

Good Practices as International Norms?

The Modalities of the Global Fight against Transnational Organised Crime and Terrorism

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Amandine Scherrer

Abstract

Since the 90's, the alleged threat of transnational organised crime has led to numerous discourses on the urgency of cooperation at the international level, contributing to the establishment of many international experts groups. This intensification of working groups has created professional networks of expertise in the field of the fight against transnational organised crime, and more recently, terrorism, and has generated numerous recommendations and so-called best practices. This paper is an attempt to highlight the dynamics of this expertise, looking at the modalities of this transnational exchange and the circulation of norms at the global level.



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This project assesses the relations between the European Union (EU) and Canada in the area of Justice and Home Affairs (JHA). It aims at facilitating a better understanding of the concepts, nature, implications and future prospects related to the Europeanization of JHA in the EU, as well as its role and dilemmas in the context of EU-Canada relations.

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Contents

| | | |
|------|---|---|
| I. | The study of international expertise: Methodological and theoretical challenges..... | 1 |
| II. | Who are these international norms producers?..... | 3 |
| III. | Proliferation of best practices and soft-law type recommendations at the global level: Practices and norms | 6 |
| | Bibliography..... | 9 |

GOOD PRACTICES AS INTERNATIONAL NORMS? THE MODALITIES OF THE GLOBAL FIGHT AGAINST TRANSNATIONAL ORGANISED CRIME AND TERRORISM

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AMANDINE SCHERRER *

Since the 90's, the alleged threat of transnational organised crime has led to numerous discourses on the urgency of cooperation at the international level. As networks of criminals operating on a global scale are deemed to be an escalating challenge for the security of the international community as a whole, the facilitation and harmonisation of police and judicial practices have been at the core of international mobilisation in the fields of investigation and prosecution. In this context, public administration officials, especially those from ministries of Justice and Home Affairs have been mobilised to fill the gap in the area of justice and police cooperation and to participate in international-level meetings with their counterparts within the framework of international/regional bodies. This intensification of working groups at the international level has created professional networks of expertise in the fight against transnational organised crime, and more recently, terrorism.

The intensification of expert-level exchanges on the international stage (within the EU, the OECD or the G8) over questions concerning the enhancement of cooperation against transnational organised crime and terrorism, has led to an impressive elaboration of best practices and soft law-type recommendations. But who are these experts deciding best practices and making recommendations? What are their socio-professional backgrounds? What is the nature of the best practices they are promoting in the global fight against organised crime and terrorism? This presentation is an attempt to highlight the transnational transmission and circulation of norms in the 'war on terror' at the global level. It aims at demonstrating how complex and challenging it is to map the international bodies involved in the fight against terrorism and trace the genesis of these international norms, as the modalities of mutual influences are numerous and multiple.

In order to highlight several elements concerning this genesis and the modalities of norms circulation, methodological and theoretical challenges in the study of international expertise will be exposed (Part I). Then, an account of a specific international Experts Group will be provided (Part II). Finally, closer attention will be given to the nature and the reach of some of these 'best practices' against transnational crime (Part III).

I. The study of international expertise: Methodological and theoretical challenges

The analysis of the way anti-crime policing is shaped at the international level has been a subject for research in different disciplines for decades. Unfortunately, the dialogue between the relevant disciplines mobilised in such research agendas remains quite timid. Yet the sub-field of securities studies within international relations (IR), comparative criminology and sociology offer promising perspectives that are often complementary. The study of international policing from a socio-criminological perspective has been undertaken for quite a long time by

* Post-doctoral Researcher, University of Montreal.

criminologists (Sheptycki, Shearing, Dupont, etc.). Some scholars usually associated with the sub-field of security studies, and more specifically the International Political Sociology (IPS) perspective used in some security studies agendas of research, have also dealt with the issue of transnational crime and its control at global level (Bigo, Guittet, etc.). Some authors have tried to build bridges and adopt interdisciplinary approaches, notably to transnational policing and international crime-control strategies (Anderson et al., Nadelman & Andreas, Sheptycki, Shearing & Johnston, Dupont & Wood, Deflem). Most of these authors have questioned the historical and social construction of the alleged threat of transnational crime at global level, and have gone beyond a realist perspective on international relations (IR) i.e. state-centric analysis. Most of them also share a relatively similar understanding of the influence of the social environment on anti-crime strategies and practices. However, they remain relatively silent, or at least cautious, on how to investigate the circulation of norms that lead to the homogenisation and harmonisation of practices within a large number of international institutional arenas, linking together questions of rational governance, risk management and national/international security.

