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THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME *and* INTERNATIONAL HUMAN RIGHTS LAW



ISSUE PAPER

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INTRODUCTION

The United Nations Convention against Transnational Organized Crime was adopted by the General Assembly on 15 November 2000. Since that time, it has become one of the world's most widely ratified treaties,¹ with a total of 190 parties as at the time of writing. Notwithstanding the importance of human rights to policymaking in the area of crime prevention and criminal justice and the widespread support enjoyed by the Convention, there has been only limited scholarship to date on the interrelationship between the Convention and international human rights law.

The aim of the present issue paper is to contribute to filling that gap. The paper is based on the fundamental premise that crime prevention and criminal justice are inextricably linked to human rights on multiple levels, and it was developed by the United Nations Office on Drugs and Crime (UNODC) Global Programme on Implementing the Organized Crime Convention: from Theory to Practice. The present paper, and an issue paper on gender in the implementation of the Organized Crime Convention,² were prepared in order to support the mainstreaming of human rights and gender into national and regional legislative frameworks and strategies and other policies to prevent and combat organized crime. More broadly, the present paper seeks to offer States parties to the Convention and all relevant stakeholders a tool that may help in developing and improving laws, strategies and other policies aimed at strengthening the implementation of the Convention in full compliance with international human rights law.³

The paper is divided into two chapters. Chapter I sets out foundational concepts and provides an introduction to both the Organized Crime Convention and international human rights law. It then covers the relationship between the two regimes and establishes the key message of the paper: that the Convention should not be interpreted and applied in isolation, but rather in the light of international human rights law, and that the two regimes can be interpreted and applied harmoniously and can mutually reinforce each other. On that basis, some of the interactions between specific provisions of the Convention and international human rights law are considered in chapter II.

KEY POINTS

Throughout the present issue paper, key points are summarized in boxes such as this one. The boxes cover only the key points discussed in the paper and do not address other important human rights issues that are beyond the scope of the paper. The scope and limitations of the paper are discussed in greater detail below.

¹ For the sake of simplicity, the term “ratified” includes accession, acceptance and approval in this context.

² UNODC, *Organized Crime and Gender: Issues relating to the United Nations Convention against Transnational Organized Crime* (Vienna, 2022)

³ See, already from the early years of implementation of the Convention, the Bangkok Declaration on Synergies and Responses: Strategic Alliances in Crime Prevention and Criminal Justice (General Assembly resolution 60/177, annex), para. 4.

SCOPE AND LIMITATIONS

The interrelationship between the Organized Crime Convention and international human rights law is an extremely broad topic. The Convention contains more than 30 substantive articles concerning domestic responses and international cooperation to prevent and combat transnational organized crime, most of which contain multiple obligations or recommendations for States parties, such as article 18, on mutual legal assistance, which is extensive enough that it could be considered a “treaty within a treaty”.

International human rights law is even more complex. It is based on multiple sources and multiple institutional structures. It entails guarantees for multiple rights, each entailing multiple obligations. Those obligations are owed to multiple groups of people. Moreover, human rights and the related obligations intersect with measures such as those contained in the Organized Crime Convention in multiple ways.

It is not possible for the present paper to cover each of the manifold dimensions of the interrelationship between the Organized Crime Convention and international human rights law. Accordingly, some remarks on the scope of the paper and its limitations are in order. The scope of the paper is limited across at least six dimensions: sources, subjects, rights holders, rights, Convention provisions and human rights issues.

Sources

In researching and drafting the present paper, a decision was made to focus on particular international and regional sources of human rights obligations. The paper gives primary consideration to instruments adopted under the auspices of the United Nations, in particular the Universal Declaration of Human Rights and the United Nations core human rights conventions,⁴ read in the light of the jurisprudence of the treaty bodies established under those instruments. The paper also addresses a select number of regional human rights treaties and systems, namely, the African Charter on Human and Peoples’ Rights and the case law of the African Court on Human and Peoples’ Rights and the African Commission on Human and Peoples’ Rights; the American Convention on Human Rights and the jurisprudence of the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights; and the European Convention for the Protection of Human Rights and Fundamental Freedoms and the jurisprudence of the European Court of Human Rights.

Subjects

States are the primary subjects of international law, including international human rights law. International human rights law also binds other international legal persons, including international organizations⁵ such as the United Nations⁶ and the European Union, which is a party to the Organized Crime Convention. The present paper covers only the international human rights obligations of States parties to the Convention. It does not address the obligations of international organizations or other entities.

Rights holders

The Organized Crime Convention involves measures that affect both natural and legal persons.⁷ Legal persons enjoy certain rights that may be affected in the implementation of the Convention, such as the rights to freedom of expression, due process and protection of property.⁸ The primary rights holders under

⁴ See the section entitled “Sources of international human rights law” below.

⁵ In this context, the term “international organization” is used in a broad sense and also includes, where appropriate, regional organizations.

⁶ See United Nations Office on Drugs and Crime (UNODC), “UNODC and the promotion and protection of human rights: position paper” (2012) p. 5.

⁷ See United Nations Convention against Transnational Organized Crime (United Nations, *Treaty Series*, vol. 2225, No. 39574), art. 10.

⁸ See Piet Hein van Kempen, “Human rights and criminal justice applied to legal persons: protection and liability of private and public juristic entities under the ICCPR, ECHR, ACHR and AfChHPR”, *Electronic Journal of Comparative Law*, vol. 14, No. 3 (2010), pp. 13–24.

international human rights law are, however, natural persons.⁹ The present issue paper covers only the position of natural persons under international human rights law.

At the end of chapter I, it is explained that States parties must take into consideration the rights of four main groups: (a) persons suspected, accused or convicted of offences covered by the Convention; (b) other persons affected by measures adopted under the Convention for the repression of crime; (c) victims, witnesses and persons collaborating with authorities; and (d) persons or groups that are vulnerable to crimes covered by the Convention. The present paper focuses in particular on human rights issues affecting persons suspected, accused or convicted of offences covered by the Convention, as well as victims, witnesses and persons collaborating with authorities.

Rights

The focus of the present paper is on civil and political rights. Resources related to economic, social and cultural rights are considered in chapter I, in particular with regard to the tripartite typology of States' human rights obligations. Chapter II focuses only on civil and political rights in the implementation of the Organized Crime Convention. That focus was chosen for the sole purpose of restricting the scope of the paper to what was achievable within the constraints of the project; it does not reflect a hierarchy of any types of rights over others. Moreover, the paper does not cover issues relating to all civil and political rights.

Convention provisions

The Organized Crime Convention contains numerous measures promoting international cooperation to prevent and combat transnational organized crime. Further measures are set out in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, the Protocol against the Smuggling of Migrants by Land, Sea and Air, and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the Convention. The scope of the present issue paper is limited to human rights issues relating to the implementation of the Convention as such; issues relating to the implementation of the Protocols are not considered. Nevertheless, the Convention and the Protocols are interrelated. Accordingly, issues concerning the implementation of the Protocols are discussed where it sheds light on issues concerning the implementation of the Convention.

Given the constraints of the project, it was not possible to cover all provisions of the Organized Crime Convention. Chapter I of the present paper addresses the interrelationship between the Convention and international human rights law from a general perspective. In chapter II, human rights issues in the implementation of specific provisions of the Convention are considered. The methodology by which those provisions were selected is explained in the introduction to chapter II.

Human rights issues

Lastly, it must be said at the outset that the present paper is not a comprehensive account of all possible human rights issues relating to the limited sources, subjects, rights holders, rights and Convention provisions that it covers. Rather, the paper seeks to provide a general stocktaking of key considerations in the implementation of the Convention, with a focus on a select number of issues. It does not address in detail a number of important aspects that deserve further elaboration but could not be covered within the constraints of the project, for example the issue of gross violations of human rights committed in the context of preventing and combating organized crime.

⁹The International Covenant on Civil and Political Rights and the International Convention on the Elimination of All Forms of Racial Discrimination, for example, apply only to natural persons (*ibid.* p. 2). See also International Court of Justice, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, General List No. 172, Judgment, 4 February 2021, para. 108.

Chapter I.

FOUNDATIONAL CONCEPTS

As noted in the introduction, the key message of the present issue paper is that the Organized Crime Convention should not be interpreted and applied in isolation, but rather in the light of international human rights law, and that the two regimes can be interpreted and applied harmoniously and can mutually reinforce each other.

Chapter I of the paper establishes this key message by providing a brief introduction to the Organized Crime Convention and then to international human rights law. Thereafter, the interrelationship between the two regimes is examined. The foundational concepts explained in chapter I provide a basis for the analysis of specific human rights issues contained in chapter II.

INTRODUCTION TO THE ORGANIZED CRIME CONVENTION

The purpose of the Organized Crime Convention, as stated in article 1, is “to promote cooperation to prevent and combat transnational organized crime more effectively”. The articles of the Convention require and encourage States parties to establish a number of measures to that end. The substantive provisions of the Convention may broadly be classified into measures that concern:

- (a) Criminalization of particular conduct;
- (b) Investigation, prosecution and adjudication;
- (c) International cooperation and assistance;
- (d) Protection of and assistance to witnesses and victims;
- (e) Prevention.

Those measures are further examined and analysed in chapter II of the present paper.

The scope of application of the Convention is defined in article 3. Under that article, the measures contained in the Convention apply, except where the Convention provides otherwise, to the prevention, investigation and prosecution of offences established in accordance with its criminalization provisions and to “serious crime”, where such offences are transnational in nature and involve an organized criminal group.¹⁰

¹⁰ Organized Crime Convention, art. 3 (1).

Several aspects of article 3 merit further explanation. First, for the purposes of the Convention, “serious crime” is defined as “conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty”.¹¹ The use of this notion of “serious crime” to define the scope of the Convention with reference to the domestic law of States parties provides the Convention with sufficient flexibility to apply to a broad range of manifestations of transnational organized crime, including new and emerging crimes.¹² Second, under article 2 (a) of the Convention, an organized criminal group is defined 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

Article 2 (c) of the Convention also includes further clarification as to the meaning of a “structured group”. Lastly, article 3 (2) sets out when an offence is considered transnational in nature for the purpose of the application of the Convention.

INTRODUCTION TO INTERNATIONAL HUMAN RIGHTS LAW

The promotion and protection of human rights is one of the pillars of the United Nations system and more broadly of contemporary international law.¹³ The birth of this branch of international law is linked to the establishment of the United Nations, albeit with some important antecedents, such as the Slavery Convention signed under the auspices of the League of Nations in 1926.¹⁴ The Charter of the United Nations includes several references to human rights; in addition, a key development in this respect was the adoption by the General Assembly of the Universal Declaration of Human Rights in 1948, which inspired the main international human rights treaties promoted by the United Nations and its specialized agencies, as well as treaties at the regional level.

The present section provides a brief introduction to several key concepts of international human rights law: its sources and institutional structure, the scope of its norms and when States parties may derogate from those norms, the difference between absolute and non-absolute rights, and the different components of international human rights obligations.

Sources of international human rights law

The source of States’ international human rights obligations can be found in – and outside of – numerous international and regional treaties. The General Assembly has adopted a number of treaties¹⁵ and other instruments in this field, among them the nine core international human rights instruments,¹⁶ namely (in chronological order of their adoption):

- International Convention on the Elimination of All Forms of Racial Discrimination
- International Covenant on Economic, Social and Cultural Rights
- International Covenant on Civil and Political Rights

¹¹ Ibid., art. 2 (b).

¹² See Dimitri Vlassis, “Drafting the United Nations Convention against Transnational Organized Crime”, in *Combating Transnational Crime: Concepts, Activities and Responses*, Phil Williams and Dimitri Vlassis, eds. (Oxon, United Kingdom, Frank Cass Publishers, 2001), p. 373.

¹³ See General Assembly resolutions 48/134 and 60/1.

¹⁴ United Nations, *Treaty Series*, vol. 212, No. 2861.

¹⁵ See United Nations Treaty Collection, Depositary, Status of Treaties, “Multilateral treaties deposited with the Secretary-General: chapter IV – Human rights” (available at <https://treaties.un.org>), which contains a list of 16 treaties and supplementing protocols in this field. Other chapters of the treaty database include treaties that protect the human rights of specific vulnerable groups, for example, chapter V (Refugees and stateless persons) or chapter VII (Traffic in persons).

¹⁶ See also Office of the United Nations High Commissioner for Human Rights (OHCHR), “The core international human rights instruments and their monitoring bodies”. Available at www.ohchr.org/en/professionalinterest/pages/coreinstruments.aspx.

- Convention on the Elimination of All Forms of Discrimination against Women
- Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
- Convention on the Rights of the Child
- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
- Convention on the Rights of Persons with Disabilities
- International Convention for the Protection of All Persons from Enforced Disappearance

In particular, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights and its two Optional Protocols, together with the Universal Declaration of Human Rights, which inspired them, form what is known as the International Bill of Human Rights.¹⁷ Regional organizations also serve as forums for the adoption of binding and non-binding instruments of international human rights law and provide institutional frameworks for monitoring compliance with the relevant standards. As mentioned above, the African Charter on Human and Peoples' Rights, the American Convention on Human Rights and the European Convention on Human Rights will be specifically considered in the present paper.

Human rights obligations may also stem from sources of international law other than treaties. In particular, States are bound by customary international human rights law. Notably, while the Universal Declaration of Human Rights as such is not formally binding, there is broad consensus today that many of its provisions reflect customary international law.¹⁸ A notable indication in this regard is the use of the Declaration as a basis for review within the universal periodic review process of the Human Rights Council.¹⁹

The standards for the protection of particular human rights under customary international law and the various international and regional human rights instruments to which States parties to the Organized Crime Convention are bound are not necessarily identical. Different human rights instruments may not provide for the protection of rights using the same terms and, moreover, similar wordings may have different meanings in different instruments.²⁰ Whenever different standards apply to the situation of an individual under different legal frameworks – either between treaties or between a treaty and customary international law – States must comply with all of their obligations by applying the highest applicable standard of protection.

KEY POINTS

- The international human rights obligations of States come from a variety of sources, including international and regional treaties and customary international law.
- Within the framework of the United Nations, there are nine core international human rights instruments.

¹⁷ See General Assembly resolution 217 (III); see also OHCHR, “Fact Sheet No. 2 (Rev.1): the International Bill of Human Rights” (1996).

¹⁸ Hurst Hannum, “The status of the Universal Declaration of Human Rights in national and international law”, *Georgia Journal of International and Comparative Law*, vol. 25, Nos. 1 and 2 (1996), p. 340.

¹⁹ Human Rights Council resolution 5/1, annex I, sect. A, para. 1 (b).

²⁰ See, for example, International Court of Justice, *Qatar v. United Arab Emirates*, para. 104.

Institutional structure

At the international level, a variety of courts, bodies and mechanisms are responsible for ensuring compliance with international human rights law. Within the United Nations, monitoring bodies and mechanisms are traditionally classified as those based on the Charter of the United Nations (Charter-based) and those created under international human rights treaties (treaty-based).

The principal Charter-based body of the United Nations is the Human Rights Council, which oversees the universal periodic review and the Council's complaints procedure, both of which are intergovernmental mechanisms, and the special procedures, which include special rapporteurs, independent experts and working groups fulfilling thematic or country-specific mandates in their personal capacity.²¹

As regards treaty-based bodies and mechanisms, compliance with each of the nine core international human rights treaties is monitored by a committee of independent experts known as a "treaty body". Each treaty body is established pursuant to its respective treaty, with the exception of the Committee on Economic, Social and Cultural Rights, which was established pursuant to a resolution of the Economic and Social Council.²² Each treaty body monitors the implementation of its respective treaty. Treaty bodies have different functions depending on the provisions of the treaty or resolution under which they are established, and also in the light of choices made by States parties to the respective treaties, such as declarations²³ or the ratification of or accession to optional protocols²⁴ recognizing the competence of the treaty bodies to receive and consider individual communications relating to the State party. All treaty bodies consider State reports and adopt concluding observations thereon, and they may also adopt general comments, which provide, inter alia, authoritative interpretations of provisions of the respective treaty. Depending on the instrument and the individual acceptance thereof by each State party, the treaty bodies may also examine inter-State and individual communications and/or set up commissions of inquiry. Notably, when examining individual and inter-State communications, treaty bodies make use of an adversarial procedure and exercise a quasi-judicial function.²⁵ In addition to the nine treaty bodies established pursuant to the core international human rights treaties, the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, established pursuant to the Optional Protocol to the Convention against Torture, exercises a preventive mandate focused on a proactive approach to the prevention of torture and ill-treatment.

Although the pronouncements of treaty bodies are not formally binding on the States involved in the proceedings,²⁶ they are authoritative determinations by organs established under the instruments that they are charged with interpreting.²⁷ States parties are thus bound to engage in good faith in the monitoring procedures of the treaty bodies and to take their findings into account. In addition, some human rights

²¹ See also Human Rights Council, "Human Rights Council subsidiary bodies". Available at www.ohchr.org.

²² Economic and Social Council resolution 1985/17.

²³ See, for example, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (United Nations, *Treaty Series*, vol. 1465, No. 24841), art. 22; International Convention on the Elimination of All Forms of Racial Discrimination (United Nations, *Treaty Series*, vol. 660, No. 9464), art. 14; International Convention for the Protection of All Persons from Enforced Disappearance (United Nations, *Treaty Series*, vol. 2716, No. 48088), art. 31.

²⁴ See, for example, Optional Protocol to the International Covenant on Civil and Political Rights (United Nations, *Treaty Series*, vol. 999, No. 14668), art. 1; Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (United Nations, *Treaty Series*, vol. 2131, No. 20378), arts. 1–2; Optional Protocol to the Convention on the Rights of Persons with Disabilities (United Nations, *Treaty Series*, vol. 2518, No. 44910), art. 1; Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (United Nations, *Treaty Series*, vol. 2922, No. 14531), arts. 1–2.

²⁵ See Human Rights Committee, general comment No. 33 (2008), para. 11.

²⁶ The level of compliance with treaty bodies' recommendations varies from State to State and may be binding. For instance, in *María de los Ángeles González Carreño v. Ministry of Justice*, Judgment No. 1263/2018, the Supreme Court of Spain held that the State must comply with decisions of the Committee on the Elimination of Discrimination against Women in meeting its obligations under the United Nations Convention on the Elimination of All Forms of Discrimination against Women.

²⁷ See Human Rights Committee, general comment No. 33 (2008), paras. 13, 15; compare African Commission on Human and Peoples' Rights, International Pen, Constitutional Rights Project, *Interights on behalf of Ken Saro-Wiwa Jr. and Civil Liberties Organisation v. Nigeria*, Communications Nos. 137/94, 139/94, 154/96 and 161/97, of 31 October 1998; African Commission on Human and Peoples' Rights resolution on the importance of the implementation of the recommendations of the African Commission on Human and Peoples' Rights by States Parties (ACHPR/Res. 97(XXXX)06).

conventions also include compromissory clauses that confer jurisdiction over inter-State disputes relating to their interpretation and application to the International Court of Justice.²⁸

At the regional level, a prominent monitoring function is entrusted to human rights courts within the African Union, the Council of Europe and the Organization of American States, which may receive complaints not only from States parties but also from individuals and organizations. In the Council of Europe, the European Convention on Human Rights envisages a right for individuals to submit an application directly to the European Court of Human Rights. In the Organization of American States and the African Union, individuals can submit communications to the Inter-American Commission on Human Rights and to the African Commission on Human and Peoples' Rights, respectively,²⁹ both of which exercise functions similar to those of the United Nations treaty bodies, but also have the competence to submit to the corresponding court cases against States that have accepted that court's jurisdiction. Both the Inter-American Court of Human Rights and the African Court on Human and Peoples' Rights can issue binding judgments and afford reparation directly to victims.

The multiplicity of sources and institutional structures associated with international human rights law does not, however, preclude its harmonized development, as those bodies engage in various forms of dialogue and cross-fertilization in their jurisprudence. Notably, the International Court of Justice has relied on the case law of regional human rights courts when dealing with reparations for violations of human rights³⁰ and ascribes great weight to the case law of United Nations treaty bodies, although it does not deem itself bound to follow that case law in the exercise of its own judicial function.³¹ Cross-fertilization also occurs in the interaction between international human rights law and the body of "transnational criminal law" that includes the Organized Crime Convention and other suppression conventions,³² and the Convention and its Protocols are relied upon at the regional level in the interpretation of the relevant human rights conventions.³³

²⁸ See, for example, Convention on the Elimination of All Forms of Discrimination against Women (United Nations, *Treaty Series*, vol. 1249, No. 20378), art. 29; International Convention on the Elimination of All Forms of Racial Discrimination, art. 22; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 30; International Convention for the Protection of All Persons from Enforced Disappearance, art. 42; International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (United Nations, *Treaty Series*, vol. 2220, No. 39481), art. 92.

²⁹ Individuals may also submit an application directly to the African Court on Human and Peoples' Rights if the State party to which the application relates has made a declaration accepting the jurisdiction of the Court to hear such cases pursuant to article 34 (6) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.

³⁰ Compare *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, *Compensation, Judgment*, I.C.J. Reports 2012, p. 324, paras. 13, 24, 33 and 40, relying on the case law of, inter alia, the European Court of Human Rights and the Inter-American Court of Human Rights; *Qatar v. United Arab Emirates*, para. 101. Within the United Nations, treaty bodies regularly coordinate in the framework of a broader effort to strengthen the effectiveness of the treaty body system; see OHCHR, Human rights bodies, "Treaty body strengthening". Available at www.ohchr.org. Regional human rights monitoring bodies also engage in judicial dialogue and cross-fertilization; see African Court on Human and Peoples' Rights, European Court of Human Rights and Inter-American Court of Human Rights, *Kampala Declaration*, signed in Kampala on 29 October 2019; *Joint Law Report 2019* by the African Court on Human and Peoples' Rights, the European Court of Human Rights and the Inter-American Court of Human Rights.

³¹ *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, *Merits, Judgment*, I.C.J. Reports 2010, para. 66; compare *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, I.C.J. Reports 2004, paras. 109, 136; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, *Judgment*, I.C.J. Reports 2012, paras. 101–102; *Qatar v. United Arab Emirates*, para. 101.

³² On this concept and its relationship to international criminal law, see Neil Boister, "Transnational criminal law?", *European Journal of International Law*, vol. 14, No. 5 (2013), p. 953–976.

³³ See European Court of Human Rights, *Rantsev v. Cyprus and Russia*, Application No 25965/04, Judgment, 7 February 2010; Inter-American Court of Human Rights, *Hacienda Brasil Verde Workers v. Brazil*, Series C No. 318, Judgment of 20 October 2016, discussed further in chapter I.

KEY POINTS

- At the international level, a variety of courts, bodies and mechanisms are responsible for ensuring compliance with international human rights law.
- Within the United Nations, these include Charter-based and treaty-based mechanisms and bodies.
- Compliance with the nine core international human rights treaties is monitored by treaty bodies.
- Compliance with regional human rights treaties is monitored by regional courts and commissions.
- The various international and regional treaty bodies, courts and commissions engage in various forms of dialogue and cross-fertilization of norms, which contributes to the harmonized development of international human rights law.

Scope of application of international human rights obligations

As regards the scope of application of international human rights obligations, the State organs that are bound by such obligations and the territorial and extraterritorial application of those obligations are discussed briefly below. First, international human rights obligations are binding on all State organs, including legislative, executive and judicial organs and other public or governmental authorities, whether at the national, regional or local level.³⁴ Second, each State is bound to comply with its international human rights obligations within its territory and when exercising its jurisdiction extraterritorially.³⁵ Notably, with regard to measures taken to prevent and combat organized crime, this may include acts of State agents exercising authority and control over an individual outside the territory of the State.³⁶

KEY POINTS

- International human rights obligations are binding on all State organs.
- Each State is bound to comply with its international human rights obligations within its territory and when exercising its jurisdiction extraterritorially.

Derogation from international human rights obligations

Some international and regional human rights treaties allow States to temporarily adopt measures derogating from their obligations to ensure certain human rights in times of public emergency.³⁷ While the exact conditions for lawfully derogating from human rights obligations differ between instruments, they generally require that there be a public emergency which threatens the life of the nation, that the State comply with procedural requirements for derogation, such as proclamation and notification, that the derogation not

³⁴ See Human Rights Committee, general comment No. 31 (2004), para. 4.

