

***Transnational Organised Crime: Challenges to Criminal
Justice Functionaries***

von

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Transnational Organised Crime: Challenges to Criminal Justice Functionaries



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Introduction

- With the changing social structure from simple to complex crime trend is also changing like organised crime, cyber crime, terrorism etc.
- Globalization, Urbanization and Industrialization has helped Organised crime offenders to develop transnational linkage.
- The cost to the World community caused by offenders includes not only loss of billions of dollars, loss of life and physical injuries, but also causing threat to security of sovereign nations (Juliet Berg, 1998).

Magnitude

- In **2013**, Europol reported the presence of at least **3,600 internationally operating Organised Crime Groups (OCGs)** in the European Union (*EUROPEAN UNION serious organised crime threat assessment, 2017*).
- In **2017** approximately, **5,000 organised crime groups** are reported to be operating in countries of European Union having transnational linkages (*World Drug Report, 2017*).
- The global market for illicit fire-arms is estimated at **US\$170-320 million per year**.
- Around 2.5 to 3 million migrants are smuggled from Latin America to the United States of America every year generating US \$6.6 billion profit to the smugglers (*organised crime has globalised and turned into security threat, 2019*).

Origin And Development Of Organized Crime

- 12th century, peasants in Sicily revolted against French Rulers. Those group of people were called **Mafia**.
- February 1986 to 30 January 1992 Maxi Trial was conducted in Sicily resulting several hundred convictions of leading Mafia.
- Many of the Mafia escaped from arrest fled to the United States of America (USA) and tried to dominate American Mafia (*Mafia Trial, 2008*) who were mainly Irish people immigrated to USA 1820 to 1850 entered into politics and took over the Democratic Party

Contd.

- The Members of political party used to get crime committed by hiring criminals at grass-root level, like organized crime Mafia (Audett, 1954).
- Petty criminals including, pick- pocketers, pimps, etc. used to get order from the political leaders for getting the vote casted in favour of them.
- They were in the voter list for costing vote in favour of Irish people.

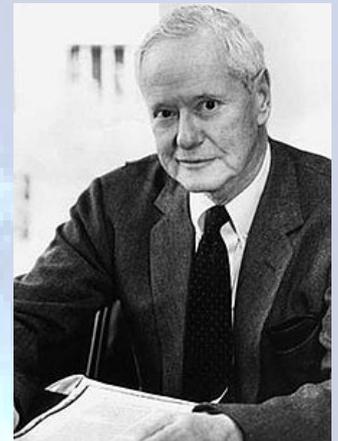
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- Finally prohibition movement in United State of America in the year 1785 *{Dr. Benjamin Rush, Surgeon General of the Continental Army and a signer of the Declaration of Independence, wrote a pamphlet declining the use of alcohol (Hamm, 1995) . The pamphlet helped people to start a movement prohibiting use of alcohol}* mobilized criminal elements in an unprecedented manner and gave birth to new level of criminal organizations *(Howard Abadinsky, 2003)*.
- The **modus operandi** (method of committing crime) of organized crime offenders became more complicated and spread their activities in various parts of the world.

Causes

Sociological causes

- Criminal behavior is **closely linked** with society. Some persons are not able to bear the **pressure** when social change takes place and they may **adopt non-conforming behavior** to achieve the **goal** rather than the conforming behavior (*R. K. Merton, 1938*).
- Organized crime is a normal response to **pressures exerted** on certain persons by the **social structure** wherein institutional control becomes less effective. Innovation is adopted by criminals to become rich easily (*Merton, 1938*). 96.6% respondents stated that lack of social control was most prominent reason for increasing trend of organized crime.

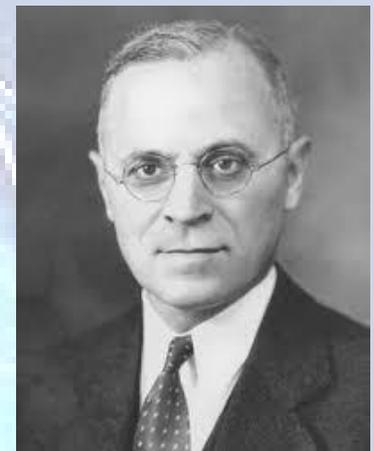


R. K. Merton

- Crime is linked with social scenario of a particular area for example; there might be illegal supply of liquor in the places where its supply was prohibited.
- There might be demand for brothels in the area where migrant labors had been living that came to earn money leaving family behind.
- The ‘**end justifies-the-means**’ doctrine becomes a guiding – tenet for action.(*Howard Abadinsky, 1994*).
- Not only this but Organized crime racketeers learn the technique of committing crime in close interaction with other criminals (*Edwin H. Sutherland,1973*).