A focus on the actors elaborating these norms could be an appropriate approach to clarifying the logics of production, diffusion and promotion. Such a research methodology reconciles critical criminologists and sociologists investigating the international environment (Sheptycki, 2007). This method means getting out of libraries and taking the risk of encountering difficulties and obstacles in gathering valuable information on individuals who, most of the time, are quite reluctant to share their professional and personal experiences. Establishing biographical trajectories is not an easy task, especially when dealing with individuals who are, in the study of anti-crime policies, law enforcement or intelligence-services professionals for whom secrecy and confidentiality are routine business. Nevertheless, according to what has been learned from current research on the EU field of security for instance (“Mapping the security field”, CHALLENGE¹), or from our research on the G8’s Lyon Group (Scherrer, forthcoming), it offers a promising axis of research. These methodological difficulties in the field of the study of international expertise against crime are enhanced by theoretical challenges.

The first of these theoretical challenges relies on the understanding of norms. From a legal perspective, norms in International Relations are often understood as results from international conventions that have legal constraints for the signatory states. Here, it may be important to jump beyond a purely legal approach and to adopt a more sociological one to the concept of international norms. Norms are defined here from a constructivist perspective adopted in the study of IR, as *a collective expectation of the proper behaviour of actors with a given identity* (Katzenstein, 1996). A point of view focusing on actors is indeed useful in order to understand the nature and role of international regulation instruments that are not hard-law mechanisms. Indeed, how should we understand the elaboration processes of these forms of international regulation that are not inscribed into legal texts?

The second challenge linked to the one above, concerns the scope of research offered by the literature on international regimes. In International Relations theory, a body of literature exists on what is referred to as “international regimes” that try to give a precise account of these international soft-law type instruments of cooperation, i.e., international norms and standards. International regimes are classically defined as “sets of rules, norms and procedures around which the expectations of actors converge in a certain issue area” (Krasner, 1983). However, this literature, mainly reflecting perspectives of the neoliberal institutionalism school of thought, gives a conceptual priority to a state-centric approach and to rational choice theories,

¹ Challenge, WP2 Deliverable, “Mapping the European Field of the professionals of security. A methodological note on the problematique”, December 2005 (www.libertysecurity.org).

investigating the cost of defection, of compliance or non-compliance for state actors in a given international regime. This approach does not investigate the processes of norms elaboration, circulation and dissemination. In order to understand the logic and professional dynamics of the actors involved in judicial and police cooperation that leads to the homogenisation and harmonisation of collective practices, one axis of research is to analyse the socio-professional backgrounds of these individuals who share and shape knowledge and discourses on crime and terrorism, and who arbitrate among various options and a possible ‘repertoire of action’² (Tilly, 1986). These experts exchange and share their know-how and their knowledge at the international level, which can favour consensus on the nature of the issue at stake and on the appropriate tools to be adopted. Here, a final theoretical question must be underlined.