³⁵ *Ibid.*, para. 10; Human Rights Committee, general comment No. 36 (2018), para. 63; Human Rights Committee, *López Burgos v. Uruguay*, communication No. 52/1979 (CCPR/C/OP/1, para. 12.3); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, I.C.J. Reports 2004, p. 136, para. 111; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, p. 168, paras. 216, 243; European Court of Human Rights, *Al-Skeini and others v. United Kingdom*, Application No. 55721/07, Judgment of 7 July 2011, paras. 131–140; Inter-American Commission on Human Rights, *Coard and others v. United States*, Case No. 10.951, Report No. 109/99, 29 September 1999, para. 37; Inter-American Commission on Human Rights, *Armando Alejandro Jr. and others v. Cuba* (“Brothers to the Rescue”), Case No. 11.589, Report No. 86/99, 29 September 1999, para. 23; African Commission on Human and Peoples’ Rights, general comment No. 3 on the African Charter on Human and Peoples’ Rights: the right to life (article 4), 18 November 2015, para. 14.

³⁶ European Court of Human Rights, *Al-Skeini and others v. United Kingdom*, paras. 133–137.

³⁷ International Covenant on Civil and Political Rights, art. 4; American Convention on Human Rights (United Nations, *Treaty Series*, vol. 1144, No. 17955), art. 27; European Convention for the Protection of Human Rights and Fundamental Freedoms (United Nations, *Treaty Series*, vol. 213, No. 2889), art. 15.

purport to derogate from non-derogable rights, and that the measures taken be strictly necessary in and proportionate to the exigencies of the situation, non-discriminatory and consistent with the State's other obligations under international law.³⁸

Treaties allowing derogation in times of public emergency distinguish between derogable and non-derogable rights. As mentioned above, no derogation is permitted in respect of non-derogable rights. Rights that are non-derogable vary between instruments. No human rights treaties permit derogations from the right to life, the prohibition of torture and cruel, inhuman or degrading treatment or punishment, the prohibition of slavery and involuntary servitude or the prohibition of retroactive criminal law.³⁹ The International Covenant on Civil and Political Rights also provides that the right not to be imprisoned for inability to meet contractual obligations, the right to recognition as a person before the law and freedom of thought, conscience and religion are non-derogable rights,⁴⁰ and the right not to be subject to the death penalty is non-derogable for States parties to the Second Optional Protocol to the Covenant, aiming at the abolition of the death penalty.⁴¹ Certain procedural guarantees provided by other rights, such as the right to habeas corpus (i.e. the right to have detention reviewed by a court without delay),⁴² the right to a fair trial and the right to an effective remedy, are also considered non-derogable as they are necessary to secure the protection of non-derogable rights.⁴³

The question of whether a right is non-derogable is related to, but not identical with, the question of whether certain human rights obligations have the status of peremptory norms of general international law (*jus cogens*). A peremptory norm is “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted” under any circumstances.⁴⁴ The enumeration of certain provisions of the International Covenant on Civil and Political Rights as non-derogable in times of public emergency may be seen partly as a recognition of the peremptory status of those provisions,⁴⁵ such as the prohibitions of genocide and torture, which have been expressly confirmed as peremptory norms by the International Court of Justice.⁴⁶ It is also widely accepted that other core human rights standards – such as the prohibitions of apartheid,⁴⁷ slavery⁴⁸ and piracy⁴⁹ – have the status of peremptory norms. At the same time, it is clear that not all non-derogable provisions of the Covenant are peremptory norms. Rather, some were designated as non-derogable simply because a state of emergency could never justify derogating from them.⁵⁰

³⁸ See International Covenant on Civil and Political Rights, art. 4; American Convention on Human Rights, art. 27; European Convention on Human Rights, art. 15. See also Human Rights Committee, general comment No. 35 (2014), para. 65.

³⁹ See International Covenant on Civil and Political Rights, art. 4 (2); American Convention on Human Rights, art. 27 (2); European Convention on Human Rights, art. 15 (2).

⁴⁰ International Covenant on Civil and Political Rights, art. 4 (2). Lists of non-derogable rights vary slightly under different human rights treaties; see European Convention on Human Rights, art. 15 (2); American Convention on Human Rights, art. 27 (2). Moreover, not all treaties include a list of non-derogable rights. Examples in this regard are the International Covenant on Economic, Social and Cultural Rights, for the purposes of which derogations may be justified in the light of general rules on circumstances precluding wrongfulness (compare Committee on Economic, Social and Cultural Rights, general comment No. 3 (1990), para. 10; African Charter on Human and Peoples' Rights (United Nations, *Treaty Series*, vol. 1520, No. 26363)).

⁴¹ United Nations, *Treaty Series*, vol. 1642, No. 14668, art. 6 (2).

⁴² Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 2nd ed. (Kehl am Rhein, Germany, N.P. Engel, 2005), p. 235.

⁴³ Human Rights Committee, general comment No. 29 (2001), paras. 14–16.

⁴⁴ Article 53 of the Vienna Convention on the Law of Treaties (United Nations, *Treaty Series*, vol. 1155, No. 18232).

⁴⁵ Human Rights Committee, general comment No. 29 (2001), para. 11.

⁴⁶ In relation to the prohibition of genocide, see *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, *Jurisdiction and Admissibility, Judgment*, I.C.J. Reports 2006, p. 6, para. 64. In relation to the prohibition of torture, see *Belgium v. Senegal*, para. 99. See also International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, 10, Judgment, 10 December 1998, para. 153.

⁴⁷ See A/CN.4/727, paras. 91–101. See also Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 16, para. 131.

⁴⁸ Abolishing Slavery and its Contemporary Forms (HR/PUB/02/4, para. 6); *Hacienda Brasil Verde Workers v. Brazil*, paras. 412–413; A/HRC/36/43, para. 11.

⁴⁹ *Yearbook of the International Law Commission, 1966*, vol. II (United Nations publication, 1967), p. 248.

⁵⁰ Examples include the freedom of thought, conscience and religion and the prohibition of imprisonment for inability to fulfil a contractual obligation (Human Rights Committee, general comment No. 29, para. 11).

KEY POINTS

- Some international and regional human rights treaties allow States to temporarily adopt measures derogating from certain human rights obligations in times of public emergency when certain conditions are met.
- Such treaties distinguish between derogable and non-derogable rights.
- No derogation is permitted in respect of non-derogable rights.
- Certain rights cannot be derogated from because they have the status of peremptory norms (*jus cogens*).

Absolute and qualified rights

International and regional human rights instruments may express human rights guarantees in either absolute or qualified terms. For example, the prohibition of torture and inhuman or degrading treatment is framed in absolute terms in article 7 of the International Covenant on Civil and Political Rights: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”

Absolute rights are, however, the exception, and most rights can be limited, provided that certain conditions are met.⁵¹ While the language used to qualify human rights may differ between and within instruments, in general, limitations may be imposed on human rights where they are prescribed by clear and accessible law,⁵² serve a legitimate aim and are necessary for meeting, and proportionate to, that legitimate aim.⁵³ A legitimate aim may include respect for or protection of the rights of others or certain public interests, such as public order, public health, public safety and national security.⁵⁴

KEY POINTS

- Rights may be absolute or qualified.
- In general, rights may only be limited if they are not absolute and the limitation is prescribed by clear and accessible law, serves a legitimate aim and is necessary for meeting, and proportionate to, that legitimate aim.

Components of international human rights obligations

International human rights norms to which States are bound involve obligations to respect, protect and fulfil human rights.⁵⁵ The present section of the issue paper examines each of those obligations in turn and

⁵¹ Olivier De Schutter, *International Human Rights Law* (Cambridge, Cambridge University Press, 2010) p. 288.

⁵² Human Rights Committee, general comment No. 34 (2011), para. 25; see also Oscar M. Garibaldi, “General limitations on human rights: the principle of legality”, *Harvard International Law Journal*, vol. 17, No. 3 (1976).

⁵³ Human Rights Committee, general comment No. 31 (2004), para. 22; Human Rights Council resolution 15/21, para. 4. On the application of these requirements, formulated in the context of the International Covenant on Civil and Political Rights, to other human rights treaties, see De Schutter, *International Human Rights Law*, pp. 288–292.

⁵⁴ See Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights (E/CN.4/1985/4, annex).

⁵⁵ See Committee on Economic, Social and Cultural Rights, general comment No. 12 (1999), para. 15; Committee on Economic, Social and Cultural Rights, general comment No. 13 (1999), para. 46; Committee on Economic, Social and Cultural Rights, general comment No. 14 (2000), para. 33; *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework* (HR/PUB/11/04), endorsed by the Human Rights Council in its resolution 17/4, para. 1; African Commission on Human and Peoples’ Rights, *Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria* (2001), para. 44; see also Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (General Assembly resolution 60/147, annex), para. 3; Human Rights Committee, general comment No. 31 (2004), para. 8.

provides a brief explanation of their relevance to the Organized Crime Convention and the measures required and encouraged by the Convention. The various interconnections between those components of States' human rights obligations and specific provisions of the Convention are discussed further in chapter II of the paper.

Obligations to respect human rights

The obligation to respect human rights is generally understood as a negative obligation, or an obligation not to harm or interfere with the human rights of others.⁵⁶ Obligations to respect human rights – such as the right to life, the right to freedom from arbitrary deprivation of liberty, the right to a fair trial and the prohibition of torture and cruel or inhuman or degrading treatment or punishment – and related principles, such as the principle of legality and the presumption of innocence, are of critical importance in the repression of crime. The Organized Crime Convention was drafted in the context of growing recognition of the need to consider human rights issues in international cooperation in criminal matters,⁵⁷ and it contains several instances in which the need to respect human rights in the implementation of the measures set out in the Convention is expressly recognized.⁵⁸

Obligations to protect human rights

Human rights norms also entail positive obligations to protect human rights. Thus, the International Covenant on Civil and Political Rights provides that each State party undertakes not only to respect the rights recognized therein but also to ensure those rights for all individuals within its territory and subject to its jurisdiction.⁵⁹ States are thus required to protect individuals and groups against human rights violations by private persons and entities.⁶⁰ Similar provisions contained in other human rights instruments also require States to protect individuals and groups against harm by third parties.⁶¹

The obligation to protect entails both obligations of result and obligations of due diligence. Obligations of result require States to attain and maintain certain results, whereas obligations of due diligence do not require States to achieve a particular result, but rather to employ all means reasonably available to attain a particular aim.⁶² As regards obligations of result, States are required to establish and maintain legislative and administrative frameworks that ensure respect for human rights and provide appropriate protection to individuals,⁶³ including in relation to violations of human rights arising from the activities of organized criminal groups.⁶⁴ This requires, inter alia, appropriate frameworks criminalizing organized crime and allowing

⁵⁶ Compare David Jason Karp, "What is the responsibility to respect human rights? Reconsidering the 'respect, protect, and fulfill' framework", *International Theory*, vol. 12, No. 1 (March 2020), pp. 83–108.

⁵⁷ In particular following the decision of the European Court of Human Rights in *Soering v. United Kingdom*, Application No. 14038/88, Judgment, 7 July 1989; Neil Boister, "Human rights protections in the suppression conventions", *Human Rights Law Review*, vol. 2, No. 2 (2002), p. 213; Robert J. Currie, "The protection of human rights in the suppression of transnational crime", in *Routledge Handbook of Transnational Criminal Law*, Neil Boister and Robert J. Currie, eds. (London, Routledge, 2015).

⁵⁸ See, in particular, Organized Crime Convention, arts. 11 (3), 12 (8), 13 (8), 16 (13), 24 (2) and 25 (2).

⁵⁹ International Covenant on Civil and Political Rights, art. 2 (1). See also Human Rights Committee, general comment No. 31 (2004), paras. 6–8.

⁶⁰ Human Rights Committee, general comment No. 31 (2004), paras. 6–8.

⁶¹ See, for example, American Convention on Human Rights, art. 1 (1); European Convention on Human Rights, art. 1; African Charter on Human and Peoples' Rights, art. 1. See also Inter-American Court of Human Rights, *Río Negro Massacres v. Guatemala*, Series C No. 250, Judgment, 4 September 2012, para. 174; African Commission on Human and Peoples' Rights, *Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, para. 57.

⁶² See, generally, Human Rights Committee, general comment No. 36 (2018), paras. 21–22.

⁶³ See, generally, International Covenant on Civil and Political Rights, art. 2 (2); African Charter on Human and Peoples' Rights, art. 1; American Convention on Human Rights, art. 1 (2); Inter-American Court of Human Rights, *Velásquez-Rodríguez v. Honduras*, Series C No. 4, Judgment, 29 July 1988, paras. 166–167, 175.

⁶⁴ European Court of Human Rights, *Rantsev v. Cyprus and Russia*, paras. 284–289; *Chowdury and others v. Greece*, Application No. 21884/15, Judgment, 30 March 2017, para. 104.

effective investigations.⁶⁵ Additionally, States must also take reasonable steps to prevent violations of human rights and protect individuals from violations, to investigate violations, to prosecute and hold accountable those responsible, to eliminate impunity and to redress harm by providing victims with reparation.⁶⁶ As an obligation of due diligence rather than one of result, the obligation to prevent does not require States to avoid victimization at all costs; rather, it requires States to take reasonable steps, in the circumstances, to avoid harm.⁶⁷ In other words, a State will not be in breach of the obligation to prevent if, despite the State taking all steps reasonably available to it to prevent victimization, an organized criminal group or other third party has violated the rights of a person under its jurisdiction. The specific protection and assistance measures required of States in a given case will also depend in part on the type of crime in question.⁶⁸ For example, in cases of slavery, forced labour and human trafficking, a State may be required to provide shelter, medical and psychological assistance and consular and legal assistance.⁶⁹

In the light of these aspects of the obligation of States to protect, the various measures required and encouraged by the Organized Crime Convention – including measures relating to criminalization, investigation, prosecution and adjudication, international cooperation, protection of and assistance to witnesses and victims, and prevention – can be seen as promoting States’ obligations to protect human rights when implemented in full respect of their other human rights obligations.

Obligations to fulfil human rights

The third component of international human rights norms, the obligation to fulfil, requires States to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of human rights.⁷⁰ This obligation can further be disaggregated into obligations to facilitate, promote and provide.⁷¹ Obligations to fulfil are often discussed in relation to economic, social and cultural rights, but apply to all human rights.⁷²

Obligations to fulfil are obligations of progressive realization, meaning that the full enjoyment of the right will generally not be possible immediately and may only be achievable progressively over a period of time.⁷³ That characteristic notwithstanding, the obligation to fulfil each right entails a minimum core obligation that must be satisfied immediately.⁷⁴ The progressive realization of human rights implies significant discretion on the part of public authorities as to the prioritization of different rights and, possibly, the need for trade-offs in allocating limited resources.⁷⁵ Whether a State has met its obligations to fulfil, including the minimum core obligations, depends on the resource constraints to which the country is subject.⁷⁶

⁶⁵ See Tom Obokata, “Combating transnational organised crime through international human rights law”, *International Human Rights Review*, vol. 8, No. 1 (June 2019), p. 9.

⁶⁶ Inter-American Court of Human Rights, *Velásquez-Rodríguez v. Honduras*, paras. 166–167, 174; Human Rights Committee, general comment No. 31 (2004), para. 8; European Court of Human Rights, *Ergi v. Turkey*, Application No. 66/1997/850/1057, Judgment, 28 July 1998, para. 82; African Court on Human and Peoples’ Rights, *Zongo and others v. Burkina Faso*, Case No. 13/2011, Judgment, 28 March 2014, paras. 150–156. See also General Assembly resolution 65/228.

⁶⁷ Inter-American Court of Human Rights, *Velásquez-Rodríguez v. Honduras*, paras. 172–174; European Court of Human Rights, *Osman v. United Kingdom*, Application No. 87/1997/871/1083, Judgment, 28 October 1998, para. 116; European Court of Human Rights, *Mastromatteo v. Italy*, Application No. 37703/97, Judgment, 24 October 2002, para. 68.

⁶⁸ Obokata, “Combating transnational organised crime”, p. 20.

⁶⁹ Recommended Principles and Guidelines on Human Rights and Human Trafficking (E/2002/68/Add. 1, para. 6); report of the Special Rapporteur on trafficking in persons, especially women and children (A/64/290); CCPR/C/URY/CO/5, para. 16; CMW/C/IDN/CO/1, para. 37.

⁷⁰ Committee on Economic, Social and Cultural Rights, general comment No. 14 (2000), para. 33; *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies* (HR/PUB/06/12, para. 48).

⁷¹ Committee on Economic, Social and Cultural Rights, general comment No. 15 (2002), para. 25; general comment No. 14 (2000), paras. 33 and 37. See also general comment No. 13 (1999), para. 47; general comment No. 12 (1999), para. 15.

⁷² E/CN.4/Sub.2/1987/23, para. 115.

⁷³ Committee on Economic, Social and Cultural Rights, general comment No. 3 (1990), para. 9.

⁷⁴ *Ibid.*, para. 10.

⁷⁵ HR/PUB/06/12, para. 49.

⁷⁶ Committee on Economic, Social and Cultural Rights, general comment No. 3 (1990), para. 10. See also article 2 (1) of the International Covenant on Economic, Social and Cultural Rights.

That the full realization of human rights is to be achieved progressively and implies significant discretion on the part of States does not, however, deprive the obligation of meaningful legal content.⁷⁷ The discretion of States is not unconstrained. They must move as expeditiously and effectively as possible to achieve the full realization of the rights in question.⁷⁸ They must develop and implement time-bound plans of action for the realization of the rights, with appropriate targets, benchmarks and indicators.⁷⁹ While priorities in the achievement of different human rights may differ from country to country, the process of prioritizing the realization of particular rights and any trade-offs must involve the effective participation of all stakeholders.⁸⁰ States are also bound to provide equal opportunities for the enjoyment of human rights without discrimination.⁸¹ Moreover, they must meet their minimum core obligations before allocating resources for other purposes.⁸² They must also monitor the extent of their progress towards the full realization of human rights.⁸³ In addition, retrogressive measures are generally prohibited.⁸⁴

Organized crime severely hinders the ability of States to meet their obligations to fulfil human rights. Organized crime drains public resources and undermines the integrity of public institutions and their ability to effectively target vulnerable groups with actions tailored to facilitate, provide and promote human rights.⁸⁵ This is especially clear with regard to corruption⁸⁶ and money-laundering, which are the object of specific obligations under the Organized Crime Convention.⁸⁷ The Human Rights Committee has also addressed the fight against corruption in the context of States parties' compliance with the right to participate in the conduct of public affairs.⁸⁸

KEY POINTS

- International human rights norms involve obligations to respect, protect and fulfil human rights.
- Obligations to respect, protect and fulfil human rights are all relevant to the implementation of the Organized Crime Convention.
- States parties to the Convention must respect human rights when implementing the measures set out therein.
- The various measures required and encouraged by the Convention can be seen as promoting States' obligations to protect human rights when implemented in full respect of their other human rights obligations.
- Organized crime severely hinders States' ability to meet their obligations to fulfil human rights. Effective implementation of the Convention can assist States in meeting their obligations.

⁷⁷ Committee on Economic, Social and Cultural Rights, general comment No. 3 (1990), para. 9.

⁷⁸ *Ibid.*; Committee on Economic, Social and Cultural Rights, general comment No. 12 (1999), para. 14; HR/PUB/06/12, paras. 51–52.

⁷⁹ HR/PUB/06/12, paras. 53–55.

⁸⁰ *Ibid.*, paras. 56–57.

⁸¹ *Ibid.*, para. 60.

⁸² *Ibid.*, para. 61.

⁸³ Committee on Economic, Social and Cultural Rights, general comment No. 3 (1990), para. 11.

⁸⁴ *Ibid.*, para. 9.

⁸⁵ As noted in the foreword to the UNODC *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (Vienna, 2004), “Political processes, democratic institutions, social programmes, economic development and human rights are all undermined by the wealth of organized criminal groups and the influence they can wield. Also at stake is the integrity of the financial system, particularly in parts of the world awash with the proceeds of crime”.

⁸⁶ See A/HRC/28/73, paras. 11–23; Anne Peters, “Corruption as a violation of international human rights”, *European Journal of International Law*, vol. 29, No. 4 (2018), pp. 1251–1287; Cecily Rose, “The limitations of a human rights approach to corruption”, *International and Comparative Law Quarterly*, vol. 65, No. 2 (April 2016), pp. 405–438.

⁸⁷ See Organized Crime Convention, arts. 6–9.

⁸⁸ See, for example, CCPR/C/MDV/QPR/2, para. 5.

INTERRELATIONSHIP BETWEEN THE ORGANIZED CRIME CONVENTION AND INTERNATIONAL HUMAN RIGHTS LAW

On the basis of the brief introduction to both the Organized Crime Convention and international human rights law provided above, the present section covers the interrelationship between those regimes. The section is structured as follows: First, it provides examples of how the Convention and its Protocols, the *Travaux Préparatoires* and resolutions of the Conference of the Parties to the Convention each refer to human rights. Second, it briefly examines how international and regional human rights courts and treaty bodies refer to the Convention. Third, on that basis, the nature of the interrelationship between the Convention and international human rights law is described in broad terms. Fourth, some general implications of that interrelationship for the interpretation and implementation of the Convention are set out. Lastly, the question of the groups of people to whom States parties owe human rights obligations in the implementation of the Convention is considered.

References to human rights in the Organized Crime Convention and the Protocols thereto, *Travaux Préparatoires* and resolutions of the Conference of the Parties

The Organized Crime Convention contains several express references to the need to safeguard human rights in its implementation. The express references to human rights contained in the Convention relate to the safeguarding of rights in relation to particular measures set out in the Convention. For example, article 12 (Confiscation and seizure) and article 13 (International cooperation for purposes of confiscation) provide that nothing in those articles is to be construed to prejudice the rights of bona fide third parties.⁸⁹ Article 16 (Extradition) provides that any person subject to extradition proceedings for an offence to which the article applies is to be guaranteed fair treatment, including the enjoyment of relevant rights and guarantees provided by domestic law.⁹⁰ Requirements that certain measures be taken “with due regard to”, “without prejudice to” or “in a manner not prejudicial to” the rights of the defence are set out in article 11 (Prosecution, adjudication and sanctions), article 24 (Protection of witnesses) and article 25 (Assistance to and protection of victims, in particular concerning the participation of victims in criminal proceedings).⁹¹ The preamble to the resolution by which the General Assembly adopted the Convention and the Trafficking in Persons and Smuggling of Migrants Protocols does not contain any express references to human rights, but the Assembly did express deep concern about the “negative economic and social implications related to organized criminal activities”,⁹² which can include negative effects on human rights.⁹³

Broader references to human rights and international human rights law are found in the Trafficking in Persons and Smuggling of Migrants Protocols.⁹⁴ Article 2 (b) of the Trafficking in Persons Protocol provides that protecting and assisting victims of trafficking, “with full respect for their human rights”, is one of the purposes of the Protocol. Article 2 of the Smuggling of Migrants Protocol provides that the purpose of the

⁸⁹ Organized Crime Convention, arts. 12 (8) and 13 (8).

⁹⁰ *Ibid.*, art. 16 (13).

⁹¹ *Ibid.*, arts. 11 (3), 24 (2) and 25 (3).

⁹² General Assembly resolution 55/25, seventh preambular paragraph. See also the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime (United Nations, *Treaty Series*, vol. 2326, No. 39574), first preambular paragraph: “Aware of the urgent need to prevent, combat and eradicate the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition, owing to the harmful effects of those activities on the security of each State, region and the world as a whole, endangering the well-being of peoples, their social and economic development and their right to live in peace”.

⁹³ Compare General Assembly resolution 60/1, para. 111.

⁹⁴ See Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (United Nations, *Treaty Series*, vol. 2237, No. 39574), arts. 2 (b) and 14; Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (United Nations, *Treaty Series*, vol. 2241, No. 39574), art. 19. See also Trafficking in Persons Protocol, art. 10 (2).

Protocol is “to prevent and combat the smuggling of migrants, as well as to promote cooperation among States Parties to that end, *while protecting the rights of smuggled migrants*”.⁹⁵ Moreover, both Protocols include saving clauses which each provide that nothing in the Protocols shall affect the

rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.⁹⁶

References to the purpose of protecting human rights can also be found in the drafting history of the Organized Crime Convention and its Protocols. In paving the ground for the establishment of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, the General Assembly established an intersessional open-ended intergovernmental group of experts⁹⁷ for the purpose of elaborating a preliminary draft of a possible comprehensive international convention against organized transnational crime. In the report on the group’s meeting held in Warsaw from 2 to 6 February 1998, it is stated that the group understood that efforts to elaborate the new international convention would be guided by a number of general principles emanating from the group’s general discussion, including that “the convention should incorporate appropriate safeguards for the protection of human rights and to ensure compatibility with fundamental national legal principles”.⁹⁸

In the context of the history of negotiations on the Convention itself, an interpretative note on article 25 of the Convention included in the *Travaux Préparatoires* states that, while the purpose of article 25 was to concentrate on the physical protection of victims, the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime was cognizant of the need for protection of the rights of individuals as accorded under applicable international law.⁹⁹

The relationship of the Organized Crime Convention and its Protocols to human rights has also been addressed by the Conference of the Parties to the Convention. For example, in its resolutions 5/1 and 6/1, the Conference expressed that it was “greatly concerned by the negative impact of organized crime on human rights, the rule of law, security and development”.¹⁰⁰ In its resolution 10/4, the Conference underscored that

tackling transnational organized crime and its root causes in an effective manner is essential for ensuring that individuals, including women, children and vulnerable members of society, are able to enjoy their human rights and fundamental freedoms and that the implementation of the Convention and the Protocols thereto provides an important contribution to this objective¹⁰¹

In its resolution 5/1, the Conference of the Parties urged States parties to promote, within the United Nations system, a strategic, proactive and holistic response to transnational organized crime, and requested the Secretariat to apprise the Conference, at its sixth session, of measures taken to mainstream responses to transnational organized crime into the work of the United Nations system, in particular in the context of human rights, the rule of law, security and development.¹⁰²

⁹⁵ Emphasis added.

