher (2009: 812) clarifies that the purported transnational element exists to require interstate cooperation, not to mandate that trafficking is limited to conduct that is transnational in nature. Gallagher further notes that the Palermo Protocol contains a general obligation on nation states to criminalize ‘exploitative practices taking place within as well as between national borders’ and that the ‘central and mandatory obligation of all State Parties to the Palermo Protocol is to criminalize trafficking in their domestic legal systems’. In fact, Gallagher notes that she is not aware of any evidence of a

domestic statute limiting the definition or the scope of criminalization to only transnational instances.

However, where states have chosen not to include a transnational requirement within their domestic codification, this does not lead to a conclusive outcome on trafficking's definitional contours in the Palermo Protocol itself. The UNODC's Organized Crime Issue Paper refrains from determining whether this is in fact, an element of the crime of trafficking. Nevertheless, the Issue Paper noted that trafficking is perpetrated by organized as well as 'un-organized criminal involvement'.

The decision to not include these aspects in domestic codification is likely due to the UNODC's Legislative Guide which states:

- (a) Non-inclusion of transnationality in domestic offences. The element of transnationality is one of the criteria for applying the Convention and the Protocols (art. 3 of the Convention), but transnationality must not be required as a proof in a domestic prosecution. For this reason, transnationality is not required as an element of domestic offences;
- (b) Non-inclusion of an organized criminal group in domestic offences. As with transnationality, the involvement of an organized criminal group must not be required as a proof in a domestic prosecution. Thus, offences established in accordance with the Protocol should apply equally, regardless of whether they were committed by individuals or by individuals associated with an organized criminal group and regardless of whether this can be proved or not;

Gallagher (2010: 73) notes of the Legislative Guide, '[w]hile not intended to be authoritative or otherwise deliver a definitive legal interpretation of these instruments, the Guide is nevertheless a useful source of additional insight, particularly with regard to legislative implementation obligations.' Other UN bodies, including the United Nations High Commissioner for Human Rights, have also defined trafficking as wholly encompassed within the Palermo Protocol's Article 3 – that is, defined trafficking without requiring transnationality or involvement of organized criminal groups. As such, a *prima facie* application of the CTNOC, as opposed to strict textual

reading of both instruments, may in fact be the cause of confusion for scholars and practitioners alike.

5. An Interpretational Way Forward?

The absence of the elements of transnational in nature or organised crime group as components in the Palermo Protocol's definition leads to the inference that these two components are not necessary requirements to prove the offense of trafficking. This raises the question of whether the elements of transnational in nature and involving organized crime groups are present in the Protocol for another reason.

Given that the main driver for the drafting of the Palermo Protocol was to 'contest the world's organized crime networks and combat the trade in human beings and transnational prostitution' (Raymond 2001: 1), one would assume that the first form of this 'contest' would be found in the constituent elements of the offense of trafficking. However, it appears that the references to transnational in nature and the involvement of an organized crime group are included simply to provide a universal concept that promotes international standardization and accountability (see Baer 2015: 167).

The insistent requirement within the drafting of Protocol that the elements of 'transnational in nature' and the 'involvement of organized crime groups' are required, and the equally insistent contradictory interpretations and commentary that says they are not, leads to an examination of whether the elements of 'transnational in nature' and 'involvement of organized crime groups' might be considered independent requirements pertaining to the obligations of states parties to the international instrument.

Instead of connecting the transnational and organized criminal group involvement considerations to the material elements of the trafficking offense, we believe this construction

imposes explicit duties and requirements on signatories of the Palermo Protocol (specifically, domestic criminalization of, and international cooperation to combat, human trafficking). Only under circumstances where the trafficking is ‘transnational in nature’ and ‘involves an organized criminal group’ is a State Parties’ commitment (eg, cooperation) to act triggered. These circumstances do relate to the commitments of the signatories to the international instrument, not to the legal definition of the trafficking offense. This perspective diverts from the concept that the material components of the offense of trafficking are: 1) an act; 2) a means, 3) all committed for the purpose of exploitation; 4) involving an organized criminal group; and 5) that is ‘transnational in nature’ (see Allain 2013: 350-353). By interpreting the requirements of transnationality and organized criminal group in this manner, the international obligation placed on states is an obligation to legislate a more narrowly defined crime (see Gallagher 2009: 812).

This is not to say that the Palermo Protocol decrees that states must or should only criminalize trafficking that is ‘transnational in nature’ and ‘involves an organized criminal group’. On the contrary, all of the UNODC literature expressly recommends domestic legislation which only embodies the contents of Article 3 of the Palermo Protocol and states have primarily legislated based on the definition found in Article 3 of the Palermo Protocol (see also Gallagher 2009: 813). However, the scope of activity (and therefore international commitment) requiring state action is more limited and may offer a solution to the interpretive tension.

5. Conclusion

On first impression, the language of the CTNOC and the Palermo Protocol articulates that human trafficking offenses must be transnational in nature and involve an organized criminal group. However, the Palermo Protocol is attached to an instrument designed to address

transnational organized crime, which effectively establishes the legal characterization of human trafficking as a ‘transnational organized crime’. Yet other evidence suggests that human trafficking is not limited to conduct that is transnational in nature and involving organized criminal groups. As a result, there has been conflict and confusion regarding the proper understanding of the definition of the crime of human trafficking in international law.

Based on a strict textual reading of the instrument, its preparatory works, the Commentary and their interpretation by countless UNODC publications, it is clear that transnational in nature and commission involving an organized criminal group are not part of the constituent elements of the offense. Upon review of the instruments and supporting documents, the interpretational confusion is likely the result of a failure to distinguish between the duties and obligations imposed upon states when committing to an international instrument, and the contents of the instrument itself and specifically, the definitions of offenses contained within.