One of the most prevalent perspectives used in International Relations to understand international expertise and its influence on political decisions is the perspective focusing on ‘epistemic communities’. An epistemic community is usually defined as “a network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-area” (Haas, 1992, p. 3). According to the approach developed by IR scholars, “members of transnational epistemic communities can influence state interests either by directly identifying them for decision-makers or by illuminating the salient dimensions of an issue from which the decision-makers may then deduce their interests” (Haas, 1992, p. 4). Even if the epistemic communities approach seems compelling for the study of experts at the international level, this understanding remains silent on the effect of any legitimisation that such expertise might provide for the political actors and does not question how discourses adopted by these communities are shaped, nor does it question the actors who produce these discourses. The concept of ‘epistemic community’ therefore gives a false image of homogeneity and ignores the complexities of the individuals involved in such a community. Again, a sociological approach is useful to fill in such gaps. Following Pierre Bourdieu’s concept of *habitus*, the aim of such an approach is to underline the set of acquired patterns of thoughts, behaviour, and taste, which constitutes the link between social structures and social practices (Bourdieu, 1977). An analysis of the actors themselves, of their identity, of their professional and personal backgrounds, thus helps understand their collective practices and the symbolic authority on the political stage. Adopting such a theoretical framework adds a new dimension to the concept of expertise. Experts are not only providers of technical information; they also have the power to shape understanding and to constitute beliefs on specific topics. The norms they are producing are therefore never neutral and reflect these beliefs. So, who are these international ‘norms entrepreneurs’? Our case study has focused mainly on an under-investigated and under-evaluated international Group of Experts on transnational crime, the G8 Lyon Group (Scherrer, forthcoming, 2009).

II. Who are these international norms producers?

The extension of the G8 agenda since the end of the 80’s, notably on international security issues, has led to the intensification of expert-level exchanges over these questions within the G8 system. In the fight against *Transnational Organized Crime* (TOC) the G8 countries set up an experts group in 1995, named the Lyon Group. After the 9/11 attacks, the Lyon Group was merged with the Roma Group, the G8 equivalent of the experts Group on Counter-Terrorism,

² Charles Tilly (1986), “Toute population a un répertoire limité d’actions collectives, c’est-à-dire de moyens d’agir en commun sur la base d’intérêts partagés (...). Ces différents moyens d’action composent un répertoire, un peu au sens où on l’entend dans le théâtre et la musique, mais qui ressemble plus à celui de la commedia dell’arte ou du jazz qu’à celui d’un ensemble classique. On en connaît plus ou moins bien les règles, qu’on adapte au but poursuivi”, in *La France contestée de 1600 à nos jours*, p. 541.

which also was set up in the 80's. This gave rise to what has since been called the 'Lyon/Roma Group'. Some specific characteristics of this G8 Lyon/Roma Group can be drawn from our research, based mainly on interviews with some of its members.³

The Lyon/Roma Group gathers experts who are all civil servants from the bureaucracies of G8 members, mainly from Justice, Foreign Affairs and Law Enforcement services and Intelligence agencies. These experts meet 3 times a year and their mandate is to prepare and coordinate high-level official meetings, and more specifically the G8 Interior and Justice ministerial meetings, which take place once a year. A few elements must be highlighted concerning the nature of the Lyon/Roma Group.

What can be seen from our own research is that since 1995 the Lyon Group was very active in the fight against TOC, and was divided into 4 main subgroups: one devoted to Police Cooperation, one to Judicial Cooperation, one to Cybercrime and one to Migrations issues. The new Lyon/Roma Group established in 2001 has kept the same structure, but a fifth subgroup has been added that mainly gathers G8 Intelligence services officials, known as the Law enforcement practitioners' subgroup.

Secondly, this new structure has led to considerable changes in the socio-professional distribution of the expertise provided. We had access to a list of all the Lyon/Roma Group delegates in 2005, and it was clear from the document that the Interior, Police and Intelligence services officials represented more than 70% of each delegation. From what we have learned throughout our interviews with some of these experts, before 9/11 there was a kind of equilibrium in number between the officials coming from Justice, Foreign Affairs and Law Enforcement services and agencies.

Thirdly, the setting-up of this new structure is certainly part of the explanation as to why terrorism has become the first priority of the Lyon/Roma Group and has become the major axis of all the subgroups. It also provides an explanation as to why more preventive and proactive strategies have been adopted by the Group since 9/11. More precisely, the Lyon/Roma Group has, since 2003, focused on 'best practices' with regard to the development of biometrics and their use in travel documents, the enhancement of special techniques of investigation, the sharing of information and databases, including DNA information, and the fight against terrorist financing.