⁹⁶ Trafficking in Persons Protocol, art. 14 (1); Smuggling of Migrants Protocol, art. 19 (1).

⁹⁷ General Assembly resolution 52/85, para. 14.

⁹⁸ E/CN.15/1998/5, para. 10 (f), quoted in *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (United Nations publication, Sales No. E.06.V.5), pp. xxii–xxiii.

⁹⁹ *Travaux Préparatoires*, p. 224.

¹⁰⁰ Conference of the Parties resolutions 5/1, eighth preambular paragraph, and 6/1, eleventh preambular paragraph.

¹⁰¹ Conference of the Parties resolution 10/4, fourth preambular paragraph.

¹⁰² Conference of the Parties resolution 5/1, para. 11.

Moreover, in its resolution 10/6, it affirmed that

States parties are to carry out their obligations to combat transnational organized crime in a manner consistent with the purposes and principles stated in the Charter of the United Nations, with all the provisions of the Convention, including the purpose and the principles stated in its articles 1 and 4, and with human rights and fundamental freedoms¹⁰³

In addition, in its resolution 9/3, the Conference endorsed, inter alia, recommendations adopted by the Working Group on International Cooperation at its tenth meeting, held on 16 October 2018, including the following:

Where necessary, States should benefit from the regular exchange of information about and best practices in the provision and enforcement of assurances and guarantees in extradition proceedings regarding the treatment of the person sought in the requesting State, including through the exchange of pertinent jurisprudence in the field of human rights in similar cases.¹⁰⁴

References to and use of the Organized Crime Convention and the Protocols thereto by international and regional human rights courts and treaty bodies

The functional role of the Organized Crime Convention and the Protocols thereto is also acknowledged and referred to by international and regional human rights courts and treaty bodies. Several United Nations treaty bodies welcome and encourage the ratification of or accession to the Organized Crime Convention and its Protocols,¹⁰⁵ and at times qualify them as human rights instruments,¹⁰⁶ even though they are primarily aimed at the prevention and repression of crime.

Regional human rights courts and monitoring bodies have also relied on the Trafficking in Persons Protocol, in particular in interpreting the relevant international human rights norms.¹⁰⁷ For example, in *Rantsev v. Cyprus and Russia*, the European Court of Human Rights relied on the Trafficking in Persons Protocol, as well as the Council of Europe Convention on Action against Trafficking in Human Beings, in order to construe the scope of article 4 of the European Convention on Human Rights (prohibition of slavery and forced labour) and of the positive obligations stemming from that article.¹⁰⁸ In *Hacienda Brasil Verde Workers v. Brazil*, the Inter-American Court of Human Rights held that, in the light of the evolution of international law, the reference to the phrase “slave trade and traffic in women” in article 6 of the American Convention on Human Rights (freedom from slavery) should be interpreted broadly to refer to “trafficking in persons” as defined in the Trafficking in Persons Protocol and the Council of Europe Convention.¹⁰⁹ The Inter-American Commission on Human Rights has also used the Trafficking in Persons Protocol to evaluate domestic legislation on human trafficking.¹¹⁰ The Human Rights Committee has likewise held that “the [International Covenant on Civil and Political Rights] should be interpreted as a living instrument and the rights protected under it should be applied in context and in the light of present-day conditions”¹¹¹ and that

¹⁰³ Conference of the Parties resolution 10/6, third preambular paragraph.

¹⁰⁴ Conference of the Parties resolution 9/3, annex III, paragraph (f).

¹⁰⁵ See, for example, CCPR/C/IRL/CO/4, para. 4; CRC/C/MMR/CO/3-4, paras. 84, 91; CEDAW/C/TCD/CO/1-4, para. 8.

¹⁰⁶ CRC/C/BEN/CO/2, para. 6 (e).

¹⁰⁷ European Court of Human Rights, *V. v. United Kingdom*, Application No. 24888/94, Judgment, 16 December 1999, para. 77; *Demir and Bakýara v. Turkey*, Application No. 34503/97, Judgment, 12 November 2008, para. 76. On the legal foundations of such a technique, which is often linked to the application by international courts of the due diligence standard, see Serena Forlati, “L’objet des différentes obligations primaires de diligence: prévention, cessation, répression...?”, in *Le standard de due diligence et la responsabilité internationale: Journée d’études franco-italienne du Mans*, Sarah Cassella, ed. (Paris, Pedone, 2018) pp. 39–63.

¹⁰⁸ European Court of Human Rights, *Rantsev v. Cyprus and Russia*, paras. 282, 285–286; followed in *Chowdury and others v. Greece*, para. 67.

¹⁰⁹ Inter-American Court of Human Rights, *Hacienda Brasil Verde Workers v. Brazil*, paras. 284–285, 289–290.

¹¹⁰ Inter-American Commission on Human Rights, Democratic Institutions, the Rule of Law and Human Rights in Venezuela: Country Report (OEA/Ser.L/V/II Doc 209/17), para. 347.

¹¹¹ CCPR/C/78/D/829/1998, para. 10.3.

a review of the scope of application of the rights protected in the Covenant may be exceptionally required “in particular if there have been notable factual and legal developments and changes in international opinion in respect of the issue raised”,¹¹² which may permit similar use of the Organized Crime Convention and its Protocols in interpreting the Covenant.

Nature of the interrelationship between the Organized Crime Convention and international human rights law

The references to human rights in the Organized Crime Convention and the Protocols thereto, the *Travaux Préparatoires* and resolutions of the Conference of the Parties to the Convention, as well as the reference to and use of the Convention and the Protocols thereto by international and regional human rights courts and treaty bodies, evince an interrelationship between the Convention and international human rights law that has both negative (restrictive) and positive (functional) dimensions.

The negative (restrictive) dimension refers to how international human rights law places restrictions on the ways in which States parties to the Organized Crime Convention can implement their obligations pursuant to the Convention and, conversely, how the aims pursued by the Convention may constitute legitimate aims that form the basis for lawful limitations to human rights under international human rights law. As noted above, and further elaborated upon in chapter II, the Convention sets out numerous obligations addressing issues such as criminalization, prosecution, sentencing and detention. Many fundamental human rights guarantees are designed primarily as safeguards from abuse in those same contexts. In implementing the Convention, States parties must also comply with their obligations under international human rights law.¹¹³ At the same time, international human rights law provides flexibility to allow limitations to qualified rights where such limitations are prescribed by clear and accessible law and are necessary for meeting, and proportionate to, that legitimate aim. It was noted above that a legitimate aim may include respect for or the protection of the rights of others or certain public interests, such as public order, public health, public safety and national security. Preventing and combating transnational organized crime – the ultimate purpose of the Convention – is one such legitimate aim.

On the other hand, there is also a positive (functional) dimension to the interrelationship.¹¹⁴ As recognized by the Conference of the Parties and international and regional human rights courts and treaty bodies, effective implementation of the Organized Crime Convention can be conducive to – and, in some cases, is necessary for – States’ compliance with their obligations to protect and fulfil human rights, specifically, to protect individuals and groups from human rights violations committed in the context of combating organized criminal groups and to negate the harmful impact that organized crime has on States’ realization of their obligations.¹¹⁵ Likewise, the importance of strengthening the rule of law and ensuring human rights is widely recognized as an essential element of preventing and combating organized crime.¹¹⁶

In this regard, the Organized Crime Convention and international human rights law should be seen as complementary and mutually reinforcing regimes. Their interrelationship should be reflected in the interpretation and implementation of the Convention. Some of the implications of this interrelationship are discussed below.

¹¹² Ibid.

¹¹³ Conference of the Parties resolution 10/6.

¹¹⁴ Similar functional relationships are explicit in international instruments that are expressly aimed both at the suppression of crime and the protection of human rights insofar as they set out obligations to criminalize behaviours that are grave breaches of human rights, such as the Convention on the Prevention and Punishment of the Crime of Genocide, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the International Convention for the Protection of All Persons from Enforced Disappearance.

¹¹⁵ See the section entitled “Components of international human rights obligations” above.

¹¹⁶ General Assembly resolutions 67/186, 68/188 and 73/185.

Interpretation and implementation of the Organized Crime Convention in the light of international human rights law

Chapter II of the present paper contains a discussion of some of the implications of the interrelationship between the Organized Crime Convention and international human rights law for the interpretation and implementation of the Convention with respect to specific provisions thereof and specific human rights issues. Before that discussion, some brief observations about those issues are made from a general perspective.

Interpretation of the Organized Crime Convention

The conclusion that the Organized Crime Convention must be interpreted and applied in the light of States' human rights obligations is also supported by the law of treaties. The principal rules concerning the interpretation of treaties are set out in the Vienna Convention on the Law of Treaties and are recognized as reflecting customary international law.¹¹⁷ A comprehensive examination of how the Organized Crime Convention must be interpreted pursuant to those rules, and in the light of its interconnection with international human rights law, would be beyond the scope of the present paper. Nevertheless, some general observations about the application of those rules to the Organized Crime Convention from a human rights perspective are made in the sections below.

The principal rule of treaty interpretation is that a treaty is to 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 the light of its object and purpose”.¹¹⁸ For the purposes of interpretation, the context of a treaty includes, inter alia, its text, including any preamble and annexes.¹¹⁹ As regards the object and purpose of the Organized Crime Convention, the purpose stated in article 1 of the Convention, “to promote cooperation to prevent and combat transnational organized crime more effectively”, makes it clear that the Convention is primarily a criminal justice instrument, but that does not mean that respecting, protecting and fulfilling human rights obligations has no role to play in ascertaining the object and purpose of the Convention. For instance, the reference to the prevention of crime should be interpreted in the light of States' obligations to protect human rights. In addition, while human rights must be ensured independent of their instrumental value to achieving other ends, the words “more effectively” in article 1 of the Convention should also be read as referring to human rights-based approaches, insofar as approaches that do not respect human rights are counterproductive to preventing and combating organized crime. Moreover, most treaties do not have a “single, undiluted object and purpose”.¹²⁰ The human rights safeguards set out in the Convention evince an intention that the prevention and combating of transnational organized crime should not be pursued at all costs, but rather in a manner consistent with States' obligations under international human rights law.

Other rules of the Vienna Convention on the Law of Treaties are relevant to interpreting the Organized Crime Convention in the light of human rights law. Article 31 (3) (b) of the Vienna Convention on the Law of Treaties provides that in the interpretation of a treaty, together with the context, “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation” shall be taken into account. Resolutions of the Conference of the Parties to the Organized Crime Convention, such as the resolutions recognizing the interrelationship between the Convention and international human rights law discussed above, may constitute subsequent practice establishing such agreement.

¹¹⁷ See, for example, *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, I.C.J. Reports 1994, p. 6; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility*, Judgment, I.C.J. Reports 1995, p. 6; *Oil Platforms (Islamic Republic of Iran v. United States of America, Preliminary Objections)*, Judgment, I.C.J. Reports 1996, p. 803; *Kasikilil/Sedudu Island (Botswana/Namibia)*, Judgment, I.C.J. Reports 1999, p. 1045. With specific regard to the interpretation of the Organized Crime Convention, see *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Judgment, I.C.J. Reports 2018, p. 292, para. 91.

¹¹⁸ Vienna Convention on the Law of Treaties, art. 31 (1).

¹¹⁹ *Ibid.*, art. 31 (2).

¹²⁰ World Trade Organization, document WT/DS58/AB/R, para. 17.

Article 31 (3) (c) of the Vienna Convention on the Law of Treaties also provides that “any relevant rules of international law applicable in the relations between the parties” shall also be taken into account in the interpretation of a treaty. That includes international human rights law, including both international (and, in appropriate cases, regional) treaties and customary international law. Article 31 (3) (c) reflects a more general principle whereby “a rule of international law, whether customary or conventional, does not operate in a vacuum; it operates in relation to facts and in the context of a wider framework of legal rules of which it forms only a part”.¹²¹ Thus, in the *Jadhav* case, which involved a death sentence over allegations of espionage, the International Court of Justice expressly relied on article 31 (3) (c) when it interpreted the Vienna Convention on Consular Relations in the light of the International Covenant on Civil and Political Rights.¹²² It is also through this interpretive mechanism that international and regional human rights courts and treaty bodies have made use of the Organized Crime Convention and the Protocols thereto in interpreting human rights standards.¹²³

Implementation of the Organized Crime Convention

The question of what it means, in practical terms, that the Organized Crime Convention must be interpreted and applied in the light of States’ human rights obligations is not susceptible of a simple answer. It involves considering the relationship between multiple provisions of the Convention and multiple, multifaceted human rights, the variety and scope of which may differ between States according to the international and regional human rights treaties to which they are parties. Moreover, what a State’s obligations to protect and fulfil human rights require in practice will depend upon a variety of factors specific to the conditions in that State.

Before examining select human rights issues in the implementation of the Organized Crime Convention in chapter II, it is worth making some brief observations on the general nature of the provisions contained in the Convention. The provisions contained in the Convention entail varying levels of obligation. Those obligations may be grouped into three broad categories: measures that are mandatory, measures that States parties must consider applying or endeavour to apply, and measures that are optional.¹²⁴ In chapter I of the present issue paper, it has been highlighted that the implementation of the measures contained in the Convention may contribute to the achievement of States’ obligations to protect and fulfil human rights. This is as true for measures which are optional or mandatory only to consider as it is for measures which are mandatory to apply or to endeavour to apply. Accordingly, States parties to the Convention should rely on all provisions of the Convention, including those which are optional or mandatory only to consider, to enhance their compliance with their international human rights obligations.

Some of the provisions of the Organized Crime Convention also leave a measure of discretion to States parties to implement them in accordance with their domestic law or fundamental principles thereof.¹²⁵ References to rules and principles enshrined in the States parties’ domestic legal systems should be read as encompassing international human rights obligations applicable in those legal systems.

¹²¹ *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980*, p. 73, para. 10. See also *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, para. 53.

¹²² *Jadhav (India v. Pakistan), Judgment, I.C.J. Reports 2019*, p. 418, para. 135. Compare *LaGrand (Germany v. United States of America), Judgment, I.C.J. Reports 2001*, p. 466; *Avena and other Mexican Nationals (Mexico v. United States of America, Judgment, I.C.J. Reports 2004*, p. 12.

¹²³ See, for example, European Court of Human Rights, *Rantsev v. Cyprus and Russia*, paras. 273–274. See also the section entitled “References to and use of the Organized Crime Convention and the Protocols thereto by international and regional human rights courts and treaty bodies” above.

¹²⁴ UNODC, *Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime*, 2nd ed. (2017), paras. 11–12.

¹²⁵ *Ibid.*, para. 13.

Whose human rights?

Broadly speaking, there are four main groups whose rights must be taken into consideration by States parties when adopting general or specific measures to implement the Organized Crime Convention:

- Persons suspected, accused or convicted of offences covered by the Convention
- Other persons affected by measures adopted under the Convention for the repression of crime
- Victims, witnesses and persons collaborating with authorities
- Persons or groups that are vulnerable to crimes covered by the Convention

States must respect the rights of persons suspected, accused or convicted of crimes, particularly in relation to criminalization, investigation, law enforcement action, prosecution and sentencing. In some situations, States may also be required to take positive action to fulfil the rights of such persons in order for repressive measures to remain in keeping with international human rights law. For example, States have positive obligations to fulfil the right to health of imprisoned persons.¹²⁶

The actions of States parties to prevent and combat organized crime may also affect the rights of other persons not suspected, accused or convicted of offences covered by the Convention. Such persons may include, for example, bona fide third parties whose property may be affected by actions to seize and confiscate suspected proceeds of crime. States parties must also respect the rights of such persons in the implementation of the Convention.

In addition, States must take into account the rights of victims, witnesses and persons collaborating with authorities. Neither the Organized Crime Convention nor international human rights law accords to victims a right as such to the prosecution and sentencing of those responsible for the crimes of which they are victims. International human rights law does, however, accord to victims of human rights violations a right to an effective investigation, rights to protection, assistance and reparation and a right to be heard.¹²⁷ States parties to the Convention must give effect to those rights in the implementation of the Convention. Likewise, States parties must also ensure the rights of witnesses and persons collaborating with authorities.

Lastly, States parties to the Organized Crime Convention must take into account the rights of persons or groups that are vulnerable to being targeted or affected by crimes falling within the scope of the Convention. Measures to prevent and combat organized crime may protect – or, if poorly designed or implemented, harm – the rights of such persons.

The categorization set out above is a categorization of rights holders. In reality, individual persons may fall within more than one category of rights holder. Persons suspected, accused or convicted of offences may themselves also be victims of, or vulnerable to, other offences. Where they collaborate with authorities, they may also gain certain protections applicable to witnesses. These are just some examples of the ways in which a person may belong to more than one category of rights holder.

The rights of those suspected, accused or convicted of crimes are accorded particular importance in the criminal justice system. In this, as in other contexts, however, legislatures, courts, law enforcement authorities and other State organs are called upon to strike a balance between the potentially competing rights of each of the aforementioned groups. To give just one example, States must take measures to protect victims from revictimization (through further criminal acts)¹²⁸ and secondary victimization (through the responses

¹²⁶ See, for example, European Court of Human Rights, *Enea v. Italy*, Application No. 74912/01, Judgment, 17 September 2009.

¹²⁷ See the section entitled “Protection and assistance” below.

¹²⁸ See UNODC, *Model Legislative Provisions against Trafficking in Persons* (Vienna, 2020), art. 6 (s). See also UNODC, *Handbook on Justice for Victims on the Use and Application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (1999), p. 36.

of State institutions, other agencies and individuals to the victim)¹²⁹ and to protect witnesses from retaliation, intimidation or harm during investigations and criminal trials.¹³⁰ Those measures may, however, make it more difficult for defendants to defend themselves at trial. The design and use of such measures require States to strike an appropriate balance between the rights of defendants and those of victims and witnesses. Measures to respect, protect or fulfil the rights of victims and witnesses must not extinguish the rights of defendants and vice versa. The basic conditions under which limitations to rights, including through the balancing of the rights of different groups, are permissible under international human rights law are outlined above.¹³¹

In the specific context of the Organized Crime Convention, it is worth noting that international cooperation, including under the Convention, can assist States parties in striking the appropriate balance between the rights of defendants and those of victims and witnesses. For example, where a defendant has been charged with trafficking in persons perpetrated upon foreign nationals, international cooperation could allow victims acting as witnesses to return to their home country while still preserving the defendant's right to a cross-examination of the witnesses against him or her. International cooperation in such cases could take the form of mutual legal assistance under the Convention or another instrument to allow the testimony and cross-examination of a victim acting as a witness to take place remotely through, for example, video-conferencing tools or other means, or to facilitate the temporary appearance of the returned victim as a witness at trial in the requesting State party.¹³²

KEY POINTS

- The Organized Crime Convention and international human rights law are interrelated and should be seen as complementary and mutually reinforcing regimes.
- International human rights law places restrictions on the ways in which States parties to the Convention can implement their obligations pursuant to the Convention (i.e. the negative (restrictive) dimension of the interrelationship).
- Effective implementation of the Convention can be conducive to the achievement of States' obligations to protect and fulfil human rights (i.e. the positive (functional) dimension of the interrelationship).
- Express references to the need to safeguard human rights can be found in several provisions of the Convention, its Protocols, the drafting history of those instruments, and resolutions of the Conference of the Parties to the Convention.
- International and regional human rights courts and treaty bodies also rely upon the Convention and its Protocols in interpreting and giving meaning to international human rights obligations and recognize the functional rule of the Convention and Protocols to protecting and fulfilling human rights.
- The interrelationship between the Convention and international human rights law should be reflected in the interpretation and implementation of the Convention.
- The international law of treaties also requires that the Convention be interpreted and applied in the light of States' human rights obligations.
- States parties to the Convention should rely on all provisions of the Convention, including those which are optional or mandatory only to consider, to enhance their compliance with their international human rights obligations.

¹²⁹ See Updated Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice (General Assembly resolution 65/228, annex), para. 15 (c), in which secondary victimization is defined as "victimization that occurs not as a direct result of a criminal act but through the inadequate response of institutions and individuals to the victim". See also *Model Legislative Provisions against Trafficking in Persons*, art. 6 (t).

¹³⁰ On the special precautions to be adopted in cases involving children, see, for example, Inter-American Court of Human Rights, *Case of V.R.P., V.P.C. et al v. Nicaragua*, Series C No. 350, Judgment, 8 March 2018, para. 141.

¹³¹ See the section entitled "Absolute and qualified rights" above.

¹³² See, in this regard, Organized Crime Convention, art. 18 (1), (3), (18) and (27); compare European Court of Human Rights, *Breukhoven v. Czech Republic*, Application No. 44438/06, Judgment, 21 July 2011, paras. 56–57.

KEY POINTS (CONTINUED)

- Where provisions of the Convention leave a measure of discretion to States parties to implement them in accordance with their domestic law or fundamental principles of their domestic legal systems, such references should be read to encompass international human rights obligations applicable in those legal systems.
- States parties to the Convention must take into account the rights of multiple groups of persons when implementing the Convention, including:
 - Persons suspected, accused or convicted of offences covered by the Convention
 - Other persons affected by measures adopted under the Convention for the repression of crime
 - Victims, witnesses and persons collaborating with authorities
 - Persons or groups that are vulnerable to crimes covered by the Convention.

Chapter II.

SELECT HUMAN RIGHTS ISSUES IN THE IMPLEMENTATION OF THE ORGANIZED CRIME CONVENTION

Chapter II of the issue paper builds upon the foundational concepts outlined in chapter I to discuss specific human rights issues in the implementation of specific provisions of the Organized Crime Convention. In chapter I, a broad classification was introduced, according to which the substantive provisions of the Convention could be grouped into measures which concern:

- (a) Criminalization of particular conduct;
- (b) Investigation, prosecution and adjudication;
- (c) International cooperation and assistance;
- (d) Protection of and assistance to witnesses and victims;
- (e) Prevention.

The classification above forms the basis for the structure of chapter II and the selection of provisions for consideration therein. The provisions of the Organized Crime Convention concerning its scope of application are considered alongside its criminalization provisions given the overlap between some of those provisions in the Convention. Each section of chapter II provides an outline of the measures required and encouraged by the Convention within each group, addresses the human rights dimensions of the group of measures from a general perspective and then covers human rights issues relating to select provisions of the Convention. In chapter II, particular emphasis is placed on the rights of persons suspected, accused or convicted of offences covered by the Convention, as well as victims, witnesses and persons collaborating with authorities.

CRIMINALIZATION AND SCOPE OF APPLICATION OF THE ORGANIZED CRIME CONVENTION

The Organized Crime Convention requires that States parties criminalize certain conduct relating to organized crime, namely, participation in an organized criminal group (art. 5), laundering of the proceeds of crime (art. 6), corruption (art. 8) and obstruction of justice (art. 23). Those criminalization obligations, which are complemented by the obligations set out in the Protocols to the Convention, are a key aspect of

the general criminal policy envisaged by the Convention,¹³³ bringing about an at least partial harmonization of domestic legal frameworks for combating organized crime.

Neither the Organized Crime Convention nor the Protocols thereto directly establish criminal offences. Rather, those instruments require that States parties criminalize the relevant conduct under their domestic laws. This is made clear by the language of the criminalization provisions of the Organized Crime Convention and Protocols thereto, which provide that “each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences” the relevant conduct. Article 11 (6) of the Convention similarly provides that:

Nothing contained in this Convention shall affect the principle that the description of the offences established in accordance with this Convention and of the applicable legal defences or other legal principles controlling the lawfulness of conduct is reserved to the domestic law of a State Party [...]