Howard Abadinsky



Edwin H. Sutherland

Contd.

- **96.6%** respondents stated that lack of social control was most prominent reason for increasing trend of organized crime.
- **32.2 %** officials in Mumbai and **59.3%** officials in Delhi considered demand of goods and services as one of the reasons for increasing rate of organized crime cases

Economic factors

- Steven F. Messner and Richard Rosenfeld (2001).
- Believed that the **desire to succeed economically** becomes so strong in some society that other social institutions **loose** their ability to **control behavior** (therefore, poor criminals were becoming rich easily, supported by 96.6% officials in Mumbai and 88.7% respondents in Delhi).
- Because Organized crime Mafia had been paying large sum of money to the offenders involved in committing crime on their behalf.



Steven F. Messner and Richard Rosenfeld

Contd.

- Large number of respondents said (87.7%) that destitute who did not get proper employment were more vulnerable to get involved in commission of organized crime.
- The **increase** in financial business is not matched by parallel regulatory measures.
- Mafia shifts their activities in the areas where illegal and strict regulation has been lacking and the origin of the source of money is not checked.

Psychological Factors

- According to **Sigmund Freud**, people whose **superego is strong**, it prevents them to commit anti-social act. But people whose superego is weak they adopt anti social behavior and commit crime.
- People having **weak superego** if come into the contact of criminal group they easily get involved into criminal activity (accepted by more than 78.5% respondents).



Sigmund Freud

Legal And Administrative Reasons

- According to (Hirschi, 1969) crime is committed when **individuals bond to society is weak** either by internal or external restraints. External restraint includes fear of punishment.
- Organized crime has been increasing due to **lack of proper implementation of laws** (90.8% Criminal Justice Functionaries opined)
- 90.2% officers revealed that **complicated and time consuming** legal procedure is the biggest loophole in Criminal Justice System.
- Syndicates have developed better networking in comparison to Law Enforcement Agencies (informed by 84 % respondents).
- There is a **lack of cooperation** among Law Enforcement Agencies between different sovereign nations (informed by 72.3 % respondents).
- **Definition** of organised crime itself differs in domestic legislations of various nations (informed by 84.3 % respondents).

Definition

- **Article 2** of the **United Nation Convention Against Transnational Organized Crime** provides that *“organised criminal group shall mean 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”* (G.A. Resolution 55125 of 15th Nov. 2000).
- According to **Interpol’s Organized Crime Unit** *“Any group of criminals that have a corporate structure, whose primary objective is to obtain money and power through illegal activities often surviving on fear and corruption”* (<http://www.interpol.int/Crime-areas/Organized-crime/Organized-crime>).

Characteristics

- Continuity
- Structure
- Membership
- Criminality
- Corporate structure
- Violence
- Power/Profit goal
- Conspiracy
- Specialist support

- **Continuity**- criminal group operate beyond the lifetime of individual members.
- The criminal group is **structured** as a collection of hierarchically arranged inter dependent persons devoted to commit crime.
- **Membership**- the membership in the core criminal group is restricted and based on common traits such as ethnicity, criminal background or common interests.
- **Criminality**- the criminal group relies on continuing criminal activity to generate income.
- **Violence**- violence and the threat of violence are an integral part of a criminal group.

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- *Power/Profit goal*- the members of the criminal group aim at maximizing the group's profits.
- *Conspiracy*- members of syndicate indulge into criminal activity after having consensus of its members.
- *Specialist support*- syndicates rely on skilled individuals or specialist support to assist in the attainment of group's goal.
- *Corporate structure*- organised crime functions like corporation. They appoint a leader who is assisted by other members in hierarchical structure.

Challenges to Criminal Justice Functionaries

- **Offender absconds** to foreign country after committing crime
- **Evidence** is available in foreign country
- **Witnesses** are available in foreign country
- **Property purchased** out of the proceeds of crime is available in foreign country
- **Illegal Money** is kept in foreign bank

United Nations Initiatives

- United Nations has adopted **United Nations Convention Against Transnational Organized Crime** on 15 November, 2000 (UN TOT).
- Model Treaty on Extradition [**Extradition Treaty and Model Treaty on Mutual Assistance in Criminal Matters** (MLAT)] had already been adopted by the General Assembly of United Nations.
- **INTERPOL** provides a unique range of essential services for law enforcement community to optimize the International effort to combat crime.