The G8 experts work together on the possibilities of international cooperation in a very pragmatic way. Their role is mainly to discuss their knowledge and practices and to agree on best practices which, of course, reflect this specific knowledge. Those best practices are not really meant to enhance coordination between the 8; they are rather meant to be spread and promoted in other international arenas. Since norms labelled "G8 norms" have a strong symbolic weight in international negotiation processes; the influence of the G8 Lyon/Roma Group has been quite important in other international fora since the 1990's, such as the UN, the OECD, INTERPOL, and the EU. The Lyon/Roma Group, gathering high-ranking officials from three EU countries, one influential Asian country, North American countries and Russia thereby constitutes an exceptional platform of communication, socialisation and promotion.

Moreover, as our research has demonstrated, most of the G8 experts are involved in similar working groups within the UN, EU or OECD. This mobility, from one working group to the other, across national boundaries and international bodies, is part of the explanation as to why norms circulate and are diffused.

³ Interviews were conducted between 2003 and 2007, in France, Belgium, the UK, and Canada.

Of course, it does not mean that the G8 has had a decisive role, but it shows how complex and challenging it is to map the international bodies involved in the fight against TOC and terrorism and to trace the genesis of these international norms and standards, as the modalities of mutual influences are numerous and multiple. The multiplication of international meetings favours interactions, and gives root to a horizontal negotiation space that allows its participants to socialise beyond national bureaucracies and boundaries. Several comments can be made about the above-described features of this specific international Experts Group.

Firstly, these experts are all civil servants of their respective administrations, and most of them have gained legitimacy and recognition from their participation to international-level meetings. Indeed, all of them gain the status of ‘experts’ from their participation in the international negotiations process. The very nature of the issues at stake (transnational crime), their repeated presence on international agendas and the cooperation imperatives that have emerged from political discourses have multiplied justifications for such ‘expert’ meetings. Civil servants have now become ‘crime technicians’, sometimes by accident (because they were occupying specific posts in their administrations, providing them invitations to such meetings), sometimes because their hierarchy recognised their specific skills. As mentioned, G8 experts meet three times a year within the G8 system; some of them gather again within EU delegations, for those who are also members of the EU, in OECD delegations or UN delegations. Throughout our interviews, it was clear that this community of experts dealing with transnational crime constituted a small world, and that most of these experts know each other very well, since they meet a couple of times a year at international meetings. This mobility and these frequent interactions between high-profile civil servants at the international level undoubtedly favour knowledge and know-how transfer and sharing, facilitating norms circulation and promotion.

Secondly, a rather surprising element emerges from our interviews with some of these international experts. As most of the international meetings gather civil servants from member states, one might have expected that consensus among these experts was hard to reach, because of the pursuit of national or professional interests. As mentioned above, and in the specific case of the Lyon Group, Interior, Police and Intelligence services officials constitute the majority of the Experts Group. This socio-professional distribution of the expertise gives less room to actors coming from the judiciary. It was apparent during our interviews that the civil servants belonging to Justice departments were sometimes uneasy about the type of tools and instruments promoted during these meetings. The increasingly preventive and proactive strategies adopted by the Lyon/Roma Group, especially since 9/11, have engendered a certain feeling of discomfort among many officials worried about the legal application of these international standards. Nevertheless, the necessity of such proactive and preventive instruments, even when legally doubtful, is justified by all the actors, coming both from the Judiciary or the Police, by the emergency argument. In the face of such a threat (transnational crime and terrorism), the ‘we need to act fast’ argument prevails and legitimises the bypassing of legal constraints. According to some of these experts, the consensus around ‘best practices’ rather than on legal norms, is precisely the result of this imperative of facilitating operational practices, especially for the Police and Intelligence officials. Even if resistance occurs, this imperative tends to dilute national and professional interests. Thus, it can be argued that at these international meetings, the time-frame of action and reaction overrides the time-frame of law. How is this ‘emergency action’ characterised? By a proliferation of ‘best practices’ and soft-law type recommendations at the global level.