Beyond establishing obligations to criminalize, the criminalization provisions of the Convention serve a further function within the Convention: determining the scope of States parties’ obligations under other Convention provisions. Article 3 of the Convention provides that the Convention shall apply, except where it provides otherwise, to the prevention, investigation and prosecution of offences established in accordance with articles 5, 6, 8 and 23 and serious crime, where such offences are transnational in nature and involve an organized criminal group.¹³⁴

States parties must ensure that the criminal offences that they introduce pursuant to the obligations contained in the Organized Crime Convention are compliant with their obligations under international human rights law. In particular, States parties must respect the principle of legality and avoid criminalizing conduct that is protected by international human rights law.

The present section addresses three human rights issues related to the criminalization and scope of application provisions of the Organized Crime Convention, namely, the principle of legality and human rights issues relevant to the notions of financial or other material benefit and serious crime as used in the Convention.

Principle of legality

In international law, the principle of legality in criminal law is generally understood on the basis of the maxims *nullum crimen sine lege* and *nulla poena sine lege*, meaning “nothing is a crime except as provided by law” and “no punishment may be imposed except as provided by law”, respectively.¹³⁵ It prohibits retroactive application of crimes and punishments and requires that “the prohibition of the act and the maximum penalty must not only have been in existence at the time of the act. They must also have been applicable to the actor and the action at the time.”¹³⁶ In addition, the principle further requires that laws establishing criminal offences be clear and accessible such that the consequences of an individual’s acts or omissions can be foreseeable to them in advance.¹³⁷

The principle of legality constitutes an important human rights protection. It ensures that the public must be provided notice of which acts will be deemed criminal and what the applicable penalties for those acts will be. It protects individuals from the arbitrary application of criminal law. Moreover, it protects individuals’ human rights by ensuring that everything not forbidden is permitted. In addition, the principle of legality promotes the legitimacy of criminal law and the rule of law more broadly.¹³⁸

¹³³ Gualtiero Michelini and Gioacchino Polimeni, “Le linee guida della Convenzione di Palermo e la legge italiana di ratifica”, in *Criminalità Organizzata e Transnazionale e Sistema Penale italiano: la Convenzione ONU di Palermo*, Elisabetta Rosi, ed. (Milan, Italy, IPSOA, 2007), pp. 33–35.

¹³⁴ Organized Crime Convention, art. 3 (1).

¹³⁵ Kenneth S. Gallant, *The Principle of Legality in International and Comparative Criminal Law* (New York, Cambridge University Press, 2009) p. 12.

¹³⁶ *Ibid.*, p. 352.

¹³⁷ *Ibid.*, pp. 362–364.

¹³⁸ *Ibid.*, pp. 20–23.

The principle of legality is enshrined in multiple international and regional human rights instruments, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child, the European Convention on Human Rights, the American Convention on Human Rights and the African Charter on Human and Peoples' Rights.¹³⁹ It is considered a non-derogable right under the International Covenant on Civil and Political Rights, the European Convention on Human Rights and the American Convention on Human Rights¹⁴⁰ (the Convention on the Rights of the Child and the African Charter on Human and Peoples' Rights do not allow for derogation of any rights in times of public emergency). Moreover, the statement of the principle of legality in the Universal Declaration of Human Rights (*nullum crimen, nulla poena sine lege*) is now understood to reflect customary international law.¹⁴¹

It is thus of fundamental importance that States parties implement their obligations under the Organized Crime Convention to criminalize participation in an organized criminal group, money-laundering, corruption and obstruction of justice in full compliance with the principle of legality. States parties to the Convention must not prosecute persons for offences contemplated in the Convention if such conduct is not criminalized under their domestic law. Criminal provisions introduced pursuant to the Convention must not be applied retroactively. Persons found guilty of offences falling within the scope of the Convention must not be subject to any punishment greater than the maximum penalty applicable at the time of the offence. Laws establishing offences pursuant to the Organized Crime Convention must be clear and accessible such that the consequences of an individual's actions can be foreseeable in advance. Correct implementation of the criminalization provisions of the Convention in full compliance with the principle of legality ensures not only the rights of accused persons, but also the rights of victims, which require States to take all steps reasonably available to hold accountable those responsible for the crimes against the victims and end impunity for offenders. Incorrect implementation in breach of the principle of legality may make it impossible to convict offenders, leading to de facto impunity.

Concerning the issue of clarity of criminal provisions, it should be noted that the Organized Crime Convention, as an international treaty, is addressed to national Governments and was drafted for use by States representing the full range of legal systems and cultures. Accordingly, the level of abstraction used in the Convention is greater than that necessary for domestic legislation. Drafters of national legislation are therefore encouraged to adopt the spirit and meaning of the various provisions of the Convention, rather than incorporating the text of the Convention verbatim.¹⁴² Such drafters should, for example, consider consistency with other offences, definitions and legislative uses of terms before relying on formulations or terminology found in the Convention, including those in its criminalization provisions. A provision that is considered clear in one legal system may not be sufficiently clear in another if it conflicts or appears to conflict with other legislative provisions or includes terms that cannot be clearly understood in the latter legal system.

In the implementation of article 5 of the Organized Crime Convention, which provides States parties with flexibility as to which model of criminalization of participation in an organized criminal group may be adopted, national legislators should ensure that domestic provisions are sufficiently clear about what conduct will suffice for criminal liability, including, in particular, sufficiently clear notions of participation or association.

¹³⁹ See Universal Declaration of Human Rights, art. 11 (2); International Covenant on Civil and Political Rights, art. 15; Convention on the Rights of the Child (United Nations, *Treaty Series*, vol. 1577, No. 27531), art. 40 (2) (a); European Convention on Human Rights, art. 7; American Convention on Human Rights, arts. 7–9; African Charter on Human and Peoples' Rights, art. 7 (2). Note that the Convention on the Rights of the Child, unlike the other instruments cited, expressly sets out the principle of *nullum crimen sine lege* only and not that of *nulla poena sine lege*.

¹⁴⁰ International Covenant on Civil and Political Rights, art. 4 (2); European Convention on Human Rights, art. 15 (2); American Convention on Human Rights, art. 27 (2).

¹⁴¹ Gallant, *The Principle of Legality*, p. 352.

¹⁴² UNODC, *Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime*, 2nd ed. (2017), para. 17.

KEY POINTS

- States parties must ensure that conduct covered by the criminalization provisions of the Organized Crime Convention is criminalized under domestic law before prosecuting or punishing persons for such conduct.
- Criminal provisions introduced pursuant to the Convention must not be applied retroactively.
- Persons found guilty of offences falling within the scope of the Convention must not be subject to any punishment greater than the maximum penalty applicable at the time of the offence.
- Laws establishing criminal offences pursuant to the Convention must be clear and accessible.
- Correct implementation of the criminalization provisions of the Convention in full compliance with the principal of legality ensures not only the rights of accused persons, but also the rights of victims, which require States to take all steps reasonably available to hold accountable those responsible for the crimes against the victims and end impunity for offenders.

Purpose of obtaining a financial or other material benefit

The term “organized criminal group” is used in the Organized Crime Convention not only to define the scope of offences relating to participation in an organized criminal group but also in determining the scope of the Convention at large.¹⁴³

The purpose of obtaining, “directly or indirectly, a financial or other material benefit” is an important element of the definition set out in the Organized Crime Convention.¹⁴⁴ The term “financial or other material benefit” should be understood broadly, to include, for example, crimes in which the predominant motivation may be sexual gratification, such as the receipt of and trade in child sexual abuse materials.¹⁴⁵ Terrorist or insurgent groups are excluded from the definition of an organized criminal group, provided that the goals of such groups are purely non-material.¹⁴⁶ Terrorist or insurgent groups are, however, covered by the definition if they commit crimes to obtain a financial or other material benefit, such as trafficking in cultural property, trafficking in other illicit goods or trafficking in persons,¹⁴⁷ and meet the other elements of the definition.¹⁴⁸ Groups with purely political or social motives and crimes that are not economically motivated, such as environmentally or politically motivated offences, fall outside the scope of the definition. The Convention

should not be used as a pretext to eliminate political rivals, criminalize protest and advocacy or outlaw social groups. It may, however, apply to crimes covered by the Convention and committed by those groups in order to obtain financial or material benefits.¹⁴⁹

Although the purpose of obtaining a financial or other material benefit is an important element of the definition of an organized criminal group under the Convention, article 34 (3) of the Convention provides that States parties may adopt more severe measures than those provided for in the Convention for the purpose of preventing and combating organized crime. The Convention thus does not prohibit States parties from defining the term “organized criminal group” or designing domestic offences of participation in an

¹⁴³ See Organized Crime Convention, art. 3 (1).

¹⁴⁴ See section entitled “Introduction to the Organized Crime Convention” above.

¹⁴⁵ A/55/383/Add.1, para. 3.

¹⁴⁶ UNODC, *Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime*, 2nd ed. (2017), para. 33.

¹⁴⁷ The Security Council has on numerous occasions expressed its concern about the involvement of terrorist groups in those crimes; see, for example, Security Council resolutions 1373 (2001), 1371 (2001), 2240 (2015), 2331 (2016), 2374 (2017), 2462 (2019) and 2482 (2019).

¹⁴⁸ See General Assembly resolution 55/25, para. 6.

¹⁴⁹ CTOC/COP/WG.2/2014/2, para. 74. See also *Travaux Préparatoires*, footnote 4.

organized criminal group without any reference to such an element.¹⁵⁰ National legislators should, however, carefully consider the impacts of that kind of choice, including on human rights. For instance, in the Smuggling of Migrants Protocol, the element of a purpose of obtaining a financial or other material benefit is a critical element of the definition of and the requirement to criminalize the smuggling of migrants, as well as of the scope of the Protocol more broadly.¹⁵¹ The Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, which drafted the Protocol, approved the following interpretative note, explaining that:

The reference to “a financial or other material benefit” as an element of the definition in [article 3] subparagraph (a) was included in order to emphasize that the intention was to include the activities of organized criminal groups acting for profit, but to exclude the activities of those who provided support to migrants for humanitarian reasons or on the basis of close family ties. It was not the intention of the protocol to criminalize the activities of family members or support groups such as religious or non-governmental organizations.¹⁵²

This reflected a concern that the “the Protocol should not require States to criminalize or take other action against groups that smuggle migrants for charitable or altruistic reasons, as sometimes occurs with the smuggling of asylum-seekers”.¹⁵³ The same may also be said of the application of article 5 of the Organized Crime Convention (Criminalization of participation in an organized criminal group) to agreements for, or groups involved in, such activities. That some States do not require the element of a purpose of obtaining a financial or other material benefit in the legislation implementing the Protocol goes beyond the purpose of the Convention and the Smuggling of Migrants Protocol to tackle organized crime that is driven by profit.

While article 34 (3) of the Organized Crime Convention does not prohibit States parties from defining the term “organized criminal group” or designing domestic offences of participation in an organized criminal group without the element of a purpose of obtaining a financial or other material benefit, such choices do not affect the scope of other States parties’ international cooperation obligations under the Convention. In other words, the element of a purpose of obtaining a financial or other material benefit is still necessary to enliven States parties’ international cooperation obligations, regardless of whether it is a requirement of the domestic law of the requesting State party.

KEY POINTS

- The Organized Crime Convention should not be used as a pretext to eliminate political rivals, criminalize protest and advocacy or outlaw social groups.
- States parties to the Convention should carefully consider the impact on human rights of any choice to establish any offence required under the Convention or Protocols thereto, independent of the element of a purpose of obtaining a financial or other material benefit.

The notion of serious crime

Another concept central to the scope of application of the Organized Crime Convention is the notion of serious crime. Unless otherwise provided therein, the Convention applies to the prevention, investigation and prosecution of offences established in accordance with articles 5, 6, 8 and 23 and of serious crime where

¹⁵⁰ For instance, within the European Union, only three member States (Belgium, Luxembourg and Slovakia) refer to the criterion of “financial or other material benefit” in the definition of a criminal organization. See European Commission, “Report from the Commission to the European Parliament and the Council based on Article 10 of Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime”, document COM/2016/0448 final, para. 2.1.1.

¹⁵¹ See Smuggling of Migrants Protocol, arts. 3 (a), 4 and 6.

¹⁵² *Travaux Préparatoires*, p. 469.

¹⁵³ UNODC, *Legislative Guide for the Implementation of the Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime* (2004), para. 19.

such offences are transnational in nature and involve an organized criminal group. For the purposes of the Convention, serious crime is defined as “conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty”,¹⁵⁴ leaving the determination of what constitutes serious crime to national legislators.

The notion of serious crime determines the scope of the provisions in the Organized Crime Convention concerning the criminalization of participation in an organized criminal group and money-laundering, confiscation and seizure, special investigative techniques including electronic surveillance, international law enforcement cooperation, joint investigations, mutual legal assistance and extradition, among other measures. The use of such invasive or potentially invasive measures is justified by the seriousness of the crimes at which they are targeted. Where domestic legislation provides for excessive or disproportionate maximum penalties for offences, crimes that should not otherwise be considered serious – or conduct that should not be considered crimes at all, such as conduct protected by freedom of expression, freedom of thought, conscience and religion, freedom of association and the right to peaceful assembly – may fall within the scope of those measures. This may lead to the conduct being subject to disproportionately invasive investigative measures and further conduct that does not entail an appropriate level of offensiveness or seriousness being criminalized (e.g. through offences relating to participation in an organized criminal group, including secondary liability for such offences). That may constitute arbitrary interference with human rights, including, in addition to those rights already mentioned, the right to liberty and the right to privacy.

KEY POINTS

- The use of invasive or potentially invasive measures under the Organized Crime Convention is justified by the seriousness of the crimes at which they are targeted.
- Where domestic legislation provides for excessive or disproportionate maximum penalties for offences, crimes that should not be considered serious and conduct protected by human rights may fall within the scope of those measures. This may constitute arbitrary interference with human rights.
- States parties to the Convention should carefully consider the effects on the exercise of human rights of any decision to designate a domestic offence as a serious offence for the purposes of the Convention.

INVESTIGATION, PROSECUTION AND ADJUDICATION

The Organized Crime Convention contains a number of provisions dealing with the investigation, prosecution and adjudication of offences relating to transnational organized crime. These include provisions relating to special investigative techniques (art. 20), confiscation and seizure (art. 12), disposal of confiscated proceeds of crime or property (art. 14), prosecution, adjudication and sanctions (art. 11), jurisdiction (art. 15), liability of legal persons (art. 10), establishment of criminal record (art. 22) and particular measures to combat money-laundering (art. 7) and corruption (art. 9). Those provisions are aimed at ensuring effective investigation, prosecution and adjudication of cases falling within the scope of the Convention. As noted above, in implementing those provisions, States parties must strike an appropriate balance between, on the one hand, the rights of suspects, accused persons and other persons targeted by law enforcement measures and, on the other hand, the rights of victims, witnesses and persons cooperating with authorities.

The present section is aimed at offering guidance in this respect, in particular on human rights issues relating to investigation, prosecution and adjudication in general, as well as jurisdiction, special investigative techniques, pretrial detention, determination and execution of penalties, and seizure and confiscation. As in other sections of the present paper, not all human rights issues that may arise in this context are covered in the present section.

¹⁵⁴ Organized Crime Convention, art. 2 (b).

Investigation, prosecution and adjudication in general

The dual nature of the interrelationship between the Organized Crime Convention and international human rights law can be seen in the provisions of the Convention regarding investigation, prosecution and adjudication. The present section considers the dual nature of that interrelationship by addressing the rights of defendants and the rights of victims in relation to those provisions. It does so by first considering the rights of defendants, then the rights of victims and the interrelationship between States' positive obligations to victims and the rights of defendants. States parties to the Convention, including their legislators and law enforcement, prosecutorial, judicial and other relevant authorities, must carefully consider each of these issues when implementing the Convention.

Rights of defendants

Measures taken by law enforcement, prosecutorial and judicial authorities have the capacity to have an impact on – and to violate – multiple human rights, in particular those of accused persons. Those rights may include due process rights, freedom from arbitrary deprivation of liberty, the prohibition of torture and inhuman or degrading treatment or punishment, the right to privacy and family life and the right to property. Some impacts are considered elsewhere in the present paper. The present section focuses briefly on due process rights and, in particular, the presumption of innocence.

Due process rights, such as the right to equality before courts and tribunals, the right to a fair trial, the presumption of innocence, the right to be heard and the right to legal aid,¹⁵⁵ are key safeguards that must always be respected in combating crime.¹⁵⁶ Due process rights have numerous implications covering virtually all aspects of the conduct of criminal investigations and criminal proceedings.¹⁵⁷ The present issue paper cannot address all of the implications of due process rights in the implementation of the Organized Crime Convention. It does, however, contain a few remarks regarding the presumption of innocence.

The presumption of innocence is widely protected under international human rights law¹⁵⁸ and is considered to be fundamental to the protection of human rights.¹⁵⁹ The presumption of innocence

imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle.¹⁶⁰

The presumption of innocence applies at all times until the formal determination of guilt beyond reasonable doubt by a criminal court, including during investigation and trial. The presumption of innocence requires that all public authorities refrain from prejudging the outcome of a trial. This also implies that public officials must be careful when speaking to the media or otherwise making public statements regarding the case so as to avoid statements portraying a suspect or accused person as guilty before the matter has been decided by a court.¹⁶¹ More generally, the presumption of innocence also entails the accused person's right to silence

¹⁵⁵ See, generally, the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (General Assembly resolution 67/187, annex).

¹⁵⁶ See CCPR/C/124/D/2783/2016, para. 12.5.

¹⁵⁷ See, generally, Human Rights Committee, general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial.

¹⁵⁸ See International Covenant on Civil and Political Rights, art. 14 (2); European Convention on Human Rights, art. 6 (2); American Convention on Human Rights, art. 8 (2); African Charter on Human and Peoples' Rights, art. 7 (1) (b).

¹⁵⁹ Human Rights Committee, general comment No. 32 (2007), para. 30.

¹⁶⁰ Ibid. See also European Court of Human Rights, *G.I.E.M. S.R.L. and others v. Italy*, Applications Nos. 1828/06 and two others, Judgment, 28 June 2018, para. 314. See also *Salabiaku v. France*, Application No. 10591/83, 7 October 1988, paras. 27–28; *Klouvi v. France*, Application No. 30754/03, Judgment, 30 June 2011, paras. 39–41.

¹⁶¹ CCPR/C/69/D/770/1997, paras. 3.5 and 8.3.

and privilege against self-incrimination.¹⁶² Defendants should normally not be shackled or kept in cages during trials or otherwise presented to the court in a manner indicating that they may be dangerous criminals.¹⁶³ The denial of bail¹⁶⁴ or findings of liability in civil proceedings¹⁶⁵ do not affect the presumption of innocence. Furthermore, the length of pretrial detention should never be taken as an indication of guilt.¹⁶⁶

Rights of victims

At the same time, the measures relating to the investigation, prosecution and adjudication of offences set out in the Organized Crime Convention are also important for protecting the rights of victims of organized crime. In chapter I of the present issue paper, States' positive obligations to protect human rights were outlined, and it was noted that they include both obligations of result and obligations of due diligence.¹⁶⁷ As regards obligations of result, States are required to establish and maintain legislative and administrative frameworks that ensure the rights of victims,¹⁶⁸ as well as of accused persons, including in relation to organized crime.¹⁶⁹ In addition to appropriate frameworks criminalizing organized crime, this also requires appropriate frameworks to allow for effective investigations. Furthermore, States have due diligence obligations to, inter alia, investigate violations of human rights, prosecute and hold accountable those responsible, eliminate impunity and redress harm by providing victims with reparation.¹⁷⁰ The obligations of States concerning assistance to victims, including access to and participation in criminal and other proceedings, and compensation, restitution and other reparations are discussed below.¹⁷¹ The present section focuses on victims' other rights in relation to the investigation, prosecution and adjudication of offences.

States' obligations to victims to investigate violations of human rights, to prosecute and hold accountable those responsible and to eliminate impunity are obligations of due diligence, not obligations of result. This means that victims do not have rights to the prosecution, conviction and punishment of those responsible for the crimes against them. In some cases, it may be impossible to identify the offenders. What is required is that States take reasonable steps to achieve those ends.¹⁷² From the perspective of victims, effective investigation, prosecution and adjudication of offences is as important to eliminating impunity as is the criminalization of organized crime. Failure to effectively investigate violations of human rights may result in secondary victimization and amount to an independent breach of the prohibition of inhuman treatment.¹⁷³ However, the fact that an investigation ends without concrete, or with only limited, results is not necessarily indicative of a failure to discharge the duty to investigate.¹⁷⁴

¹⁶² European Court of Human Rights, *Heaney and McGuinness v. Ireland*, Application No. 34720/97, Judgment, 21 December 2000, para. 40.

¹⁶³ Human Rights Committee, general comment No. 32 (2007), para. 30.

¹⁶⁴ CCPR/C/73/D/788/1997, para. 7.3.

¹⁶⁵ CCPR/C/36/D/207/1986, para. 9.5; CCPR/C/45/D/408/1990, para. 6.2; CCPR/C/46/D/432/1990, para. 6.6.

¹⁶⁶ Human Rights Committee, general comment No. 32 (2007), para. 30.

¹⁶⁷ See, generally, Human Rights Committee, general comment No. 36 (2018), paras. 21–22.

¹⁶⁸ See, generally, International Covenant on Civil and Political Rights, art. 2 (2); African Charter on Human and Peoples' Rights, art. 1; American Convention on Human Rights, art. 1 (2); Inter-American Court of Human Rights, *Velásquez-Rodríguez v. Honduras*, paras. 166–167 and 175.

¹⁶⁹ European Court of Human Rights, *Rantsev v. Cyprus and Russia*, paras. 284–289; *Chowdury and others v. Greece*, para. 104.

¹⁷⁰ Inter-American Court of Human Rights, *Velásquez-Rodríguez v. Honduras*, paras. 166–167 and 174; Human Rights Committee, general comment No. 31 (2004), para. 8; European Court of Human Rights, *Ergi v. Turkey*, para. 82; African Court on Human and Peoples' Rights, *Zongo v. Burkina Faso*, paras. 150–156. See also General Assembly resolution 65/228.

¹⁷¹ See the section entitled "Assistance to victims" below.

¹⁷² Inter-American Court of Human Rights, *Velásquez-Rodríguez v. Honduras*, paras. 172–174; European Court of Human Rights, *S.M. v. Croatia*, Application No. 60561/14, Judgment, 25 June 2020, paras. 315–316. See also Philip Leach, Rachel Murray and Clara Sandoval, "The duty to investigate right to life violations across three regional systems: harmonisation or fragmentation of international human rights law?", in *Towards Convergence in International Human Rights Law: Approaches of Regional and International Systems*, Carla Buckley, Alice Donald and Philip Leach, eds., Nottingham Studies on Human Rights, vol. 5 (Leiden, Netherlands, Brill, 2016).

¹⁷³ CCPR/C/86/D/1159/2003, para. 12.2; European Court of Human Rights, *Varnava and others v. Turkey*, Applications Nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, Judgment, 18 September 2009, paras. 200–202.

¹⁷⁴ European Court of Human Rights, *S.M. v. Croatia*, para. 315; Inter-American Court of Human Rights, *Velásquez-Rodríguez v. Honduras*, para. 177.

The obligation of States to investigate requires them to institute and conduct an investigation capable of leading to the establishment of the facts and, if appropriate, to punish those responsible. The relevant authorities must act of their own motion once the matter has come to their attention and cannot leave it to the initiative of the victim to take responsibility for the conduct of any investigatory procedures. The authorities must take whatever reasonable steps they can to collect evidence and elucidate the circumstances of the case. The investigation's conclusion must be based on thorough, objective and impartial analysis of all relevant elements. Failing to follow an obvious line of inquiry may undermine the ability of investigators to establish the circumstances of the case and the identity of those responsible.¹⁷⁵

Related to States' obligation to investigate is the right to the truth. The right to the truth about gross human rights violations has been recognized as an inalienable and autonomous right, linked to States' duties to protect and guarantee human rights, to States' obligations to conduct effective investigations into gross human rights violations and to guarantee effective remedies and reparation, and to other human rights.¹⁷⁶ The Human Rights Council has recognized the importance of respecting and ensuring the right to the truth so as to contribute to ending impunity and to promote and protect human rights.¹⁷⁷ In cases of gross human rights violations, the right to the truth belongs not only to the victims of such violations and their families but also to other victims of similar violations and to the general public.¹⁷⁸

Interrelationship of States' positive obligations to victims and the rights of defendants

In the present section, the rights of defendants and the rights of victims have been considered separately thus far. Those aspects are, however, interrelated. At least two observations are worth making in this regard.