Empirical Study

- An empirical study was conducted in India
- Sample size -100
- Data was collected from Criminal Justice Functionaries involved handling transnational organised crime
- Duration of the study (2010-2018)

Constraints In Sharing Of Data Base

- **Sovereign nations are reluctant in sharing database relating to the offenders under the pretext of inconsistency with domestic legislation.** (80 percent respondents disclosed).
- Despite there being a provision under **Article 1** of The UN Convention against TOT that Sovereign nations should **foster and enhance close international** cooperation in order to tackle the crime .
- Further **Article 3** of the Convention mandates that member countries should provide the **widest measure of mutual assistance** to one another in investigation, prosecution and judicial proceedings in relation to the offences.

Issues In Joint Investigation In Foreign Nations

- Requested nations do not permit access of records to the joint investigation team (65 percent respondents agreed).
- **Controlled delivery** and **undercover operation** are not successfully conducted because permission for undercover operation and controlled delivery is refused in member States (70% respondents disclosed) and also in non member States (80% officers informed).
- Because sovereign nations did not want to take a risk as both the operations are risky.
- Despite there being a provision under Article 19 of the UN Convention that sovereign shall enter into bilateral or multilateral agreements, for establishing joint investigation bodies in collaboration with foreign nations.

Example -

- On 13 June, 2011 French authorities requested Morocco National security agency –to organize a controlled delivery.
- To arrest a criminal organization involved in drug trafficking between Morocco and the Paris region, in France.
- French national was appointed to supervise the transport of an unknown amount of controlled drugs. Concealed in an oil cargo.
- Van was closely monitored until reaching the location of the cargo's unloading.
- 11 people were apprehended cannabis resin was seized (case law database-UNODC downloaded on 10-5-2019, <https://sherloc.unodc.org/sheloc/cldb>)

Example

- An young lady Rachel Hoffman who was caught in raid by police for possession of cannabis with intent to sell and maintaining a drug house. She was made an under cover agent by the police.
- While conducting a major under cover operation for Tallahassee police, she was killed and her body was found in Perry(Florida)
- She was not a trained in handling under cover operation.
- Training of undercover agent is very important. (case law database-UNODC downloaded on 10-5-2019 <https://sherloc.unodc.org/sheloc/cldb>)

Problems In Victim & Witness Protection

- **Differences in legislations** of various countries and **lack of infrastructure** in many sovereign nations are not able to provide **protection to victim and witnesses** informed by (50% respondents only in 30% cases respondents) were able to get cooperation from requesting nations while getting testimony recorded through video conferencing and relocation of witnesses.
- Despite **Article 24** of the UN Convention mandates that each State party **shall take appropriate measures for witness and victim protection.**
- **Example** -In case namely {Jag Mohan @ Mohar Singh v/s Commissioner of Police Delhi {2007 (1) JCC 292} accused was acquitted in 6 cases out of seven pending for trial either due to witnesses turned hostile or killed.

Difficult To Obtain Information Of Offenders And Property In Foreign Nations

- **Mostly on the pretext of administrative system foreign nation do not share data specially relating to whereabouts of the offenders (60% respondents).**
- **Though there is a provision under Article 26 of the UN Convention that each State party shall encourage to supply information useful for investigative and evidentiary value to investigator in foreign State.**

Constraints In Examining Objects, Sites And Recording Statements In Foreign Country

- Many times requested nations **refuse** the permission to conduct investigation on the pretext of **prejudicing the sovereignty, security & public order of requested State**, if they do not want to provide assistance to the requested nation (more than 60 percent cases).
- (75%) Investigating Officers found it difficult to record statement and examine crime scene abroad.
- Despite, **Article 1 (e)** of MLAT permits mutual assistance in examining objects and sites and recording statements from persons required for investigation in foreign nations.