III. Proliferation of best practices and soft-law type recommendations at the global level: Practices and norms

Two main documents are useful sources in understanding the nature of recommendations produced within the G8. The first is the first 40 recommendations developed by the Lyon Group in 1996⁴ and the second is the revised version issued in 2002⁵ by the restructured Lyon/Roma Group. The first document is rather short, but covers all the juridical and police issues: mutual legal assistance, assistance arrangements, information exchange, extradition, protection of victims, improvement in domestic legislation, support to other international organisations, assets seizures procedures, rules against corruption. After 9/11, the experts were asked to revise their recommendations. The essence of the first recommendations remains, but the second version is far more prolific, both in quantity and in detail. The recommendations aim at enhancing international cooperation (through education and exchanges, mutual legal assistance and law enforcement channels, extradition), and strengthening investigative capabilities (through the promotion of specific investigative techniques, the protection and cooperation of witnesses and other participants in criminal proceedings). These recommendations have been enhanced by numerous best practices that address, as mentioned above, the development of biometrics and their use in travel documents, the enhancement of special techniques of investigation, the sharing of information and databases, including DNA information, and the fight against terrorist financing. Those best practices can be found in several official documents, including those produced by the G8 Home and Justice Affairs meetings.

Generally speaking, it should be noted that the fight against organised crime, reinforced by the current fight against terrorism, has allowed most of Expert Group working at the international level to give legitimacy to some procedures that have previously encountered many obstacles, specifically when it comes to the respect of civil liberties and individual privacy. Since 9/11, numerous nongovernmental organisations (NGO's) have objected to proactive policies, and most question the methods used to fight organised crime and terrorism. The establishment of domestic and international DNA databases for law enforcement purposes, the use of electronic surveillance or other forms of technology during investigations, and the tracing of networked communications, are methods often not consistent with the protection of civil liberties and individual privacy. These discrepancies are pointed out in the G8 recommendations, as the experts refer to the fact that states should maintain an appropriate balance between protecting the right to privacy, particularly given the threat of new technologies, and maintaining law enforcement's capacities to protect public safety and other social values. Nevertheless, no control mechanisms are promoted to make sure those liberties are fully respected. This guarantee is even more blurred given the legally undefined nature of these recommendations and best practices. The question of the respect of the rule of Law and Human Rights in the application of these recommendations and best practices remains delicate if not entirely flexible in its responses. In the main fields of action deemed to be efficient to prevent and fight transnational crime and terrorism, the policies promoted concerning communication and travel surveillance, immigration, DNA databases and data-sharing raise questions over the accountability of practices of exception regarding the Rule of Law and the respect for Human Rights. This is particularly true in relation to the 'usual suspects' in the fight against crime and terrorism: the refugee, asylum-seeker, the migrant, the minorities in a given society.

For instance, in 2004 under the G8 US presidency, the above-mentioned G8 experts have examined the asylum application and adjudication processes in their states for the purposes of

⁴ Senior Experts Group Recommendations: "To combat Transnational Organised Crime", Paris, 12 April 1996, p. 8.

⁵ G8 Recommendations on Transnational Organised Crime, 2002.

identifying vulnerabilities and preventing abuse of those processes by terrorists. Among their recommendations, some are quite explicit about this situation of exception and suspicion.

(Recommendation 1): “Although information pertaining to asylum applicants is normally kept confidential, States are encouraged to ensure that there is no absolute bar to sharing asylum-related information with another state, for the purpose of facilitating identification of persons involved in terrorism...”

(Recommendation 2): “Most of the G8 States’ asylum and privacy laws allow for exceptions to the general principle of asylum confidentiality for such overriding purposes as the defence of national security, the execution of legitimate law enforcement or counterterrorism activities or the protection of public safety. In addition, disclosures are generally authorized for the purpose of adjudicating the asylum application. States are encouraged to have the legal authority to make disclosures of data about asylum applicants – including, where available and through appropriate channels, their criminal histories - to appropriate authorities in other States when such disclosures serve one of the above purposes, bearing in mind the principles set forth below, in particular those covering confidentiality. To this end, States should review their laws and regulations governing the disclosure of information for use in other States’ asylum adjudications and where these laws do not permit information to be disclosed in the circumstances described above, should consider the desirability of, and scope for, amending or augmenting their laws accordingly”.

(Recommendation 3): “Nearly all G8 countries recognize consent of the applicant as a basis for disclosure of information about the applicant. Countries should utilize such provisions to obtain consent, where possible and appropriate, so that asylum information held by other countries can be disclosed to the country dealing with the application for the purposes described in principle 2 above. Consent, however, should not always be a prerequisite for sharing information to identify persons involved in terrorism”.