First, States' positive obligations of due diligence towards the victims of human rights violations include ensuring that the investigation, prosecution and adjudication of offences are conducted in full respect of the human rights of the suspect or defendant. Denials or miscarriages of justice as a result of breaches of the rights of a suspect or defendant may render it impossible to try or convict the person or may lead to a conviction being overturned, resulting in de facto impunity. Thus, States' obligations to investigate, prosecute and hold accountable those responsible and to eliminate impunity require respect for the rights of suspects and defendants.

Second, the analysis contained in the present section considers the rights of victims of human rights violations committed by State authorities or officials in the investigation, prosecution and adjudication of organized crime offences. States must establish and maintain legislative and administrative frameworks that criminalize serious violations of human rights committed by State officials and must take all reasonable steps to investigate violations, to prosecute and hold accountable those responsible and to eliminate impunity. In cases where serious human rights violations are alleged to have occurred in the investigation of criminal offences, the right to the truth belongs not only to the victims of such violations and their families but also other victims of similar violations and to the general public, who have a right to know what has happened.¹⁷⁹

¹⁷⁵ European Court of Human Rights, *S.M. v. Croatia*, paras. 313–316, summarizing the jurisprudence of the European Court of Human Rights.

¹⁷⁶ E/CN.4/2006/91, paras. 55–57. See also CCPR/C/86/D/1159/2003, para. 12.2; Inter-American Court of Human Rights, *Velásquez-Rodríguez v. Honduras*, para. 181; *Gomes Lund et al. v. Brazil*, Series C No. 219, Judgment, 24 November 2010, para. 201.

¹⁷⁷ Human Rights Council resolution 21/7, para. 1.

¹⁷⁸ E/CN.4/2006/91, para. 58; Inter-American Court of Human Rights, *Herzog et al v. Brazil*, Series C No. 353, Judgment, 15 March 2018, para. 32; European Court of Human Rights, *Abu Zubaydah v. Lithuania*, Application No. 46454/11, Judgment, 31 May 2018, para. 610.

¹⁷⁹ European Court of Human Rights, *Abu Zubaydah v. Lithuania*, para. 610. See also E/CN.4/2006/91, para. 58; Inter-American Court of Human Rights, *Herzog et al v. Brazil*, para. 32.

KEY POINTS

- Measures taken by law enforcement, prosecutorial and judicial authorities can have an impact on and violate multiple human rights, in particular those of accused persons.
- Rights which may be affected by such measures include due process rights, freedom from arbitrary deprivation of liberty, the prohibition of torture and inhuman or degrading treatment or punishment, the right to privacy and family life and the right to property.
- Due process rights, such as the right to equality before courts and tribunals, the right to a fair trial, the presumption of innocence, the right to be heard and the right to legal aid, are key safeguards that must always be respected in combating organized and other forms of crime.
- Measures relating to the investigation, prosecution and adjudication of offences set out in the Organized Crime Convention are also important for protecting the rights of victims of organized crime.
- States are required by international human rights law to take reasonable steps to investigate violations of human rights, to prosecute and hold accountable those responsible, to eliminate impunity and to redress harm by providing victims with reparation.
- Victims of human rights violations, their families and, in some cases, the general public, have a right to the truth about such violations, including those committed by organized criminal groups.
- States' positive obligations of due diligence towards the victims of human rights violations also include ensuring that the investigation, prosecution and adjudication of offences are conducted in full respect of the human rights of the suspect or defendant.
- States must establish and maintain legislative and administrative frameworks that criminalize serious violations of human rights committed by State officials and must take all reasonable steps to investigate violations, to prosecute and hold accountable those responsible and to eliminate impunity.

Jurisdiction

The establishment of jurisdiction over offences established in accordance with the Organized Crime Convention is addressed in article 15 of the Convention. Article 15 includes both mandatory and optional grounds of jurisdiction. As regards mandatory grounds, article 15 (1) requires that each State party shall establish its jurisdiction over the offences established pursuant to articles 5, 6, 8 and 23 of the Convention when they are committed in the territory of that State party, on board a vessel flying its flag or on board an aircraft registered under its laws (territorial principle of jurisdiction). Pursuant to the principle of *aut dedere aut judicare* (extradite or prosecute), article 15 (3) also requires that each State party establish its jurisdiction over offences covered by the Convention when the alleged offender is present in its territory and that State does not extradite the person solely on the ground that he or she is one of its nationals (representation principle of jurisdiction).

Optional grounds of jurisdiction are set out in article 15 (2) and (4). Article 15 (2) provides that, subject to article 4 of the Convention (protection of sovereignty), a State party may also establish its jurisdiction over:

(a) Offences established in accordance with articles 5, 6, 8 and 23 of the Convention when committed against a national of that State party (article 15 (2) (a); passive personality principle of jurisdiction);

(b) Offences established in accordance with articles 5, 6, 8 and 23 of the Convention when committed by a national of that State party or a stateless person habitually resident in its territory (article 15 (2) (b); active personality principle of jurisdiction);

(c) Offences established in accordance with article 5 (1) of the Convention (participation in an organized criminal group) and committed outside its territory with a view to the commission of a serious crime within its territory (article 15 (2) (c) (i); protection principle of jurisdiction);

(d) Offences established in accordance with article 6 (1) (b) (ii) of the Convention (participation in money-laundering) and committed outside its territory with a view to the commission of an offence

established in accordance with article 6 (1) (a) (i) or (ii) or (b) (i) (laundering of proceeds of crime) within its territory (article 15 (2) (c) (ii); protection principle of jurisdiction).

Article 15 (4) also provides that each State party may also establish its jurisdiction over offences covered by the Convention when the alleged offender is present in its territory and it does not extradite him or her.¹⁸⁰

The jurisdictional provisions of the Organized Crime Convention are designed to reduce or eliminate jurisdictional gaps (negative conflicts of jurisdiction) for offences covered by the Convention and hence end impunity. The implementation of article 15 may thus be seen as promoting States' obligations to protect and fulfil the rights of victims by establishing appropriate legislative frameworks to investigate and prosecute members of organized criminal groups, hold them accountable for their violations of human rights, and end impunity. The European Court of Human Rights uses the establishment of jurisdiction pursuant to conventions such as the Organized Crime Convention as one of the relevant factors in determining whether States parties to the European Convention on Human Rights have complied with their positive obligations to victims.¹⁸¹ The observations in the present paper concerning the implementation of optional measures set out in the Organized Crime Convention also apply in relation to the optional grounds of jurisdiction.¹⁸² Establishing jurisdiction on the basis of the optional grounds of jurisdiction should be encouraged, as it further contributes to ending impunity.

KEY POINTS

- States are encouraged to establish jurisdiction on the basis of the optional grounds of jurisdiction contained in the Organized Crime Convention to eliminate jurisdictional gaps and prevent impunity.

Special investigative techniques

Article 20 (1) of the Organized Crime Convention requires States parties, if permitted by the basic principles of their respective legal systems, to take the necessary measures to allow for the appropriate use of controlled delivery and, where deemed appropriate, for the use of other special investigative techniques by their competent authorities in their territory for the purpose of effectively combating organized crime, within each State party's possibilities and under the conditions prescribed by its domestic law. The Convention also provides that other special investigative techniques may include electronic or other forms of surveillance and undercover operations. The interpretative note on article 20 of the Convention contained in the *Travaux Préparatoires* confirms that article 20 (1) does not entail an obligation for States parties to make provision for the use of all the forms of special investigative techniques noted therein. The other paragraphs of article 20 concern agreements on or arrangements for international cooperation relating to the use of such techniques.

Some forms of special investigative techniques are particularly intrusive. This is reflected in the numerous caveats included in article 20 (1). The caveats "if permitted by the basic principles of its domestic legal system" and "within its possibilities and under the conditions prescribed by its domestic law" call upon States parties to define in their national legislation the circumstances and conditions under which competent authorities are empowered to use special investigative techniques and recognize that, in some legal systems, the use of such techniques may need to be prohibited or limited, including through domestic

¹⁸⁰ This optional provision covers cases where extradition is refused on grounds other than the ground that the person is one of the State's nationals. See UNODC, *Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime*, 2nd ed. (2017), para. 268.

¹⁸¹ See, for example, European Court of Human Rights, *J. and others v. Austria*, Application No. 58216/12, Judgment, 17 January 2017, para. 114.

¹⁸² See the section entitled "Implementation of the Organized Crime Convention" above.

constitutions and applicable national or international human rights norms.¹⁸³ The references in article 20 (1) to “necessary measures” to allow for the “appropriate use of” special investigative techniques invoke concepts of necessity and proportionality, which, as discussed above, are familiar concepts under international human rights law.¹⁸⁴ Moreover, article 20 provides a legal basis for the use of special investigative techniques only: (a) by the competent authorities of a State party; (b) in its territory; and (c) for the purpose of effectively combating organized crime.

As with other measures contained in the Organized Crime Convention, the use of special investigative techniques concerns both the positive and negative dimensions of the interrelationship between the Convention and international human rights law. On the one hand, the use of special investigative techniques can contribute to effectively combating organized crime and to the realization of States’ positive human rights obligations to victims. The European Court of Human Rights in particular has recognized the need for the authorities to have recourse to special investigative methods to gather evidence in organized crime and corruption cases.¹⁸⁵ Moreover, the positive obligations owed to victims may require that the use of special investigative techniques be considered in appropriate cases.¹⁸⁶

On the other hand, the use of these techniques may affect the exercise of the rights of suspects and accused persons, such as the right to a fair trial and the right to privacy. The rights affected and the risks of infringement vary according to the special investigative technique in question, and it is not possible to address all of those issues in the present paper. Nevertheless, certain observations are made below.

The use of special investigative techniques must be compliant with general rules of international human rights law governing the limitation of rights. In chapter I, it was explained that rights may only be limited if they are not absolute and the limitation is prescribed by clear and accessible law, serves a legitimate aim and is necessary for meeting, and proportionate to, that legitimate aim. The same principles apply in relation to the use of special investigative techniques.¹⁸⁷ It is worth noting in this context that article 20 (1) of the Organized Crime Convention refers to “necessary measures” to allow for the “appropriate use of” special investigative techniques.

The proportionality of special investigative techniques should be tested and ensured before the techniques are resorted to. In this regard, when deciding on the use of such techniques, the competent authorities should make an assessment in the light of the seriousness of the offence in question and assess whether the intrusive nature of the specific special investigative technique is justified. Factors to consider in determining whether a covert measure is proportionate to the aim pursued include the seriousness of the offence vis-à-vis the level of intrusion involved in the specific special investigative techniques used, whether relevant and sufficient reasons have been advanced in support of the measure, whether a less restrictive alternative measure is available, whether there has been some measure of procedural fairness in the decision-making process, whether adequate safeguards against abuse exist and whether the restriction under scrutiny destroys the very essence of the right in question.¹⁸⁸

The use of electronic surveillance is particularly intrusive. The General Assembly has emphasized that:

Unlawful or arbitrary surveillance and/or interception of communications, as well as the unlawful or arbitrary collection of personal data, hacking and the unlawful use of biometric technologies, as highly intrusive acts, violate the right to privacy, can interfere with the right to freedom of

¹⁸³ See also CTOC/COP/WG.3/2020/3, paras. 24–30.

¹⁸⁴ See the section entitled “Absolute and qualified rights” above. See also CTOC/COP/WG.3/2020/3, paras. 31–32, 34–35.

¹⁸⁵ See, for example, European Court of Human Rights, *Malone v. United Kingdom*, Application No. 8691/79, Judgment, 2 August 1984, para. 81; *Ramanauskas v. Lithuania*, Application No. 74420/01, Judgment, 5 February 2008, paras. 49–51; *Bannikova v. Russia*, Application No. 18757/06, Judgment, 4 November 2010. See also *S. and Marper v. United Kingdom*, Applications Nos. 30562/04 and 30566/04, Judgment, 4 December 2008, para. 105.

¹⁸⁶ European Court of Human Rights, *X and others v. Bulgaria*, Application No. 22457/16, Judgment, 2 February 2021, para. 221.

¹⁸⁷ See, for example, European Court of Human Rights, *Big Brother Watch and others v. United Kingdom*, Applications Nos. 58170/13, 62322/14 and 24960/15, Judgment, 13 September 2018, paras. 304–305.

¹⁸⁸ CTOC/COP/WG.3/2020/3, paras. 34–35.

expression and to hold opinions without interference, the right to freedom of peaceful assembly and association and the right to freedom of religion or belief and may contradict the tenets of a democratic society, including when undertaken extraterritorially or on a mass scale¹⁸⁹

Moreover, the General Assembly has expressed its deep concern about the negative impact that surveillance and/or interception of communications, as well as the collection of personal data, may have on the exercise and enjoyment of human rights, and emphasized that:

States must respect international human rights obligations regarding the right to privacy when they intercept digital communications of individuals and/or collect personal data, when they share or otherwise provide access to data collected through, inter alia, information- and intelligence-sharing agreements and when they require disclosure of personal data from third parties, including business enterprises¹⁹⁰

Electronic surveillance should be authorized by law and subject to strict judicial control and other appropriate statutory safeguards.¹⁹¹ In particular, the use of electronic surveillance should be subject to safeguards that limit its use to appropriate cases and its impact to the extent necessary and proportionate in such cases.¹⁹² Persons whose rights are infringed by electronic surveillance must have access to remedies, which may require States to provide subsequent notification to individuals subject to electronic surveillance.¹⁹³

An important factor in the use of special investigative techniques is the need to comply with procedural safeguards to ensure the admissibility in court of the evidence obtained through such techniques, including those involving the use of modern technologies. In most jurisdictions, the process of gathering evidence requires strict adherence to a number of safeguards against potential abuses of authority, including judicial or independent oversight of the use of those techniques and observance of the principles of legality and proportionality. While the use of special investigative techniques does not, in and of itself, amount to an infringement of an accused person's right to a fair trial, the use of such techniques must be kept within clear limits.¹⁹⁴ For example, undercover agents must not incite the commission of an offence that would not otherwise have been committed.¹⁹⁵

Unlike the equivalent provision in the United Nations Convention against Corruption,¹⁹⁶ article 20 (1) of the Organized Crime Convention does not expressly address the admissibility in court of evidence derived from the use of special investigative techniques. In practice, rules governing the admissibility of such evidence – and its inadmissibility when admitting the evidence would amount to a violation of the rights of the accused – are necessary to ensure that the use of special investigative techniques is consistent with international human rights law. It is vital for drafters of national legislation to consider the issue of whether evidence obtained through, for example, infiltration or undercover operations can be adduced in court and, if so, whether the undercover agents have to reveal their real identity. It is important to balance the interests of justice (including the need to combat transnational organized crime) with the need to ensure a fair trial of the accused.

¹⁸⁹ General Assembly resolution 75/176, twenty-fourth preambular paragraph.

¹⁹⁰ Ibid., twenty-eighth preambular paragraph.

¹⁹¹ UNODC, *Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime*, 2nd ed. (2017), para. 445. See also European Court of Human Rights, *Szabó and Vissy v. Hungary*, Application No. 37138/14, Judgment, 12 January 2016, para. 77; *Big Brother Watch and others v. United Kingdom*, para. 309; European Court of Human Rights, *Weber and Saravia v. Germany*, Application No. 54934/00, Decision, 29 June 2006, paras. 94–95.

¹⁹² CCPR/C/GBR/CO/7, para. 24.

¹⁹³ European Court of Human Rights, *Weber and Saravia v. Germany*, para. 135.

¹⁹⁴ *Ramanauskas v. Lithuania*, para. 51; *X v. Bulgaria*, para. 221.

¹⁹⁵ *Ramanauskas v. Lithuania*, paras. 54–55. See also *Matanović v. Croatia*, Application No. 2742/12, Judgment, 4 April 2017, paras. 121–135; *Teixeira de Castro v. Portugal*, Application No. 25829/94, Judgment, 9 June 1998, paras. 35–36 and 39; *Bannikova v. Russia*, para. 34; *Baltiņš v. Latvia*, Application No. 25282/07, Judgment, 8 January 2013, para. 55.

¹⁹⁶ United Nations Convention against Corruption (United Nations, *Treaty Series*, vol. 2349, No. 42146), art. 50.

KEY POINTS

- The use of special investigative techniques can contribute to effectively combating organized crime and the realization of States' positive human rights obligations to victims.
- At the same time, the use of those techniques may affect the exercise of the rights of suspects and accused persons, such as the right to a fair trial and the right to privacy.
- The use of special investigative techniques must be kept within clear limits.
- States must respect international human rights obligations, including the right to privacy, when conducting electronic surveillance.
- States must ensure that any limitations to the exercise of human rights caused by the use of special investigative techniques are compliant with international human rights law governing limitations to human rights, namely that rights may be limited only if they are not absolute and the limitation is prescribed by clear and accessible law, serves a legitimate aim and is necessary for meeting, and proportionate to, that legitimate aim.
- Electronic surveillance should be authorized by law and subject to strict judicial control and other appropriate statutory safeguards.
- States should establish appropriate frameworks governing the admissibility of evidence obtained through the use of special investigative techniques, including the exclusion of evidence that would, if admitted, amount to a violation of the rights of the accused.

Pretrial detention

Article 11 (3) of the Organized Crime Convention requires that, with respect to the offences established under the Convention, each State party take appropriate measures, in accordance with its domestic law and with due regard for the rights of the defence, to seek to ensure that conditions imposed in connection with decisions on release pending trial or appeal take into consideration the need to ensure the presence of the defendant at subsequent criminal proceedings. Pretrial detention of any defendant, including persons charged with offences established in accordance with the Organized Crime Convention, must be compliant with international human rights law.

Pretrial detention raises a variety of human rights concerns. It can have a devastating effect on the ability of defendants to prepare for trial.¹⁹⁷ Inhumane prison conditions mean that defendants are forced to concentrate on surviving their time in pretrial detention or considering plea bargains, rather than on preparing their defence. Access to a lawyer and information about their case are often much more limited if the defendant is detained. The Working Group on Arbitrary Detention of the Human Rights Council has noted that accused persons in pretrial detention exhibit a lower likelihood of obtaining an acquittal than those who remain at liberty before trial.¹⁹⁸ This finding is confirmed by numerous other research studies.¹⁹⁹

Accordingly, under international human rights law, pretrial detention should be the exception, not the general rule,²⁰⁰ or a measure of last resort.²⁰¹ States should make the widest and earliest possible use of alternatives to pretrial detention,²⁰² which must include gender-specific alternatives and take into account both the history of victimization of many women offenders and their caretaking responsibilities.²⁰³ The particular risk of abuse that women face in pretrial detention must be taken into account in considering whether to

¹⁹⁷ UNODC, *Handbook on Strategies to Reduce Overcrowding in Prisons*, Criminal Justice Handbook Series (Vienna, 2013) pp. 22–23.

¹⁹⁸ E/CN.4/2006/7, para. 66.

¹⁹⁹ See also UNODC, *Handbook on Strategies to Reduce Overcrowding in Prisons*, footnote 48.

²⁰⁰ International Covenant on Civil and Political Rights, art. 9 (3).

²⁰¹ United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules) (General Assembly resolution 45/110, annex), rule 6.1.

²⁰² CCPR/C/PAN/CO/3, para. 12; the Tokyo Rules, rule 6.2.

²⁰³ United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules) (General Assembly resolution 65/229, annex), rule 57.

order pretrial detention or a non-custodial measure.²⁰⁴ Bail should be granted in all cases except in situations where it is likely that the accused would fail to appear at subsequent criminal proceedings, flee from the jurisdiction of the country, commit a further offence, or influence a witness, tamper with or destroy evidence, or otherwise obstruct the course of justice.²⁰⁵ These risks may be greater in cases involving organized criminal groups²⁰⁶ but must be assessed on a case-by-case basis.

Persons arrested or detained on criminal charges must be promptly and physically²⁰⁷ brought before a judge or other judicial officer who is to rule on whether the person should be released or remanded in custody for additional investigation or to await trial.²⁰⁸ This power may not be exercised by a public prosecutor or another officer not exercising judicial power.²⁰⁹ While the exact meaning of “promptly” may vary depending on the circumstances,²¹⁰ delays should not exceed a few days from the time of arrest.²¹¹ The Human Rights Committee has stated that 48 hours will ordinarily be sufficient and that “any delay longer than 48 hours must remain absolutely exceptional and be justified under the circumstances”.²¹² Especially strict standards of promptness should apply in relation to juvenile suspects or defendants.²¹³

A person arrested or detained on a criminal charge must be entitled to trial within a reasonable time or to release.²¹⁴ Such persons should be tried as expeditiously as possible, to the extent consistent with their rights of defence.²¹⁵ The reasonableness of any delay in bringing a case to trial depends on the circumstances.²¹⁶ While impediments to the completion of an investigation may justify additional time prior to trial,²¹⁷ general conditions of understaffing or budgetary constraints do not.²¹⁸ Where delays in bringing an accused person to trial occur, the judge must reconsider alternatives to pretrial detention.²¹⁹ For this and other purposes, an offender shall have the right to appeal to a judicial or other competent independent authority in cases where pretrial detention is employed.²²⁰

²⁰⁴ Ibid.

²⁰⁵ CCPR/C/86/D/1085/2002, para. 8.3; CCPR/C/94/1178/2003, para. 10.3; CCPR/C/29/D/305/1988, para. 5.8. See also International Covenant on Civil and Political Rights, art. 3; European Convention on Human Rights, art. 5 (3); American Convention on Human Rights, art. 7 (5). See also UNODC, *Model Legislative Provisions against Organized Crime* (Vienna, 2012), art. 24.

²⁰⁶ UNODC, *Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime*, 2nd ed. (2017), para. 319.

²⁰⁷ Human Rights Committee, general comment No. 35 (2014), para. 34; CCPR/C/44/D/289/1988, para. 6.2; CCPR/C/66/D/613/1995, para. 9.5.

²⁰⁸ International Covenant on Civil and Political Rights, art. 9 (3); European Convention on Human Rights, art. 5 (3); American Convention on Human Rights, art. 7 (5); Human Rights Committee, general comment No. 35 (2014), paras. 32 and 36; European Court of Human Rights, *McKay v. United Kingdom*, Application No. 543/03, Judgment, 3 October 2006.

²⁰⁹ CCPR/C/56/D/521/1992, para. 11.3; CCPR/C/101/D/1769/2008, para. 7.3; CCPR/C/103/D/1547/2007, para. 6.2; CCPR/C/95/D/1278/2004, para. 8.2; CCPR/CO/84/TJK, para. 12.

²¹⁰ CCPR/C/60/D/702/1996, para. 5.6; CCPR/C/106/D/2120/2011, para. 11.3.

²¹¹ CCPR/C/83/D/1128/2002, para. 6.3. In document CCPR/C/44/D/277/1988, para. 5.3, a delay of five days was found not to be prompt. In document CCPR/C/68/D/625/1995, para. 7.4, a delay of four days was found not to be prompt.

²¹² Human Rights Committee, general comment No. 35 (2014), para. 32. See also CCPR/C/107/D/1787/2008, paras. 7.3–7.5; CCPR/C/43/D/336/1998, para. 6.4.

²¹³ Committee on the Rights of the Child, general comment No. 10 (2007) on children’s rights in juvenile justice, para. 83; Human Rights Committee, general comment No. 35 (2014), para. 32.

²¹⁴ International Covenant on Civil and Political Rights, art. 9 (3); European Convention on Human Rights, art. 5 (3); American Convention on Human Rights, art. 7 (5).

²¹⁵ Human Rights Committee, general comment No. 35 (2014), para. 37; general comment No. 32 (2007), para. 35; CCPR/C/72/D/818/1998, para. 7.2.

²¹⁶ Human Rights Committee, general comment No. 35 (2014), para. 37.

²¹⁷ CCPR/C/74/D/721/1996, para. 6.2.

²¹⁸ Human Rights Committee, general comment No. 35 (2014), para. 37; CCPR/C/43/D/336/1998, para. 6.5; CCPR/C/72/D/818/1998, paras. 4.2 and 7.2.

²¹⁹ Human Rights Committee, general comment No. 35 (2014), para. 37; CCPR/C/86/D/1085/2002, para. 8.3.

²²⁰ International Covenant on Civil and Political Rights, art. 9 (4); Human Rights Committee, general comment No. 35 (2014), paras. 39–48; the Tokyo Rules, rule 6.3.