Difficult To Get Documentary Evidence From Abroad

- It is difficult to obtain **documentary evidence** from foreign country (75% respondents informed)
- 100% respondents felt that **time taken** to obtain judicial order for obtaining document from abroad is too long.
- **Banks** are reluctant to give information on the ground of secrecy 80% respondents said.
- 91.7% Investigating Officers stated that it is not possible to **receive evidence in an acceptable form** as required by the Court of Law of requesting nation because authorities in foreign countries are not aware about the legally accepted form of producing evidence in requesting nations.
- Though **Article 6 MLAT** provides that the request for mutual assistance shall be **carried out promptly**, in the manner provided by the law and practice of the requested State.

Difficulty In Arresting Fugitive Criminal

- **Bhavesh Jayantilal Lakhani v. State of Maharashtra** (2009, Indian Kanoon Org.) - Arrest in India is not automatic in case of red corner notice and fugitive criminal can only be apprehended according to the provisions of the **1962 Extradition Act**.
- A red corner notice per se does not give it a status of warrant of arrest; It is merely a request of issuing authority to keep surveillance on the person and provisionally or finally arrest the wanted person for extradition.

Non Sharing Of Analytical Expertise

- Many sovereign Nations **do not share data** collected and analysed by **academic communities** on the pretext of **confidentiality** (70% respondents told).
- **Article 28** of the Convention provides that each State party shall **analyze trend of organized crime** in its own territory with the **help of academic and scientific communities**.

Delay in Extradition

- **Extradition of offenders is complicated and time consuming and without satisfying requirement of domestic legislation of requested States, offender cannot be extradited.**
- According to **Article 16 (8)** of the Convention, State parties must, subject to their domestic **laws endeavour to expedite extradition** procedures and to simplify evidentiary requirements.

Example

A noted organised crime offender (Abu Salem) started his criminal career from 1989 as a driver for the (Dawood Ibrahim gang) used to deliver weapons, illegal cash and goods to different gang members in Mumbai and became organised crime Mafia.

In 1993, he left the country and moved to Dubai when good number cases were registered against him including Mumbai serial blasts case.

On 18. 09. 2002 Abu Salem was detained by Portuguese Police at Lisbon on the basis of Red Notice.

In December 2002, GOI requested extradition of Abu Saleem in 09 criminal cases to Portugal (a non treaty state)



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The request was made on the basis of **International Convention for the Suppression of Terrorist Bombings.**

- Assurance of Reciprocity.
- Portugal and India are both signatories to the Convention
- In the year 2004, Court in the Portugal agreed to extradite Abu Salem on the condition that he should not be prosecuted for offences other than those for which his extradition has been sought.
- Not be re-extradited to any their country.
- No death penalty should be granted.

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- In the meantime, the Portuguese court sentenced Salem to four years imprisonment for illegally entering and staying in Portugal on forged passport.
- The court also ordered that their extradition could be made only after they have completed their prison term.
- 30-7-2004, he filed an appeal in Supreme Court of Portugal against the order of High Court of Lisbon, which was rejected.
- He further appealed in the Constitutional Court, which was also rejected. In 2005, he seeks political asylum. Finally he was handed over to Indian officer on 10.11.2005.
- Abu Salem, convicted with Life Imprisonment by Indian court in June 2017 in connection with the 1993 Bombay blasts case.

Non- Fulfilment Of The Principal Of ‘Dual Criminality’

- Extradition of criminals from one country to another becomes difficult due to non-fulfilment of the principal of ‘**Dual Criminality**’ (70 respondents informed).
- Despite there being a provision that **Fugitive criminal shall be extradited** to the other country upon request in the treaty state (Article 1 of the Extradition Treaty).

Refusal Of Extradition On The Ground Of Violation Of Human Rights Of Fugitive Criminal

- Around 70.2% respondents informed that extradition is refused on the **pretext of torture and inhuman** degrading treatment of fugitive criminal in prisons of requested nation.
- **Example:** A key accused involved cricket match fixing case was discharged by District Judge in South Africa on the presumed violation of his human rights in prison after extradition to requested nation.
- Though the judge found a prima facie case against the suspect over his role in the fixing of "cricket matches played between India and South Africa in February - March 2000".
- In assurance by the Govt. Of India that respect shall be accommodated in a exclusive cell in prison with proper safety. On 27th Feb, 2019, Home Secretary UK signed the order of Sanjeev Chawla's extradition to India. (PTI London March 02, 2019, www.ndtv.com.uk-court)

Refusal Of Extradition On Optional Grounds

- Extradition is refused on optional grounds without assigning reasons (80% respondents opined).
- State can refuse extradition of fugitive criminal on optional grounds (Article 4 of the Extradition Treaty).
 - 1-if requested State decides not to institute or to terminate proceedings against the offender.
 - 2-offence is punishable with death penalty.
 - 3-Offender has been sentenced or would be liable to be sentenced or tried in requesting State by extra-ordinary ad-hoc Court.
 - 4-Extradition would be incompatible with humanitarian consideration.