These advocated exceptions to the regular practices of Law in the name of ‘the war on terror’ – in the field of the control of migrations, the protection of borders, the surveillance of communication, movements and travels – have been convincingly analysed in many studies on the European Union, the US or Canada, and in particular for scholars who have been working on the delicate balance between liberty and security (notably in the CHALLENGE Network). The other presentations of this panel perfectly reflect this trend of current critical researches. In the case of the G8, one could argue that G8 countries are democratic countries, and therefore that there is no need to worry. But one should always keep in mind that the logics of suspicion and exception that prevail now in the ‘war against terror’ often lead to illiberal practices, even in liberal regimes, as the title of a recent collection of publications analyses⁶. What might be complementary to this trend of research is to question the effects of soft-law type recommendations and best practices on the homogenisation and harmonisation of such dubious practices.

As explained elsewhere, soft-law type instruments have become important tools of cooperation and regulation at the global level (Lascoumes & Le Gallès, 2004). Instead of inscribing laws and judicial rules, these kinds of instruments prescribe standards of behaviour and professional norms. Thus, it would be counterproductive to consider these best practices and recommendations as harmless because they are only declarative. These norms, in the IR theoretically constructivist sense (as a collective expectation of the proper behaviour of actors

⁶ Didier Bigo & Anastassia Tsoukala (eds) (2006), *Illiberal practices of liberal regimes: the (in) security games*, Paris: l’Harmattan.

with a given identity), do have an impact even in the absence of coercive tools. This impact should be considered in terms of the dynamics of norms socialisation, institutionalisation and habitualisation (Risse & Sikkink, 1999). As mentioned above, it would be simplistic to consider these soft-law type instruments as the result of quiet and undisputed diplomatic negotiations among experts at international level. Those instruments (recommendations and best practices) are no more than the result of exchanges among professionals sharing different interests. As such, the consensus they are reaching in the elaboration of international guidelines reflects the lowest common denominator among actors coming from different professional and national backgrounds. Paradoxically, one of the major effects of these soft law-type instruments is that their informal characteristics render them highly and quickly exportable. They are conceived precisely as ready-to-use guidelines. Interestingly, one of the G8 judicial experts we met stated:

Of course we would face problems of legal interpretation if we were to go further into detail in these general recommendations. But in the G8 Experts Group, the task is to reach consensus around general principles and guidelines that can be applied in many different countries.

This quote clearly illustrates that the time of action has overlapped the time of law. An interesting research hypothesis might be that best practices and recommendations constitute one of the most efficient tools in terms of promotion and diffusion of practices at the international level.

This hypothesis is supported by the fact that many of these international experts at the core of norms elaboration and as demonstrated earlier, circulate from one instance to the other. As such, the Lyon/Roma Group constitutes an exceptional platform of communication compared to other international-level experts groups. Experts from four EU countries, one influential Asian country, North American countries and Russia are all equally represented within the G8. Regarding the issue of transnational organised crime and terrorism, it should not be forgotten that EU Commission observers participate at every level of the G8 system, from the Experts Group to ministerial and head of states and government meetings. Moreover, and as described earlier, most of the G8 experts are involved in similar working groups within the UN, the EU or the OECD. This mobility, from one working group to the other, across national boundaries and international bodies, is part of the explanation as to why norms circulate and are diffused. The multiplication of international meetings favours interactions, and gives root to a horizontal negotiations space that allows its participants to socialise beyond national bureaucracies, but also to get socialised to collectively defined practices and recommendations. These actors can be seen as norms entrepreneurs, as their role is critical for norm emergence because it “calls attention to issues by using language that names, interprets and dramatizes them” (Finnemore & Sikkink, 1998).

Therefore, a focus on the actors elaborating these norms is essential to the understanding of the logics and professional dynamics of actors involved in judicial and police cooperation, which in turn leads to the homogenisation and harmonisation of collective practices and second, in the analysis of norms circulation, diffusion and promotion.

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