In addition to breaches of specific rules of international human rights law applying to persons arrested or detained on criminal charges, unjustified pretrial detention, including arbitrary denial of bail, may violate other human rights,²²¹ such as freedom from arbitrary detention²²² and the presumption of innocence.²²³ As regards arbitrary detention,

the notion of “arbitrariness” is not to be equated with “against the law”, but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality. For example, remand in custody on criminal charges must be reasonable and necessary in all the circumstances. Aside from judicially imposed sentences for a fixed period of time, the decision to keep a person in any form of detention is arbitrary if it is not subject to periodic re-evaluation of the justification for continuing the detention.²²⁴

Concerning the presumption of innocence,

this presumption can be considered violated where a person is held in connection with criminal charges for a prolonged period of time in preventative detention without proper justification, for the reason that such detention becomes a punitive rather than precautionary measure that is tantamount to anticipating a sentence.²²⁵

KEY POINTS

- Pretrial detention raises a variety of human rights concerns, including in relation to the ability of defendants to prepare for trial.
- Pretrial detention should be a measure of last resort, and States should make the widest and earliest possible use of alternatives to pretrial detention.
- Alternatives to pretrial detention must include gender-specific alternatives and take into account both the history of victimization of many women offenders and their caretaking responsibilities. The same principle can apply to men, as they can also be vulnerable to victimization, including through forced or coerced recruitment to take part in activities of organized criminal groups.
- Bail should be granted in all cases except in situations where it is likely that the accused would fail to appear at subsequent criminal proceedings, flee from the jurisdiction of the country, commit a further offence, or influence a witness, tamper with or destroy evidence or otherwise obstruct the course of justice.
- Persons arrested or detained on criminal charges must be promptly brought before a judicial officer, who shall rule on whether they are to be released or remanded in custody.
- Persons arrested or detained on a criminal charge shall be entitled to trial within a reasonable time or to release.

Determination and execution of penalties

Article 11 (1) of the Organized Crime Convention provides that “each State Party shall make the commission of an offence established in accordance with articles 5, 6, 8 and 23 of this Convention liable to sanctions that take into account the gravity of that offence”.

²²¹ CCPR/C/86/D/1085/2002, para. 8.3; CCPR/C/99/D/1502/2006, para. 10.4; CCPR/C/99/D/1369/2005.

²²² See International Covenant on Civil and Political Rights, art. 9 (1); European Convention on Human Rights, art. 5 (1); American Convention on Human Rights, art. 7 (1)–(3); African Charter on Human and Peoples’ Rights, art. 6.

²²³ See the section entitled “Rights of defendants” above.

²²⁴ Human Rights Committee, general comment No. 35 (2014), para. 12.

²²⁵ Inter-American Commission on Human Rights, document OEA/Ser.L/V/II.116 Doc 5 rev. 1 corr., para. 223; Inter-American Court of Human Rights, *Suárez Rosero v. Ecuador*, Series C No. 35, Judgment of 12 November 1997, para. 77.

The determination and execution of penalties may affect various human rights of convicted persons, including freedom from arbitrary deprivation of liberty, the prohibition of torture or inhuman or degrading treatment or punishment, the right to life, due process rights and the right to property. In the present section, two human rights issues relating to the determination and execution of penalties for offences established in accordance with the Convention are considered: proportionality of sentence and the imposition of the death penalty.

Proportionality of sentence

The Organized Crime Convention leaves it to States parties to determine the sanctions for offences established in accordance with the Convention. Article 11 (1) does, however, require that the applicable sanctions for such an offence be sanctions that “take into account the gravity of that offence”.

Article 11 (1) reflects the principle of proportionality of penalties,²²⁶ which is a general principle of criminal law common to national legal systems and is also protected by international human rights law.²²⁷ This principle requires that criminal penalties adequately reflect, but not exceed, the gravity of the offence and the circumstances of the offender. It is enshrined in the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)²²⁸ and the United Nations Standard Minimum Rules for Non-Custodial Measures (the Tokyo Rules).²²⁹ It is linked to the more general principle of international human rights law that any restrictions of human rights must be necessary and proportionate to a legitimate aim.²³⁰ In the Kyoto Declaration on Advancing Crime Prevention, Criminal Justice and the Rule of Law: Towards the Achievement of the 2030 Agenda for Sustainable Development, adopted by consensus at the Fourteenth United Nations Congress on Crime Prevention and Criminal Justice, States Members of the United Nations declared that they would endeavour to “promote national sentencing policies, practices or guidelines for the treatment of offenders in which the severity of penalties for offenders is proportionate to the gravity of offences in accordance with national legislation”²³¹

The principle of proportionality reflects States’ human rights obligations, both to convicted persons and to victims. On the one hand, penalties which are disproportionately lenient and which fail to adequately take into account the gravity of the offence may be considered a form of de facto impunity and hence a breach of States’ obligations to hold perpetrators of human rights violations accountable. On the other hand, penalties which are disproportionately harsh in comparison to the gravity of the offence and the circumstances of the offender may amount to arbitrary deprivation of liberty²³² or cruel, inhuman or degrading treatment or punishment.²³³ They may also be inconsistent with an essential aim of the penitentiary system, namely, the

²²⁶ See the similarly worded provision in the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (United Nations, Treaty Series, vol. 1582, No. 27627), art. 3 (4) (a), and Commission on Narcotic Drugs resolution 59/7, entitled “Promotion of proportionate sentencing for drug-related offences of an appropriate nature in implementing drug control policies”, which begins by recalling the concept of proportionate sentencing provided for under that provision of the 1988 Convention.

²²⁷ The principle is recognized as such in the concluding observations of human rights treaty bodies; see, for example, CCPR/C/SDN/CO/3, para. 10; CERD/C/MUS/CO/15-19, para. 12; E/C.12/JPN/CO/3, para. 20; CRC/C/OPSC/BFA/CO/1, para. 31; CAT/C/EST/CO/4, para. 15. It is also recognized in several international human rights instruments; see Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949 (United Nations, Treaty Series, vol. 75, No. 973), art. 67; Charter of Fundamental Rights of the European Union (*Official Journal of the European Communities*, C 364), art. 49 (3). See also Dirk van Zyl Smit and Andrew Ashworth, “Disproportionate sentences as human rights violations”, *The Modern Law Review*, vol. 67, No. 4 (July 2004), 541–560.

²²⁸ General Assembly resolution 40/33, annex, rules 5.1 and 17.1.

²²⁹ Rules 2.3 and 3.2. See also Economic and Social Council resolution 2017/19, pp. 2–3.

²³⁰ See Human Rights Committee, general comment No. 31 (2004), para. 6.

²³¹ A/CONF.234/16, chap. I, resolution 1, para. 50.

²³² CCPR/C/83/D/1189/2003, para. 9.2; CCPR/C/93/D/1373/2005, para. 11.42. See, generally, Human Rights Committee, general comment No. 35 (2014), para. 12.

²³³ European Court of Human Rights, *Vinter and others v. United Kingdom*, Applications Nos. 66069/09, 130/10 and 3896/10, Judgment (9 July 2013), para. 102. For domestic cases, see Constitutional Court of South Africa, *Buzani Dodo v. the State*, Case CCT 1/01, Judgment (5 April 2001); Hong Kong, China, *Lau Cheong v. Hong Kong Special Administrative Region* (2002); United States of America, *Graham v. Florida*, 130 S. Ct. 2011, Opinion No. 08-7412 (17 May 2010). See, generally, Zyl Smit and Ashworth, “Disproportionate sentences”.

rehabilitation of offenders.²³⁴ Moreover, legislation establishing mandatory minimum sentences that preclude sentencing judges from taking into account the gravity of the offence and the circumstances of the offender, including relevant mitigating factors, is likely to lead to the imposition of disproportionate penalties.²³⁵ In addition, mandatory minimum sentences may have a discriminatory impact on certain groups. For example, mandatory minimum sentences for drug-related offences have resulted in a disproportionate impact on women, who are more likely to be involved in drug-related offending at lower levels and hence more likely to be sentenced to a disproportionately harsh penalty under mandatory minimum sentencing laws.²³⁶

States parties should take each of these issues into account in the implementation of article 11 (1) of the Organized Crime Convention. In relation to offences of participation in an organized criminal group, States should consider providing for higher penalties for higher-ranking members of organized criminal groups and for those who organize and direct those criminal activities.²³⁷ Whenever a sentence of imprisonment is imposed, detention conditions should be in line with international standards, including the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules).²³⁸

Imposition of the death penalty

International human rights law also restricts – and, in some circumstances, prohibits – the imposition of the death penalty. The imposition of the death penalty is prohibited by States parties to several human rights instruments, including the Second Optional Protocol to the International Covenant on Civil and Political Rights, Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the Abolition of the Death Penalty, and Protocol No. 13 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the Abolition of the Death Penalty in All Circumstances,²³⁹ and the Protocol to the American Convention on Human Rights to Abolish the Death Penalty.²⁴⁰ States parties to the International Covenant on Civil and Political Rights that have abolished the death penalty are also prevented from reinstating it.²⁴¹ The General Assembly has also called for a moratorium on the use of the death penalty on several occasions.²⁴²

In countries where the death penalty has not been abolished, it may be carried out only with full respect for international human rights guarantees. Under article 6 of the International Covenant on Civil and Political Rights, the death penalty may be imposed only by States that have not yet abolished it.²⁴³ Moreover, persons must not be sentenced to death for crimes committed before they were 18 years of age and the death penalty must not be carried out on pregnant women.²⁴⁴ Furthermore, a sentence of death “may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime.”²⁴⁵ This reflects both the principle of legality²⁴⁶ and the principle of proportionality. The term “the most serious

²³⁴ See International Covenant on Civil and Political Rights, art. 10 (3).

²³⁵ CCPR/C/AUS/CO/6, para. 39; CCPR/C/70/D/806/1998, para. 8.57.

²³⁶ *World Drug Report 2018*, booklet 5, *Women and Drugs* (United Nations publication, 2018), pp. 27, 29–32.

²³⁷ CTOC/COP/WG.2/2014/4, para. 6.

²³⁸ See General Assembly resolution 70/175, annex.

²³⁹ United Nations, *Treaty Series*, vol. 1496, No. 2889, and vol. 2246, No. 2889.

²⁴⁰ Organization of American States, *OAS Treaty Series*, No. 73.

²⁴¹ International Covenant on Civil and Political Rights, art. 6 (2); Human Rights Committee, general comment No. 36 (2018), paras. 33–34.

²⁴² See, for example, General Assembly resolutions 62/149 and 75/183.

²⁴³ International Covenant on Civil and Political Rights, art. 6 (2).

²⁴⁴ *Ibid.*, art. 6 (5).

²⁴⁵ *Ibid.*, art. 6 (2).

²⁴⁶ See the section entitled “Principle of legality” above. See also Human Rights Committee, general comment No. 36 (2018), para. 38.

crimes” must be read restrictively and appertains only to crimes of extreme gravity involving killing.²⁴⁷ In summarizing its jurisprudence, the Human Rights Committee has stated that:

Crimes not resulting directly and intentionally in death, such as attempted murder, corruption and other economic and political crimes, armed robbery, piracy, abduction, drug and sexual offences, although serious in nature, can never serve as the basis, within the framework of article 6, for the imposition of the death penalty. In the same vein, a limited degree of involvement or of complicity in the commission of even the most serious crimes, such as providing the physical means for the commission of murder, cannot justify the imposition of the death penalty.²⁴⁸

In addition, a sentence of death must not be imposed in a manner contrary to the other provisions of the International Covenant on Civil and Political Rights or the Convention on the Prevention and Punishment of the Crime of Genocide.²⁴⁹ The death penalty may only be carried out “pursuant to a final judgment rendered by a competent court”.²⁵⁰ Moreover, the Human Rights Committee has stated the following:

In all cases involving the application of the death penalty, the personal circumstances of the offender and the particular circumstances of the offence, including its specific attenuating elements, must be considered by the sentencing court. Hence, mandatory death sentences that leave domestic courts with no discretion as to whether to designate the offence as a crime warranting the death penalty, and whether to issue the death sentence in the particular circumstances of the offender, are arbitrary in nature. The availability of a right to seek pardon or commutation on the basis of the special circumstances of the case or the accused is not an adequate substitute for the need for judicial discretion in the application of the death penalty.²⁵¹

Wherever a case involves the possible imposition of the death penalty, it is of utmost importance that the right to a fair trial and other due process rights are fully respected. Violation of fair trial guarantees in proceedings resulting in the imposition of the death penalty will render the sentence arbitrary in nature, in breach of the prohibition of arbitrary deprivation of life.²⁵² A failure to promptly inform detained foreign nationals of their right to consular notification of arrest, detention or prosecution, or to communication with consular officials,²⁵³ resulting in the imposition of the death penalty likewise renders the imposition and execution of such a penalty arbitrary.²⁵⁴ Where the death penalty is permitted under international human rights law, the method of execution must not constitute torture or cruel, inhuman or degrading treatment or punishment.²⁵⁵ In cases where the death penalty is permissible, methods of execution must exclude suffering or involve the least suffering possible.²⁵⁶

Human rights issues relating to the possible imposition of the death penalty in relation to a person sought for extradition are addressed below.²⁵⁷

²⁴⁷ Human Rights Committee, general comment No. 36 (2018), para. 35. See also Economic and Social Council resolution 1984/50, annex, para. 1.

²⁴⁸ Human Rights Committee, general comment No. 36 (2018), para. 35.

²⁴⁹ International Covenant on Civil and Political Rights, art. 6 (2).

²⁵⁰ Ibid.

²⁵¹ Human Rights Committee, general comment No. 36 (2018), para. 37.

²⁵² Ibid., para. 41.

²⁵³ See Vienna Convention on Consular Relations (United Nations, *Treaty Series*, vol. 596, No. 8638), arts. 36 and 42.

²⁵⁴ See also Human Rights Committee, general comment No. 36 (2018), paras. 41–42; *Jadhav (India v. Pakistan)*, para. 138. Compare *LaGrand (Germany v. United States of America)*, para. 125.

²⁵⁵ Human Rights Committee, general comment No. 36 (2018), para. 40.

²⁵⁶ African Court on Human and Peoples’ Rights, *Ally Rajabu and others v. United Republic of Tanzania*, Application No. 007/2015, Judgment, 28 November 2019, para. 118.

²⁵⁷ See the section entitled “Extradition” below.

KEY POINTS

- Sentences for offences established in accordance with the Organized Crime Convention and serious crimes involving organized criminal groups, like all sentences, must be proportionate to the gravity of the offence and the circumstances of the offender.
- Mandatory minimum sentences that preclude sentencing judges from taking into account the gravity of the offence and the circumstances of the offender are likely to lead to the imposition of disproportionate penalties and may have a discriminatory impact on certain groups.
- Detention conditions for persons serving sentences of imprisonment must be in line with international standards, including the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules).
- Where the death penalty has not been abolished, it may be carried out only with full respect for international human rights guarantees, and it may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and after the final judgment of a competent court following a trial in full respect of the right to a fair trial and other due process rights.
- Where the death penalty is permitted under international law, it must not be imposed for crimes committed before the perpetrator was 18 years of age and it must not be carried out on pregnant women.
- Where the death penalty is permitted under international law, the method of execution must not constitute torture or cruel, inhuman or degrading treatment or punishment and must exclude suffering or involve the least suffering possible.

Seizure and confiscation

Article 12 (1) of the Organized Crime Convention provides that States parties shall adopt, to the greatest extent possible within their domestic legal systems, such measures as may be necessary to enable confiscation of:

- (a) Proceeds of crime derived from offences covered by this Convention or property the value of which corresponds to that of such proceeds;
- (b) Property, equipment or other instrumentalities used in or destined for use in offences covered by this Convention.

Article 12 (2) provides that States parties shall adopt such measures as may be necessary to enable the identification, tracing, freezing or seizure of any item referred to in article 12 (1) for the purpose of eventual confiscation.

The appropriate and effective use of seizure and confiscation is necessary to prevent organized criminal groups from profiting from their crimes and from using proceeds of crime to commit further offences. Illicit financial flows deprive States of resources required to protect and fulfil human rights.²⁵⁸ Moreover, the Organized Crime Convention contemplates, at least in the case of international cooperation for purposes of confiscation, that priority consideration should be given to the return of confiscated proceeds of crime for purposes of compensation or restitution to victims.²⁵⁹ Accordingly, the appropriate and effective use of seizure and confiscation can contribute to the realization of States' obligations to protect and fulfil human rights.

Seizure and confiscation may, however, affect the exercise of several human rights of both accused persons and third parties, including the right to property,²⁶⁰ the principle of legality (*nullum crimen, nulla poena sine lege*), the presumption of innocence, the right to a fair trial and other due process rights, the right to private and

²⁵⁸ A/HRC/28/60, para. 22; A/HRC/36/52, para. 50.

²⁵⁹ Organized Crime Convention, art. 14 (2). See also the section entitled "Compensation, restitution and other reparations" below.

²⁶⁰ The right to property is protected under several instruments of international human rights law, although the International Covenant on Civil and Political Rights is not included among these instruments. See, for example, Universal Declaration of Human Rights, art. 17; Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms (United Nations, *Treaty Series*, vol. 213, No. 2889), art. 1; American Convention on Human Rights, art. 21; African Charter on Human and Peoples' Rights, art. 14.

family life and the right to reputation. Article 12 (8) of the Organized Crime Convention expressly provides that “the provisions of this article shall not be construed to prejudice the rights of bona fide third parties”. More broadly, international human rights law protects the rights of all persons affected by such measures.

Domestic provisions concerning confiscation vary according to, *inter alia*, whether they require the prior conviction of the offender and whether they require proof according to the criminal standard of proof or the lower civil standard.²⁶¹ Moreover, article 12 (7) contemplates the reversal of the burden of proving the lawful origin of property liable to confiscation:

States Parties may consider the possibility of requiring that an offender demonstrate the lawful origin of alleged proceeds of crime or other property liable to confiscation, to the extent that such a requirement is consistent with the principles of their domestic law and with the nature of the judicial and other proceedings.

Limitations to human rights safeguards applicable to persons suspected or accused of criminal offences, including limitations through non-conviction-based confiscation, confiscation based on a lesser standard of proof and the reversal of the burden of proof, must comply with international human rights law. The general conditions under which rights may be limited under international human rights law set out in chapter I of this issue paper are relevant in this context. Such limitations may be imposed only where they are prescribed by clear and accessible law, serve a legitimate aim (such as preventing and combating transnational organized crime) and are necessary for meeting, and proportionate to, this legitimate aim.

The European Court of Human Rights, in particular, has developed a body of jurisprudence on the compatibility of seizure and confiscation measures with the European Convention on Human Rights,²⁶² specifically the right to the peaceful enjoyment of possessions,²⁶³ the principle of legality (*nullum crimen, nulla poena sine lege*)²⁶⁴ and the right to a fair trial.²⁶⁵ The applicable guarantees depend in part on whether the confiscation amounts to a criminal penalty.²⁶⁶ This is a question of substance; the characterization of the measure under domestic law is one factor that is relevant to the assessment of this question, but it is not determinative.²⁶⁷ If confiscation amounts to a criminal penalty, it will be subject to all of the guarantees applicable in criminal matters, such as the principle of legality, the presumption of innocence and other aspects of the right to a fair trial applicable in criminal proceedings.²⁶⁸ As regards confiscation for preventive purposes not amounting to a criminal penalty, the European Court of Human Rights has upheld confiscation pursuant to such a scheme on the grounds that the interference with the applicant’s right to peaceful enjoyment of his possessions was not disproportionate to the legitimate aim pursued by the confiscation (preventing organized crime), having regard to the problem of organized crime faced by the country and the evidence against the applicant.²⁶⁹ Finally, the European Court of Human Rights has held that the reversal of the burden of proving the lawful origin of property liable to confiscation, contemplated in article 12 (7) of the Organized Crime Convention and similar provisions such as article 31 (8) of the United Nations Convention against Corruption, is not *per se* contrary to the civil limb of article 6 (right to a fair trial) of the European Convention on Human Rights.²⁷⁰

²⁶¹ UNODC, *Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime*, 2nd ed. (2017), para. 332.

²⁶² See, generally, Antonio Balsamo, “The content of fundamental rights”, in *Handbook of European Criminal Procedure*, Roberto E. Kostoris, ed. (Cham, Switzerland, Springer International Publishing, 2018), pp. 164–165.

²⁶³ Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 1.

²⁶⁴ European Convention on Human Rights, art. 7.

²⁶⁵ *Ibid.*, art. 6.

²⁶⁶ Balsamo, “The content of fundamental rights”, p. 165.

²⁶⁷ European Court of Human Rights, *G.I.E.M. S.R.L. and others v. Italy*, paras. 210–211.

²⁶⁸ See European Convention on Human Rights, art. 6 (2) and (3) and art. 7; European Court of Human Rights, *G.I.E.M. S.R.L. and others v. Italy*, paras. 233, 252.

²⁶⁹ European Court of Human Rights, *Arcuri and three others v. Italy*, Application No. 52024/99, Decision, 5 July 2001.

²⁷⁰ European Court of Human Rights, *Gogitidze and others v. Georgia*, Application No. 36862/05, 12 May 2015, para. 122. See also *Phillips v. United Kingdom*, Application No. 41087/98, Judgment, 5 July 2001, paras. 41–47; *Grayson and Barnham v. United Kingdom*, Applications Nos. 19955/05 and 15085/06, Judgment, 23 September 2008, paras. 42–50.

KEY POINTS

- The appropriate and effective use of the seizure and confiscation of proceeds of crime and other property, equipment or other instrumentalities can contribute to the realization of States' obligations to protect and fulfil human rights, in particular through the application of confiscated proceeds of crime to compensation or restitution for victims.
- States must also consider, however, the impact of seizure and confiscation measures under the Organized Crime Convention on the rights of both accused persons and third parties, including the right to property, the principle of legality, the presumption of innocence, due process rights, the right to private and family life and the right to reputation and ensure that such measures do not limit the exercise of such rights beyond what is justified to prevent and combat transnational organized crime.
- The provisions of the Organized Crime Convention relating to seizure and confiscation shall not be construed to prejudice the rights of bona fide third parties.
- Limitations to human rights safeguards applicable to persons suspected or accused of offences involving organized crime, including limitations through non-conviction-based confiscation, confiscation on a lesser standard of proof and the reversal of the burden of proof, must comply with international human rights law.
- In particular, such limitations must be prescribed by clear and accessible law, serve a legitimate aim (such as preventing and combating transnational organized crime) and be necessary for meeting, and proportionate to, this legitimate aim.

INTERNATIONAL COOPERATION AND ASSISTANCE

In a context where organized crime operates across borders, international cooperation to prevent and combat it becomes a matter of international necessity.²⁷¹ The purpose of the Organized Crime Convention, as stated in article 1, is “to promote cooperation to prevent and combat transnational organized crime more effectively”. To this end, the Organized Crime Convention contains a number of articles requiring or encouraging various forms of international cooperation. These include articles relating to law enforcement cooperation (article 27), joint investigations (article 19), mutual legal assistance (article 18), extradition (article 16), international cooperation for purposes of confiscation (article 13), transfer of criminal proceedings (article 21) and the transfer of sentenced persons (article 17). Provisions relating to international cooperation are also included in a number of other articles of the Organized Crime Convention.²⁷²

This section of the issue paper begins with a discussion of general human rights issues relating to international cooperation in the context of the Organized Crime Convention, from the perspective of both the rights of victims and the rights of persons targeted by international cooperation measures. It then describes in more detail human rights considerations relating to two forms of international cooperation covered by the Organized Crime Convention: the extradition and transfer of sentenced persons. The analysis contained in those subsections may be of broader relevance to States parties when implementing other forms of international cooperation under the Convention.

²⁷¹ See Neil Boister, “The ‘bad global citizen’, ‘naked’, in the ‘transnational penal space’”, in *New Perspectives on the Structure of Transnational Criminal Justice*, Mikkel Christensen and Neil Boister, eds., Brill Research Perspectives in Transnational Crime Series (Leiden, Netherlands, Koninklijke Brill, 2018), pp. 12, 14–15.

²⁷² These include articles relating to measures to combat money-laundering (art. 7 (1) (b) and (4)), disposal of confiscated proceeds of crime or property (art. 14 (2) and (3)), jurisdiction (art. 15 (5)), special investigative techniques (art. 20 (2)–(4)), protection of witnesses (art. 24 (3)), measures to enhance cooperation with law enforcement authorities (art. 26 (5)), collection, exchange and analysis of information on the nature of organized crime (art. 28 (2)), training and technical assistance (art. 29 (2) and (4)), other measures: implementation of the Convention through economic development and technical assistance (art. 30) and prevention (art. 31 (7)) of the Organized Crime Convention.

International cooperation and assistance in general

The various forms of international cooperation contemplated by the Organized Crime Convention have numerous implications for the exercise of human rights. Prior to consideration of the implications of specific forms of international cooperation, it is useful to make some brief, general observations about the human rights dimensions of international cooperation measures to prevent and combat organized crime. In this section, this question is considered from the perspective of both victims of crimes covered by the Organized Crime Convention and the persons targeted by the international cooperation measures contained in the Convention.