Lack of guidelines to surrender offender if concurrently demanded by two countries

- Due to lack of guidelines extradition under this situation solely depends on discretion of requested State.
- If same person is concurrently requested for extradition by two States. The requested State may decide at its discretion to which of the requesting State the person is to be extradited. (Article 16 of the Treaty)

Difficult to get offender extradited in emergency situations

- Many times arrest is delayed by foreign nations on **non supply of information** (70.5% respondents) found it difficult to supply information in the format of foreign State leading to delayed arrest.
- While under **Article 9** of the Extradition Treaty in emergency, requesting State may apply for **provisional arrest** of the fugitive criminal.

Non-cooperation due to lack of authenticated documents

- (65.4% respondent) disclosed that **many times countries become rigid because certification or authentication is the requirement of the domestic law of the requested State.**
- **Such authentication may not be the requirement in requesting state or even in many cases concerned officers are not aware about the standard of authentication required.**
- Document supplied in support of extradition request does not need certification or authentication (Article 7 of the Extradition Treaty).

Difficulty In Extradition Accused's Absconds To Different Nations

- **Case** - Six Romanian nationals having experience and advanced technical knowledge in hacking bank data, **made conspiracy to commit an organized crime**, came to India and installed the electronic devices at State Bank of India (SBI) ATM counter, Thiruvananthapuram. They collected the decoded data which were hacked from the ATM machine, withdraw money from ATM using forged magnetic strip cards.
- The 1st accused was arrested from Mumbai and others escaped abroad. Red notices were published against them. One accused IONUT ALEXANDRU MARINOIU was detained at Nicaragua. He was formally extradited to India. The extradition request against one accused pending in other nations.

Suggestion /Recommendations

- Common public should be **sensitized about ill consequences** of organized crime as well as about the **importance of joint family system** to have better social control on youth. This may be done by way of **mobilizing** non-governmental organisations, media and civil society.
- **Emotionally imbalanced** youth should be identified at school level. They should be provided **proper counselling** on the ill effect of organized crime to save them from indulging in criminal activity.
- **Extradition** procedure should be **simplified**. **Deportation** should be **encouraged** as an alternative means to get back offender in India by way of having dialogue with appropriate agencies in foreign country.

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- **Sovereign nations** should discuss with one another to find out ways and **means for cooperation** and help in Investigation of organised crime cases.
- **Sovereign nations** should take **special initiative** and discuss the issue with the concerned authorities in foreign country so that authorities in foreign countries may not only permit to conduct investigation through “**controlled delivery**”, but would also cooperate in tracing the witnesses.

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- **United Nations** should take initiative to collect data from sovereign nations having **evidentiary value**, relating to transnational organized crime so that database containing such data, may be established and shared with treaty and non-treaty both the States.
- **United Nations** should take initiative of **collecting research data** under its aegis and makes it available on its website so that it may get wide circulation and become useful for every one.
- **United Nations Office on Drug Control Program** should organize **special training** for officials working at grass root level.

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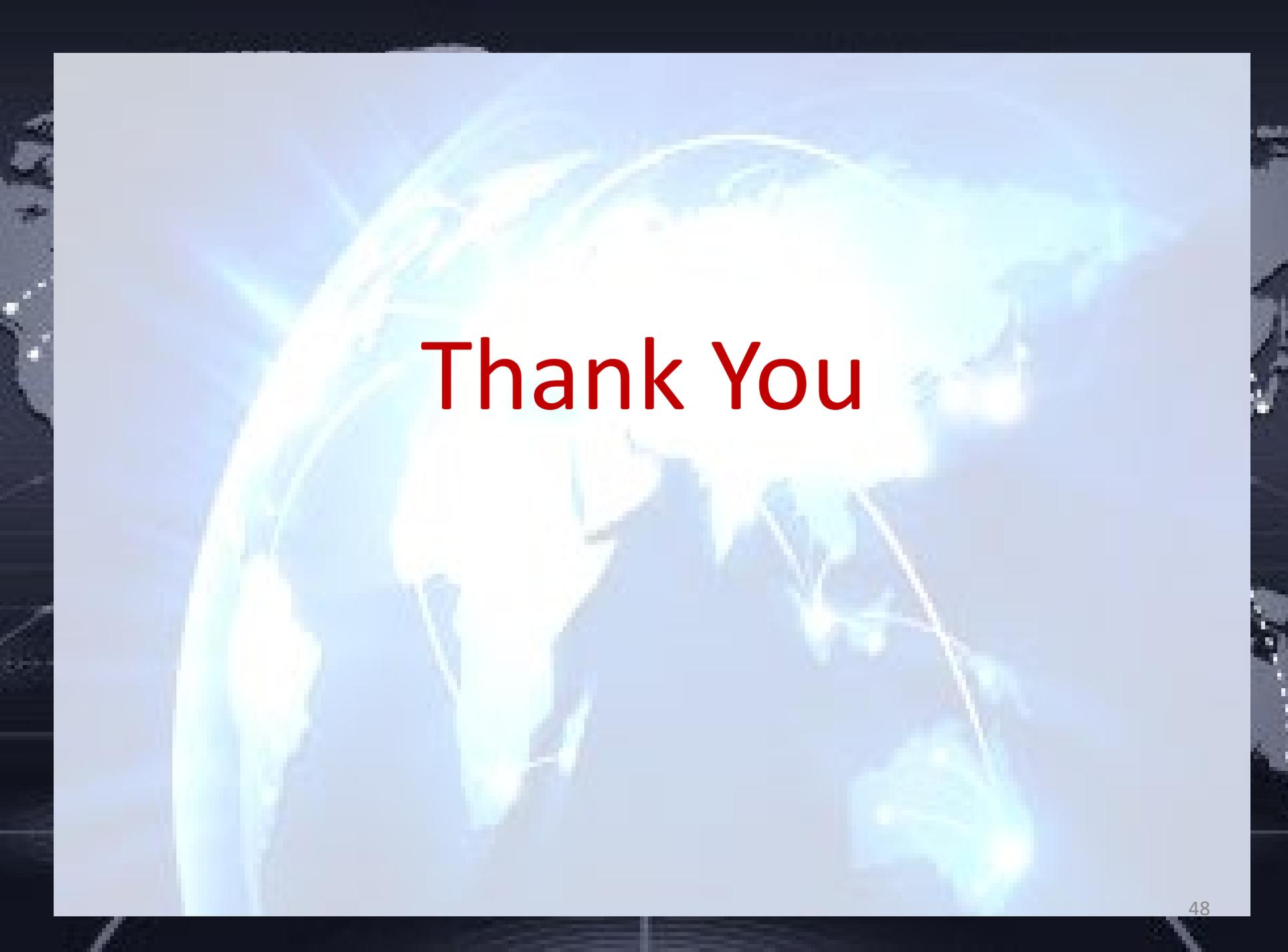
- **United Nations** should issue guidelines to the member States while asking the requesting nations who seeks extradition of offenders for fulfilling the requirement of principle of dual criminality, “**crux of crime**” committed should be considered “**terminology**” used for the offence should not be required to be fulfilled by requesting nation.
- At the time of **contracting treaty**, it should be made compulsory that the treaty **state shall not refuse assistance** in criminal matter on the pretext of false grounds unless and until these grounds are actually found. Some mechanism should be provided to prove that the grounds for refusal are actually persisting in the requested nation.

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- For increasing better cooperation,
 - **INTERPOL** should come to the **effective assistance** of affected countries. Keeping in view that INTERPOL is overloaded and overworked.
 - It is the time to set up **regional units** of INTERPOL in Asia, Africa, Arab and other countries.
- Proper guidelines should be issued by United Nations to extradite offender in case, the request is concurrently made by two countries so that requested country cannot grant extradition arbitrarily

Contd.

- Some mechanism should be provided to **prove that the grounds for refusal** are actually persisting in the requested nation.
- Sovereign nations must enact the **relevant legislation, negotiate** the necessary instruments and establish some form of **administrative framework** for effective implementation of the provisions of Model Treaty on Mutual Assistance in Criminal Matters.
- Prior **discussion with requesting nation** should be done before refusing extradition on optional grounds. Such discussion should be made compulsory.
- Accordingly **optional protocol** should be issued under Article 4 of the Extradition Treaty.



Thank You