From the perspective of victims, international cooperation measures are functional to the protection and fulfilment of their rights. Moreover, obligations to rely on instruments for international cooperation, whenever this would be conducive to the effective protection of human rights, can be construed as a facet of the obligation to protect human rights. In a case concerning the death of a woman in circumstances of alleged trafficking in persons, the European Court of Human Rights held that the obligation to conduct an effective investigation required the State to take such reasonable steps as were necessary and available, including under mutual legal assistance treaties, to secure relevant evidence located in another jurisdiction.²⁷³ The case law of United Nations human rights treaty bodies, the Inter-American Court of Human Rights and the African Court on Human and Peoples' Rights is not as developed in relation to such matters; however, in a case concerning crimes against humanity, the Inter-American Court of Human Rights stated that it "considers that the obligation to prevent and to punish crimes under international law includes the duty of States to cooperate."²⁷⁴

On the other hand, there are risks of multiple and potentially serious infringements of the fundamental rights of individuals targeted by the international cooperation measures required or encouraged by the Organized Crime Convention, varying to some extent according to the form of international cooperation in question. Thus, for example, information-sharing and international cooperation for the provision of evidence under, for example, article 27 (law enforcement cooperation) or article 18 (mutual legal assistance) of the Organized Crime Convention may entail risks of infringing the rights to privacy, reputation and due process. Forms of international cooperation involving the physical transfer of a person to another State may entail risks of infringements of other rights, such as the right to life, freedom from torture and cruel, inhuman or degrading treatment or punishment, the right to respect for private and family life, freedom from arbitrary deprivation of liberty, freedom of expression, freedom of thought, conscience and religion, freedom from discrimination and the principle of non-refoulement. These risks, as well as the relevant human rights considerations more generally, differ depending on the purpose of the transfer (in other words, the form of international cooperation) in question. The following sections consider some of the human rights implications of two different forms of international cooperation involving the physical transfer of persons: extradition and the transfer of sentenced persons. Different human considerations may be relevant to other forms of international cooperation involving the transfer of persons, such as transfer for the purposes of making a statement pursuant to a request for mutual legal assistance under article 18 of the Organized Crime Convention.

²⁷³ European Court of Human Rights, *Rantsev v. Cyprus and Russia*, paras. 241, 245. See also *Güzelyurtlu and others v. Cyprus and Turkey*, Application No. 36925/07, Judgment, 29 January 2019, paras. 235–236.

²⁷⁴ Inter-American Court of Human Rights, *Herzog et al v. Brazil*, para. 232. In a different transnational context, see the views of the Committee on the Elimination of Discrimination against Women (CEDAW/C/73/D/87/2015, para. 9.2), (*OM v. Ukraine*), to the effect that "the State party ... must exercise due diligence in the protection of its citizens facing violations of their fundamental rights" and construing on this basis an obligation for Ukraine to effectively provide consular protection to Ukrainian women in vulnerable situations abroad.

KEY POINTS

- The international cooperation measures contained in the Organized Crime Convention can promote the protection and fulfilment of the rights of victims.
- In some cases, international cooperation may be required as a facet of States' obligations to protect human rights.
- On the other hand, the various forms of international cooperation can result in multiple and potentially serious infringements of human rights, which must be considered by States when engaging in such forms of international cooperation.
- International cooperation involving the physical transfer of a person to another State may entail risks of infringements of rights such as the right to life, freedom from torture and cruel, inhuman or degrading treatment or punishment, freedom from arbitrary deprivation of liberty, freedom of expression, freedom of thought, conscience and religion, freedom from discrimination and the principle of non-refoulement.
- Information-sharing and international cooperation for the provision of evidence may entail risks of infringing the rights to privacy, reputation and due process.
- Other forms of international cooperation may result in infringements of other human rights.

Extradition

Extradition is the formal process whereby one State (the “requesting State”) requests from another State (the “requested State”) the return of a person accused or convicted of a crime to stand trial or serve a sentence in the requesting State. It is a particularly important mechanism for combating transnational organized crime as offenders may commit offences in States other than the State in which they are located or they may have moved from one State to another. Article 16 of the Organized Crime Convention provides a basis for the extradition of persons sought in respect of offences established in accordance with the Convention and serious crimes, where such offences involve an organized criminal group. Article 16 is intended to be complementary to existing bilateral and multilateral extradition treaties²⁷⁵ and can be relied upon as a basis for extradition for offences covered by article 16 when no extradition treaty is in force between the States in question.²⁷⁶

Article 16 of the Organized Crime Convention is one of the few provisions in the Convention that expressly envisages safeguards for fundamental human rights. Article 16 (13) provides as follows:

Any person regarding whom proceedings are being carried out in connection with any of the offences to which this article applies shall be guaranteed fair treatment at all stages of the proceedings, including enjoyment of all the rights and guarantees provided by the domestic law of the State Party in the territory of which that person is present.

Extradition enhances opportunities to bring offenders to justice and the possibility for victims to obtain reparation in the form of compensation or restitution. It may thus be seen as promoting the rights of victims of crime. On the other hand, the extradition of a defendant or a convicted person to another jurisdiction may pose the risk of violation of that person's human rights. States, including through their legislative, executive and judicial organs, need to take into consideration both of these perspectives in the implementation of the Organized Crime Convention. This section discusses some of the main international human rights considerations at stake within extradition proceedings, as regards both offenders and victims. These human rights obligations are discussed in relation to grounds for refusal of extradition, expedited and simplified extradition procedures, provisional arrest and the principle of speciality.

²⁷⁵ Besides the already existing bilateral and multilateral treaties on extradition, States may also consider to enter into new arrangements applying the Model Treaty on Extradition adopted by the General Assembly in its resolution 45/116.

²⁷⁶ Organized Crime Convention, art. 16 (4).

Grounds for refusal

Traditionally, there are a number of grounds for which a requested State may refuse a request to extradite a particular person. Some of these grounds are based on or may promote the protection of human rights. This section provides an outline of the grounds for refusal contemplated in the Organized Crime Convention, their links to the human rights of persons sought for extradition and additional circumstances in which international human rights law requires States to refuse extradition. Finally, the relevance of diplomatic assurances to States' human rights duties in this regard is briefly examined.

There are several paragraphs in article 16 of the Organized Crime Convention which are relevant to grounds for refusal, for example, article 16 (7):

Extradition shall be subject to the conditions provided for by the domestic law of the requested State Party or by applicable extradition treaties, including, inter alia, conditions in relation to the minimum penalty requirement for extradition and the grounds upon which the requested State Party may refuse extradition.

Accordingly, when ascertaining the potentially applicable grounds for refusal, it is important to refer to the domestic law of the requested State and any applicable bilateral or multilateral extradition treaties. Article 16 (7) should, moreover, be read in conjunction with article 16 (13) (mentioned above) and article 16 (14). The latter provision acts to preserve a number of human rights-based grounds for refusal of extradition, providing as follows:

Nothing in this Convention shall be interpreted as imposing an obligation to extradite if the requested State Party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin or political opinions or that compliance with the request would cause prejudice to that person's position for any one of these reasons.

While article 16 does not impose an obligation on States parties to the Organized Crime Convention to establish and apply those grounds for refusal, States parties should establish and make appropriate use of such grounds for refusal to best respect, protect and fulfil human rights in the implementation of the Organized Crime Convention. In this regard, States should be aware of their obligations to guarantee for all persons equal and effective protection against discrimination under international human rights law²⁷⁷ and that the international human rights instruments to which they are party may protect against discrimination on further grounds than those mentioned in article 16 (14). For example, article 26 of the International Covenant on Civil and Political Rights provides that:

the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.²⁷⁸

The ground of "other status" mentioned in this provision may include grounds such as disability, age, marital and family status, sexual orientation, gender identity and health status, place of residence and economic and social situation.²⁷⁹ These and other relevant grounds should be taken into consideration in the implementation of article 16 of the Organized Crime Convention.

Article 16 (10) of the Organized Crime Convention concerns the non-extradition of nationals, a ground for refusal found in the law of many States, particularly civil-law countries. Article 16 (10) provides that if a State party to the Convention does not extradite a person in their territory solely on the basis that he or she

²⁷⁷ See, for example, International Covenant on Civil and Political Rights, art. 26.

²⁷⁸ See also International Covenant on Civil and Political Rights, art. 2 (1), and International Covenant on Economic, Social and Cultural Rights, art. 2 (2).

²⁷⁹ See, generally, Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009) (E/C.12/GC/20), paras. 27–35.

is one of its nationals, it is obliged, at the request of the State party requesting extradition, to submit the case without undue delay to its competent authorities for prosecution. This reflects the principle of *aut dedere aut judicare* (extradite or prosecute)²⁸⁰ and seeks to prevent the impunity of persons involved in organized crime and uphold the rights of victims of organized crime to obtain justice. Where extradition is sought for the purposes of enforcing a sentence, rather than prosecution, and extradition is refused on the basis that the person is a national of the requested State, article 16 (12) of the Organized Crime Convention provides that the requested State party shall, if permitted by and in conformity with its domestic law, consider the enforcement of the sentence imposed under the law of the requesting party.²⁸¹

Additionally, a condition of extradition on the basis of article 16 of the Organized Crime Convention is that the offence for which extradition is sought is punishable under the domestic law of both the requesting State party and the requested State party (that is, the principle of dual or double criminality).²⁸² In this regard, what matters is that the conduct for which extradition is sought is criminalized under the laws of both States, regardless of the formal denomination of such offences.²⁸³ The dual criminality requirement constitutes a human rights safeguard insofar as it allows a requested State to refuse extradition if it would be contrary to that State's basic values²⁸⁴ and excludes extradition where it would be contrary to the principle of legality.

Aside from the grounds for refusal referred to in article 16 of the Organized Crime Convention, there are other circumstances in which a requested State will be required to refuse extradition under international human rights law and, as applicable, international refugee law. States must, in particular, comply with their obligations of non-refoulement under conventional and customary human rights and refugee law, which protect against the return of the individual concerned to reasonably foreseeable serious violations of human rights in the requesting State and, in the case of international refugee law, threats to life or freedom on the basis of protected grounds.²⁸⁵ The principle of non-refoulement applies not only to extradition but also to other forms of expulsion or return ("refoulement").

International human rights law prohibits a State from extraditing or otherwise transferring a person where its authorities know, or ought to know, that the person concerned would face a genuine risk of serious human rights violations in the territory to which they are extradited or transferred.²⁸⁶ Article 3 (1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which has customary status,²⁸⁷ provides that no State may extradite²⁸⁸ a person to another State where there are substantial grounds for believing that he would be in danger of being subject to torture. The Committee against Torture has held that "substantial grounds" exist whenever a risk of torture is "foreseeable, personal, present and real".²⁸⁹ Decisions of regional human rights courts and United Nations treaty bodies have further held that a person may not be extradited where there are substantial grounds for believing that, if extradited, the person would face a real risk of being subjected to torture or to cruel, inhuman or degrading treatment

²⁸⁰ UNODC, *Manual on Mutual Legal Assistance and Extradition* (Vienna, 2012), paras. 108–110. See also Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 10 (A/69/10), chap. IV.

²⁸¹ See also Organized Crime Convention, art. 17, and the section entitled "Transfer of sentenced persons" below.

²⁸² Organized Crime Convention, art. 16 (1).

²⁸³ See also UNODC, *Manual on Mutual Legal Assistance and Extradition*, para. 103.

²⁸⁴ Petter Asp, Andrew von Hirsch and Dan Frände, "Double criminality and transnational investigative measures in EU criminal proceedings: some issues of principle", (*Zeitschrift für Internationale Strafrechtsdogmatik*, vol. 11 (2006)), p. 513.

²⁸⁵ See Convention relating to the Status of Refugees (United Nations, *Treaty Series*, vol. 189, No. 2545), art. 33.

²⁸⁶ A/67/275, para. 72.

²⁸⁷ CAT/C/67/D/857/2017, para. 9; Elihu Lauterpacht and Daniel Bethlehem, "The scope and content of the principle of non-refoulement: opinion", in *Refugee Protection in International Law*, Erika Feller, Volker Türk and Frances Nicholson, eds. (Cambridge, United Kingdom; New York, Cambridge University Press; Geneva, UNHCR, 2003), p. 158.

²⁸⁸ As this section concerns article 16 of the Organized Crime Convention, for convenience, references of the principle of non-refoulement refer to its application in the context of extradition, notwithstanding that, as noted above, the principle of non-refoulement also applies to other forms of expulsion or return.

²⁸⁹ Committee against Torture, general comment No. 4 (2017) on the implementation of article 3 in the context of article 22, para. 11. See also CAT/C/67/D/857/2017, para. 9.4.

or punishment, including inhumane treatment as a result of being placed on death row,²⁹⁰ a violation of their right to life,²⁹¹ a flagrant breach of the right to liberty and security,²⁹² or a flagrant denial of justice in relation to their right to a fair trial.²⁹³ A State is also prohibited from extraditing a person where its authorities know, or ought to know, that the person would face a genuine risk of arbitrary execution in the receiving State.²⁹⁴ States that have abolished the death penalty cannot extradite a person to a country in which they are facing criminal charges that carry the death penalty unless they have obtained credible and effective assurances that the death penalty will not be imposed.²⁹⁵ Additionally, no State may extradite a refugee to a State where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion.²⁹⁶

Article 16 (16) of the Organized Crime Convention provides that, before refusing extradition, “the requested State party shall, where appropriate, consult with the requesting State party to provide it with ample opportunity to present its opinions and to provide information relevant to its allegation”. Consultations at the “executive stage” of extradition proceedings may also offer the opportunity to consider whether the provision of particular assurances by the requesting State could, in certain cases, allow extradition to be granted, while providing an acceptable degree of protection of the person sought.²⁹⁷ Such assurances could include the following:

(a) The requesting State will not impose the death penalty or will not carry it out if it is imposed, if the offence for which extradition is being sought carries the death penalty;

(b) The person sought will not be subjected to cruel, inhuman or degrading treatment or punishment or prosecuted or punished after surrender on the basis of sex, race, religion, nationality, ethnic origin or political opinions;

(c) Where the person sought has been convicted in the requesting State in absentia, upon surrender, the person sought will have the opportunity to have the case retried in his or her presence;

(d) Where the person sought would be liable to be tried or sentenced in the requesting State by an extraordinary court or tribunal, the judgment will be passed by an independent and impartial court that is generally empowered under the rules of judicial administration to pronounce on criminal matters.²⁹⁸

While States may seek diplomatic assurances that a person sought for extradition will be treated in conformity with human rights standards, the extradition request should be refused notwithstanding such assurances if there are substantial grounds for believing that there is a real risk of a serious violation of human rights.²⁹⁹ States are required to consider whether there are substantial grounds for such a belief and must take into

²⁹⁰ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3 (1); Committee against Torture, general comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22, para. 29 (1); the European Court of Human Rights, *Soering v. United Kingdom*, para. 111; CCPR/C/49/D/469/1991, para. 16.4; *Maksudov et al. v. Kyrgyzstan* (CCPR/C/93/D 1461, 1462, 1476 and 1477/2006), para. 12.6.

²⁹¹ Human Rights Committee, general comment No. 31 (2004), para. 12; European Court of Human Rights, *Al-Sadoon and Mufdhi v. United Kingdom*, Application No. 61498/08, Judgment, 2 March 2010, para. 123; *Al Nashiri v. Poland*, Application No. 28761/11, Judgment, 24 July 2014, paras. 576–579; Inter-American Court of Human Rights, *Wong ho Wing v. Peru*, Series C No. 297, Judgment, 30 June 2015, para. 130.

²⁹² European Court of Human Rights, *Othman (Abu Qatada) v. United Kingdom*, Application No. 8139/09, Judgment, 17 January 2012, para. 233.

²⁹³ *Ibid.*, para. 258; *Soering v. United Kingdom*, para. 113; European Court of Human Rights, *Mamatkulov and Askarov v. Turkey*, Applications Nos. 46827/99 and 46951/99, Judgment, 4 February 2005, para. 90; Inter-American Court of Human Rights, *Wong ho Wing v. Peru*, para. 136.

²⁹⁴ A/67/275, para. 72.

²⁹⁵ *Ibid.*, para. 74; Human Rights Committee, general comment No. 36 (2018), para. 34; A/HRC/18/20, para. 45.

²⁹⁶ Convention relating to the Status of Refugees, art. 33. On the customary status of article 33, see Lauterpacht and Bethlehem, “The scope and content of the principle of *non-refoulement*”, pp. 140–149.

²⁹⁷ See also UNODC, *Model Law on Extradition* (2004), p. 21.

²⁹⁸ CTOC/COP/WG.3/2018/2, para. 30.

²⁹⁹ A/60/316, para. 51; European Court of Human Rights, *Saadi v. Italy*, Application No. 37201/06, Judgment, 28 February 2008, para. 148.

account “all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights”.³⁰⁰ Relevant indications of personal risk include the ethnic background, political affiliation or political activities of the person sought for extradition or their family.³⁰¹

In the European Union, Member States’ discretion to refuse to cooperate with each other in matters of extradition is limited by the principle of mutual recognition,³⁰² based on the “mutual confidence between Member States that their national legal systems are capable of providing equivalent and effective protection of [fundamental rights]”.³⁰³ The Court of Justice of the European Union has nevertheless held that a Member State may refuse to surrender a person pursuant to a European arrest warrant where there are substantial grounds to believe that the person, if surrendered, would be exposed to a real risk of torture or inhuman or degrading treatment³⁰⁴ or a breach of the right to fair trial.³⁰⁵ This is also consistent with the jurisprudence of the European Court of Human Rights regarding the principle of mutual recognition.³⁰⁶

Expedited and simplified procedures

Human rights considerations must also be taken into account when developing and amending extradition procedures. Article 16 (8) of the Organized Crime Convention requires States parties to, subject to their domestic law, “endeavour to expedite extradition procedures and to simplify evidentiary requirements relating thereto in respect of any offence to which this article applies”. Article 16 (8) is aimed at preventing delays in extradition and hence may serve both the interests of victims in ensuring offenders are brought to justice and the interests of defendants in ensuring a speedy trial. Where proceedings for extradition are not carried out diligently and are subject to delay, this may, depending on the delay in question and the circumstances of the case, amount to an infringement of the detained person’s right to liberty and detention may cease to be lawful.³⁰⁷

One example of implementation of article 16 (8) – expressly mentioned in the *Travaux Préparatoires* of the Organized Crime Convention – is expedited and simplified procedures of extradition subject to the domestic law of the requested State party, the agreement of the requested State party and the consent of the person sought for extradition.³⁰⁸ Simplified extradition procedures are common under domestic law where the individual concerned does not challenge surrender.³⁰⁹ Simplified extradition procedures also exist in the European Union³¹⁰ and under other regional agreements.³¹¹

Any expedited or simplified extradition procedures should be carried out in full conformity with applicable human rights law. In this regard, the *Travaux Préparatoires* note that the requirement to endeavour to expedite extradition procedures and to simplify evidentiary requirements contained in article 16 (8) should not be applied and interpreted as prejudicing in any way the fundamental legal rights of the defendant.³¹² The requirement of the consent of the person to be extradited acts as one safeguard of the person’s rights.

³⁰⁰ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3 (2). See also UNODC, *Manual on Mutual Legal Assistance and Extradition*, para. 112.

³⁰¹ CAT/C/67/D/857/2017, para. 9.4.

³⁰² Council of the European Union framework decision 2002/584/JHA on the European arrest warrant and the surrender procedures between member States (*Official Journal of the European Communities*, L 190/1, 18 July 2002), art. 1 (2).

³⁰³ Court of Justice of the European Union, *Pál Aranyosi and Robert Căldăraru*, Joined Cases C-404/15 and C-659/15 PPU, Judgment, 5 April 2016, paras. 75–77.

³⁰⁴ *Ibid.*, para. 104.

³⁰⁵ Court of Justice of the European Union, *LM*, Case C-216/18 PPU, Judgment, 25 July 2018, para. 79.

³⁰⁶ See European Court of Human Rights, *Romeo Castaño v. Belgium*, (Application No. 8351/17, Judgment, 9 July 2019, paras. 83 and 85. See also Valsamis Mistilegas, “The limits of mutual trust in Europe’s area of freedom, security and justice: from automatic inter-State cooperation to the slow emergence of the individual”, *Yearbook of European Law*, vol. 31, No. 1 (October 2012), p. 319.

³⁰⁷ European Court of Human Rights, *Quinn v. France*, Application No. 18580/91, Judgment, 22 March 1995, para. 48.

³⁰⁸ *Travaux Préparatoires*, p. 162.

³⁰⁹ CTOC/COP/2005/2/Rev.1, para. 83.

³¹⁰ See Council of the European Union framework decision 2002/584/JHA on the European arrest warrant.

³¹¹ See, for example, Inter-American Convention on Extradition (United Nations, *Treaty Series*, vol. 1752, No. 30597), art. 21.

³¹² *Travaux Préparatoires*, p. 162.

As further noted in the *Travaux Préparatoires*, consent should be expressed voluntarily and in full awareness of the consequences and should relate to the simplified procedures specifically, not extradition more generally.³¹³ Informed consent requires that the person be informed of his or her rights and the consequences of waiving the guarantees of the ordinary extradition procedure prior to expressing consent.³¹⁴ Expedited or simplified extradition procedures should also respect other rights of the person, such as the right to be assisted by a lawyer and by an interpreter, if needed, and the right to judicial review.

Provisional arrest

Article 16 (9) of the Organized Crime Convention concerns the provisional arrest of persons whose extradition is sought. It provides as follows:

Subject to the provisions of its domestic law and its extradition treaties, the requested State Party may, upon being satisfied that the circumstances so warrant and are urgent and at the request of the requesting State Party, take a person whose extradition is sought and who is present in its territory into custody or take other appropriate measures to ensure his or her presence at extradition proceedings.

Provisional arrest allows for the detention of a person prior to extradition proceedings being formally commenced.³¹⁵ Provisional arrest seeks to prevent offenders from absconding and evading extradition.

The use of provisional arrest procedures requires additional safeguards, in particular to respect the arrested person's right to liberty and freedom from arbitrary detention. Once a provisional arrest is made, the requesting State will be required to provide all information needed to commence extradition proceedings within a certain time frame.³¹⁶ Domestic laws usually establish a time frame of between 30 and 60 days for the commencement of extradition proceedings.³¹⁷ Provisional arrest should be used only if it is urgently needed to ensure the attendance of the person at subsequent hearings.³¹⁸ The arrested person should be promptly brought before a judge or other judicial officer so as to ensure respect of his or her right to liberty.

Principle of speciality

The principle (or rule) of speciality³¹⁹ limits the power that the requesting State has over the person surrendered to it through the extradition process. According to this rule, an extradited person cannot be proceeded against, sentenced, detained, re-extradited to another State or subjected to any other restriction of personal liberty for any offence committed before the surrender other than the one for which extradition was requested and granted.³²⁰ The principle does not preclude prosecution if the person, having the opportunity to leave the country to which they were extradited (for example, following their acquittal on the charges for which they were extradited or their completion of the sentence of imprisonment for such charges), chooses to remain in the country or subsequently returns to it. The principle does not apply to any offences committed after extradition. It may also be waived by the requested State or, under some extradition treaties, the person themselves.³²¹

³¹³ Ibid.

³¹⁴ CTOC/COP/WG.3/2018/5, para. 10. See also UNODC, *Model Law on Extradition*, chap. 3, sect. 27, para. 1.

³¹⁵ UNODC, *Manual on Mutual Legal Assistance and Extradition*, para. 136.

³¹⁶ Ibid.

³¹⁷ Ibid.

³¹⁸ Ibid.; UNODC, "Report of the Informal Expert Working Group on Effective Extradition Casework Practice" (Vienna, 2004), paras. 88–89.

³¹⁹ Sometimes spelled "specialty".

³²⁰ UNODC, *Manual on Mutual Legal Assistance and Extradition*, para. 105. See CCPR/C/118/D/2118/2011.

³²¹ See, for example, UNODC, *Model Law on Extradition*, chap. 3, sect. 27, para. 1.

The traditional view is that the principle of speciality is for the benefit of the requested State, not the individual whose extradition is sought, as evinced by the possibility for the requested State to waive the application of the principle.³²² Nevertheless, the principle of speciality may serve as a safeguard for the human rights of the person sought for extradition. In particular, it may guard against prosecutions for political offences and violations of other substantive rules of extradition law, such as the dual criminality rule (and hence the principle of legality) and the prohibition of double jeopardy.

KEY POINTS

- Extradition enhances opportunities to bring offenders to justice and the possibility for victims to obtain reparation in the form of compensation or restitution and may be seen as promoting the rights of victims of crime.
- On the other hand, the extradition of a defendant or a convicted person to another jurisdiction may pose the risk of violation of that person's human rights.
- States parties to the Organized Crime Convention should establish and make use of appropriate grounds for refusal, including in cases where the requested State party has substantial grounds for believing that the request for extradition has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin or political opinions or that compliance with the request would cause prejudice to that person's position for any one of these reasons.
- States parties to the Organized Crime Convention should establish and make use of grounds for refusal of extradition in cases where there are substantial grounds for believing that extradition is sought for the purpose of prosecuting or punishing a person on account of other internationally protected grounds, such as property, birth, disability, age, marital and family status, sexual orientation, gender identity and health status, place of residence and economic and social situation.
- States parties to the Organized Crime Convention must comply with their obligations pursuant to article 16 (10) (the principle of *aut dedere aut judicare*) to prevent impunity and uphold the rights of victims of organized crime.
- Likewise, States parties, pursuant to article 16 (12) of the Organized Crime Convention, should consider the enforcement of sentences in cases of the kind described in that paragraph in order to prevent impunity and uphold the rights of victims of organized crime.
- The dual criminality requirement, a condition of extradition on the basis of article 16 of the Organized Crime Convention, constitutes a human rights safeguard insofar as it allows a requested State to refuse extradition if it would be contrary to that State's basic values, and excludes extradition where it would be contrary to the principle of legality.
- States parties to the Organized Crime Convention must not extradite a person where extradition would be contrary to the principle of non-refoulement under international human rights and refugee law.
- The principle of non-refoulement under international human rights law has been held by regional human rights courts and United Nations treaty bodies to prohibit, inter alia, the extradition of a person where the authorities of the requested State know, or ought to know, that the person would face a genuine risk of serious human rights violations in the territory of the requesting State, including torture, cruel inhuman or degrading treatment or punishment, a violation of their right to life, a flagrant breach of the right to liberty and security, or a flagrant denial of justice in relation to their right to a fair trial.
- Under international refugee law, the principle of non-refoulement prohibits the extradition of a refugee to a State where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion.
- States that have abolished the death penalty cannot extradite a person to a country in which they are facing criminal charges that carry the death penalty unless they have obtained credible and effective assurances that the death penalty will not be imposed.
- An extradition request should be refused notwithstanding any diplomatic assurances from the requesting State if there are substantial grounds for believing that there is a real risk of a serious violation of human rights.

³²² John Dugard and Christine Van den Wyngaert, "Reconciling extradition with human rights", *The American Journal of International Law*, vol. 92, No. 2 (April 1998), p. 188; Kenneth E. Levitt, "International extradition, the principle of speciality, and effective treaty enforcement", *Minnesota Law Review*, vol. 76, No. 4 (1992), p. 1025.

Transfer of sentenced persons

The transfer of sentenced persons is a relatively recent form of international cooperation in criminal matters and involves the transfer of an offender from a State in which they are serving a sentence of imprisonment (the “sentencing State”) to a State of which they are a national or with which they have significant ties (the “administering State”) for the purpose of serving the remainder of the sentence of imprisonment.³²³ The transfer of sentenced persons differs from extradition for the purpose of enforcement as it involves transfer for the purposes of enforcement of a foreign judgment in the administering State, whereas in the case of extradition the offender moves for the purpose of being prosecuted or serving a sentence in the State which issued it.

Article 17 of the Organized Crime Convention provides that States parties may consider entering into bilateral or multilateral agreements or arrangements for the transfer of persons sentenced to deprivation of liberty for offences covered by the Convention. Beyond stating that States parties may consider entering into such agreements or arrangements, article 17 does not further regulate or provide any guidance as to the content of such agreements or arrangements. States parties may also use existing international treaties concerning the transfer of sentenced persons, such as, for example, the 1983 European Convention on Transfer of Sentenced Persons, which has been ratified or acceded to by both States members and non-members of the Council of Europe alike, Council framework decision No. 909/2008/JHA in the European Union and the 1993 Inter-American Convention on Serving Criminal Sentences Abroad.³²⁴

This section of the issue paper considers a number of human rights dimensions relating to the transfer of sentenced persons. After considering the function of transfers of sentenced persons, this section describes human rights considerations relating to the requirements for transfer, sentence recognition and the conditions to which the person is subject post-transfer.

Humanitarian function

Transfer of sentenced persons “has a strong basis in international human rights law”.³²⁵ In fact, while the other forms of cooperation provided by the Organized Crime Convention are aimed primarily at realizing State interests to prosecute and punish those responsible for crimes covered by the Convention, the transfer of sentenced persons pursues the interest of the detainee to serve the sentence in a country with which he or she has closer ties,³²⁶ thus also enhancing their opportunities for rehabilitation and reintegration into society. This is in line with the objectives and requirements of the Organized Crime Convention and international law concerning penal systems more broadly. Article 31 (3) of the Organized Crime Convention requires States parties to “endeavour to promote the reintegration into society of persons convicted of offences covered by this Convention”. Article 10 (3) of the International Covenant on Civil and Political Rights provides that “the penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation”. Furthermore, rule 4 (1) of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), adopted by the General Assembly, notes that the purposes of a sentence of imprisonment or other similar measures are primarily to protect society against crime and to reduce recidivism and can be achieved only if the period of imprisonment is used to ensure, so far as possible, the reintegration of sentenced persons into society upon release. Rule 53 of the United Nations

³²³ See, generally, Michal Plachta, *Transfer of Prisoners Under International Instruments and Domestic Legislation: A Comparative Study* (Freiburg im Breisgau, Germany, Max-Planck-Institut für Ausländisches und Internationales Strafrecht, 1993); Jamil Ddamulira Mujuzi, “Legal pluralism and the Convention on the Transfer of Sentenced Persons in Practice: highlighting the jurisprudence of the European Court of Human Rights on the transfer of sentenced persons within and to Europe”, *Journal of Legal Pluralism and Unofficial Law*, vol. 47, No. 2 (May 2015).

³²⁴ When none of these is applicable, State authorities may also conclude the so-called ad hoc agreements of administrative nature (memorandums of understanding) dealing with a specific transfer, which will be regulated by national legislation on the transfer of detainees of the administering State, which is also used to complement treaty provisions, if such legislation exists.

³²⁵ UNODC, *Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime*, 2nd ed. (2017), para. 600.

³²⁶ *Ibid.*, para. 599.

Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules) provides that:

Where relevant bilateral or multilateral agreements are in place, the transfer of non-resident foreign-national women prisoners to their home country, especially if they have children in their home country, shall be considered as early as possible during their imprisonment, following the application or informed consent of the woman concerned.

The transfer of sentenced persons may be used to secure the return of persons who may be imprisoned in harsh or inhumane conditions abroad, or who, more generally, are suffering language, religious, cultural or dietary barriers or other forms of discrimination in a foreign prison system.³²⁷ There is, moreover, a particularly strong humanitarian argument in favour of the transfer of detainees that are vulnerable or who have special needs, such as pregnant women and people with disabilities or physical or mental health problems.³²⁸ The transfer of sentenced persons should not pursue the sole purpose of easing the prison system of the sentencing State,³²⁹ and in most cases the consent of the sentenced person is a requirement for their transfer. Rights under domestic law for sentenced foreign nationals to be informed of their eligibility to apply for transfer to their home country further facilitate the humanitarian function of transfer of sentenced persons.³³⁰

The case in the United Kingdom of Great Britain and Northern Ireland of *Orobator v. Governor of Her Majesty's Prison Holloway and Secretary of State for Justice* presents an example of States cooperating to arrange the transfer of a sentenced person in compelling humanitarian circumstances.³³¹ This case concerned a pregnant woman from the United Kingdom who had been sentenced to life imprisonment in the Lao People's Democratic Republic for trafficking heroin. Although the bilateral treaty on transfer of prisoners between the United Kingdom and the Lao People's Democratic Republic³³² had not yet entered into force, the two countries signed a memorandum of understanding to immediately apply the terms of the treaty administratively to facilitate the transfer of the woman to the United Kingdom. She was transferred to the United Kingdom on 7 August 2009, where she was resentenced according to United Kingdom law.

Requirements for transfer

The requirements for transfer of sentenced persons commonly include that the person is a national of the administering State (or, in some cases, has close ties to that State, such as prior residence for an extended period), that the person has been finally sentenced, that the offence for which the person has been sentenced is also an offence under the law of the administering State, and that the sentencing State, the administering State and the sentenced person each consent to the transfer.³³³ The requirement that the person consent to their transfer is necessary to fulfil its humanitarian function. If transfer is not voluntary, it may be perceived as a further penalty and is likely to harm the rehabilitation of the offender.

³²⁷ UNODC, *Model Legislative Provisions against Organized Crime*, pp. 119–120.

³²⁸ See UNODC, *Handbook on the International Transfer of Sentenced Persons*, Criminal Justice Handbook Series (Vienna, 2012), pp. 11–13.

³²⁹ The same rationale has underlined decisions of the European Court of Human Rights, dealt with on the basis of the right to respect for private and family life (article 8 of the European Convention on Human Rights), concerning expulsion from a State in which the offender had greater family ties. See *Radovanovic v. Austria*, Application No. 42703/98, Judgment, 22 April 2004, paras. 31–38. See also European Court of Human Rights, *Guide on Article 8 of the European Convention on Human Rights: Right to Respect for Private and Family Life, Home and Correspondence* (2020), para. 377.

³³⁰ See, for example, UNODC, *Model Legislative Provisions against Organized Crime*, art. 34.

³³¹ England and Wales High Court, *Orobator v. Governor of Her Majesty's Prison Holloway and Secretary of State for Justice*, Case No. CO/9527, EWHC 58 (Administrative Court) (20 January 2020).

³³² Treaty between the United Kingdom of Great Britain and Northern Ireland and the Lao People's Democratic Republic on the Transfer of Sentenced Persons of 25 September 2009.

³³³ See, generally, UNODC, *Handbook on the International Transfer of Sentenced Persons*, pp. 25–42. See also Model Agreement on the Transfer of Foreign Prisoners (Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August–6 September 1985: report prepared by the Secretariat (United Nations publication, Sales No. E.86 IV.1), chap. I, sect. D.1, annex I); Convention on the Transfer of Sentenced Persons (Council of Europe, European Treaty Series, No. 112), art. 3 (1) (d); UNODC, *Model Legislative Provisions against Organized Crime*, art. 31.

The requirement that both the sentencing and administering States also consent to the transfer gives rise to human rights considerations that must be considered by the respective States. Human rights protections are not widely mentioned in instruments governing the transfer of persons but nevertheless must be respected under international law.³³⁴ From the perspective of the sentencing State, the State may not remove a person where removal would be contrary to the principle of non-refoulement under conventional or customary international human rights and refugee law. In particular, the State may not remove a person if there is a threat to their life or if they are likely to be subject to torture or inhuman or degrading treatment or punishment in the administering State. Transfers should also be consistent with the principle of non-discrimination and, where applicable, the rights of the child.³³⁵ Finally, while the human rights of the sentenced person must be respected regardless of the person's prospects for rehabilitation and reintegration into society, these ends cannot be pursued successfully in a country where the person faces violation of their human rights.

The administering State may – and, in some cases, may be bound to – refuse to consent to the transfer for reasons relating to the human rights of the sentenced person. The transfer of a sentenced person is a procedure based on the consent of the States involved. No would-be administering State is under an obligation to accept the request for transfer initiated by another State.³³⁶ A State may refuse to accept the transfer of a sentenced person for any reason, including reasons relating to the human rights of the sentenced person. The refusal to accept the transfer of a sentenced person on the basis of human rights violations relating to his or her conviction or sentence should, however, be a last resort, as refusal would prevent the person, having already been subject to human rights violations in the sentencing country, from benefiting from the humanitarian function of transfer of sentences, which may ameliorate, but not undo, the injustice in the sentencing country. In this regard, the European Court of Human Rights has held that the European Convention on Human Rights does not oblige contracting parties to verify whether the proceedings in the sentencing State resulting in the conviction or sentence which serves as the basis for transfer were conducted in full respect of the person's right to a fair trial under the European Convention on Human Rights.³³⁷ To require such a review would “thwart the current trend towards strengthening international cooperation in the administration of justice, a trend which is in principle in the interests of the persons concerned”.³³⁸ Contracting States to the European Convention on Human Rights are, however, obliged to refuse cooperation “if it emerges that the conviction is the result of a flagrant denial of justice”.³³⁹ The European Court of Human Rights has indicated that the standard of a “flagrant denial of justice” is a stringent standard to meet:

It goes beyond mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of Article 6 [the right to a fair trial] if occurring within the Contracting State itself. What is required is a breach of the principles of a fair trial guaranteed by article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that article³⁴⁰

In such cases, the protection of the fundamental principles of the domestic law of the State in receipt of the request prevails over the interest of the sentenced person to serve the sentence in their home country.

³³⁴ UNODC, *Handbook on the International Transfer of Sentenced Persons*, p. 37.

³³⁵ Human Rights Committee, general comment No. 31 (2004), para. 12. See also UNODC, *Handbook on the International Transfer of Sentenced Persons*, pp. 37–38. Article 1 of the Convention on the Rights of the Child states “a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier”. See, in particular, Committee on the Rights of the Child, general comment No. 20 (2016) on the implementation of the rights of the child during adolescence, para. 40. See also Trafficking in Persons Protocol, art. 3 (d).

³³⁶ UNODC, *Handbook on the International Transfer of Sentenced Persons*, p. 31. Note that this does not affect States' obligations not to reject a person at the frontier where this would amount to refoulement, see Lauterpacht and Bethlehem, “The scope and content of the principle of *non-refoulement*”, pp. 113–115.

³³⁷ European Court of Human Rights, *Drozdz and Janousek v. France and Spain*, Application No. 12747/87, 26 June 1992, para. 110.

³³⁸ *Ibid.*

³³⁹ *Ibid.*, citing *Soering v. United Kingdom*, para. 113.

³⁴⁰ European Court of Human Rights, *Willcox and Hurford v. United Kingdom*, Applications Nos. 43759/10 and 43771/12, Decision, 8 January 2013, para. 95. The Court goes on to give several examples of breaches which may amount to a flagrant denial of justice. For an example of a case in which a flagrant denial of justice was found, see *Stoichkov v. Bulgaria*, Application No. 9808/02, Judgment, 24 March 2005, paras. 51, 58–59.

The European Court of Human Rights has further held that a sentence imposed by a sentencing State will not be deemed to be “grossly disproportionate” such that its enforcement by an administering State amounts to inhuman or degrading treatment or punishment simply because the sentence is more severe than the sentence which would have been imposed in the sentencing State.³⁴¹ From the perspective of the sentenced person, rules relating to the recognition of sentence, discussed below, may to some extent ameliorate the injustice of a disproportionately harsh sentence.

Recognition of sentence

Other human rights issues may arise with regard to the formal recognition of the sentence by the administering State. In general, there are two modes of recognition that may be available to the receiving State: continued enforcement or conversion of the sentence. Continued enforcement refers to a process whereby the sentence imposed by the sentencing State is enforced by the administering State. Under continued enforcement, the sentence is not normally altered by the administering State, but the administering State may (and indeed, is obliged to) adapt the sentence where, because of its nature or duration, it would be incompatible with its domestic law. In such cases, the administering State may adapt the sentence to a punishment prescribed by its own law for a similar offence. The adapted sentence must, as far as possible, correspond with the initial sentence. Conversion of a sentence, on the other hand, refers to a process whereby the administering State, through a judicial or administrative procedure, imposes a new sentence based on the facts found by the court in the sentencing State.

When converting or adapting a sentence, it is important for the administering State to respect the principle of legality (*nulla poena sine lege*). The sentenced person must not be subject to a penalty that was not both in existence at the time of the offence and applicable both to the person and the act in question. The converted or adapted sentence must not aggravate, due to its nature or duration, the sanction imposed in the sentencing State. The converted or adapted sentence must be compatible with the domestic law of the administering State and must not exceed any statutory maximum penalty prescribed by its law. Moreover, the period of detention already served in the sentencing State should be deducted from the period imposed by the recognized sentence in order to avoid a partial duplication of the penalty.³⁴²

Enforcement and administration of sentence post-transfer

Further human rights considerations arise in relation to the enforcement and administration of a sentence once a sentenced person has been transferred to the administering State and their sentence has been recognized. The general position is that the enforcement of the sentence is governed by the law of the administering State.³⁴³ The administering State is thus the only authority competent to regulate the conditions under which the person is imprisoned and other measures, including, as appropriate, their conditional release. It is the responsibility of the administering State to ensure that the transferred person is imprisoned in adequate conditions and has the benefit of all protections applicable under domestic and international law. In this regard, the receiving State should also take into account any relevant vulnerabilities or special needs of the prisoner.³⁴⁴ The sentencing and administering States should impose a special enforcement arrangement that would discriminate between domestic prisoners and the foreign-transferred prisoner, especially where this would entail a violation of the human rights of the transferred prisoner.³⁴⁵

³⁴¹ European Court of Human Rights, *Steven Willcox and Scott Hurford v. United Kingdom*, paras. 74, 78.

³⁴² See also Model Agreement on the Transfer of Foreign Prisoners, para. 18; UNODC, *Model Legislative Provisions against Organized Crime*, art. 35 (3).

³⁴³ UNODC, *Handbook on the International Transfer of Sentenced Persons*, pp. 51–53.

³⁴⁴ See the Nelson Mandela Rules, rule 2 (2).

³⁴⁵ See Italian Constitutional Court, Judgment No 73/2001, *Baraldini*, on the enforcement in Italy of a judgment issued in the United States of America on the basis of a bilateral agreement setting forth a special enforcement regime. For an overview of this case, see Annalisa Ciampi, “Baraldini”, *The American Journal of International Law*, vol. 95, No. 4 (October 2001).

A common exception to the general position that enforcement of the sentence is a matter for the administering State is the existence of provisions in international agreements for the transfer of sentenced persons concerning the pardon, amnesty or commutation of sentences. Unless an international agreement provides otherwise, there is in principle no reason why a sentenced person should not be capable of benefiting from the exercise of powers of pardon, amnesty or commutation by both the administering and sentencing States.³⁴⁶ On the other hand, a lack of respect for the conditions set forth in the transfer agreement by, for example, releasing a sentenced person immediately or soon after their transfer, may result in de facto impunity and hence also affect the rights of the victims.

KEY POINTS

- The transfer of sentenced persons has a strong basis in international human rights law.
- The transfer of sentenced persons can secure the return of persons imprisoned in harsh or inhumane conditions or who are suffering language, religious, cultural or dietary barriers or discrimination and can enhance the opportunities for rehabilitation of offenders and their reintegration into society.
- States parties should take into account that there is a particularly strong humanitarian argument in favour of the transfer of detainees who are vulnerable or who have special needs, such as pregnant women and people with disabilities or physical or mental health problems.
- Where relevant bilateral or multilateral agreements are in place, the transfer of non-resident women prisoners to their home country should be considered as early as possible during their imprisonment, especially if they have children in their home country, if the woman applies or provides her informed consent.
- Transfer should only be undertaken with the consent of the sentenced person.
- As with extradition and other forms of transfer, the transfer of sentenced persons must not be in breach of the principle of non-refoulement under international human rights or refugee law.
- The refusal to accept the transfer of a sentenced person on the basis of human rights violations relating to his or her conviction or sentence should be a last resort.
- The administering State must not convert, adapt or alter the sentence imposed in the sentencing State in such a way that would aggravate either the nature or duration of the sentence.
- A converted or adapted sentence of a transferred person must be compatible with the domestic law of the administering State and must not exceed any statutory maximum penalty prescribed by its law.
- Any period of detention already served in the sentencing State should be deducted from the sentence to be served in the administering State.
- It is the responsibility of the administering State to ensure that the transferred person is imprisoned in adequate conditions and has the benefit of all protections applicable under domestic and international law.
- Administering States must not discriminate between prisoners sentenced under domestic law and those sentenced under foreign law.
- Unless an international agreement provides otherwise, there is in principle no reason why a sentenced person should not be capable of benefiting from the exercise of powers of pardon, amnesty or commutation by both the administering and sentencing States.
- Lack of respect for the conditions set forth in the transfer agreement by, for example, releasing a sentenced person immediately or soon after their transfer, may, however, result in de facto impunity and hence also affect the rights of victims.

³⁴⁶ UNODC, *Handbook on the International Transfer of Sentenced Persons*, p. 53. See, for example, Model Agreement on the Transfer of Foreign Prisoners, paras. 21–22.

PROTECTION AND ASSISTANCE

The Organized Crime Convention contains several provisions concerning victims, witnesses and persons cooperating with the authorities that are innovative compared with previous conventions for the suppression of crime. The protection of victims, witness and persons cooperating with authorities is particularly important in the prosecution of members of organized criminal groups, who have the means and motivation to silence and/or intimidate potential witnesses in order to prevent them from cooperating with law enforcement and judicial authorities.³⁴⁷ At the same time, the protection of victims, witnesses and persons cooperating with authorities is, and must be regarded as, an end in itself and not simply “a means necessary to ensure the willingness of witnesses to cooperate in reporting crime and providing the evidence needed to prosecute and convict offenders”³⁴⁸

This section considers human rights dimensions to the implementation of the provisions of the Organized Crime Convention concerning, first, the protection of witnesses and persons cooperating with the authorities and, secondly, assistance to and protection of victims.

Protection of witnesses, victims and persons cooperating with the authorities

Article 24 (1) of the Organized Crime Convention provides that:

Each State Party shall take appropriate measures within its means to provide effective protection from potential retaliation or intimidation for witnesses in criminal proceedings who give testimony concerning offences covered by this Convention and, as appropriate, for their relatives and other persons close to them.

This obligation also applies to victims, insofar as they are also witnesses,³⁴⁹ and persons cooperating with the authorities.³⁵⁰ The Organized Crime Convention does not define the term “witness”, but it is suggested that a broad notion of witnesses be applied when establishing measures for the protection of witnesses to best achieve the protective aims of article 24.³⁵¹ In this regard, legislators may wish to make protective measures available to not only persons who have actually testified but also persons cooperating with the authorities.

Article 24 (2) of the Organized Crime Convention provides that the measures envisaged by article 24 (1) may include, among others, measures for the physical protection of witnesses (such as relocation and measures restricting the disclosure of their identity or whereabouts) and evidentiary rules to permit witness testimony to be given in a manner that ensures their safety (such as through the use of video links). The purpose of the measures envisaged by article 24 is ensuring the protection and safety of witnesses. As regards victims that are also witnesses, the protective measures are also aimed at avoiding revictimization and secondary victimization in the course of judicial proceedings.

The measures envisaged by article 24 are functional, in order not only to ensure the effective investigation, prosecution and adjudication of cases involving organized crime but also to protect the rights of witnesses and victims – primarily their rights to safety and security of person, as well as their rights to privacy and family life and other rights, depending on the circumstances. Several international human rights

³⁴⁷ UNODC, *Model Legislative Provisions against Organized Crime*, art. 27.

³⁴⁸ UNODC, *Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime*, 2nd ed. (2017), para. 404.

³⁴⁹ Organized Crime Convention, art. 24 (4).

³⁵⁰ *Ibid.*, art. 26 (4).

³⁵¹ UNODC, *Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime*, 2nd ed. (2017), para. 409.

instruments also expressly establish obligations for States to protect witnesses and victims.³⁵² For example, the Convention against Torture requires States parties to take steps to ensure that the complainant and witnesses in cases of torture are protected against “all ill-treatment or intimidation as a consequence of his complaint or any evidence given.”³⁵³ The International Convention for the Protection of All Persons from Enforced Disappearance provides that each State party

shall ensure in particular that persons suspected of having committed an offence of enforced disappearance are not in a position to influence the progress of an investigation by means of pressure or acts of intimidation or reprisal aimed at the complainant, witnesses, relatives of the disappeared person or their defence counsel, or at persons participating in the investigation.³⁵⁴

An obligation to protect witnesses under international human rights law has also been highlighted by human rights courts and bodies. In particular, the European Court of Human Rights has identified an obligation for States parties to the European Convention on Human Rights to organize their criminal proceedings in such a way that the interests of witnesses in general and, in particular, the interests of victims called upon to testify, are not “unjustifiably imperilled.”³⁵⁵ States parties to the Organized Crime Convention should ensure that the rights of witnesses, including victims and persons cooperating with the authorities, are upheld in the investigation, prosecution and adjudication of cases involving organized crime, including in relation to the forms of international cooperation envisaged by the Convention.³⁵⁶ Measures taken to protect witnesses should not, however, unjustifiably interfere with the rights of defendants. Article 24 (2) of the Organized Crime Convention expressly notes that the measures to which the article refers are “without prejudice to the rights of the defendant, including the right to due process”.

As regards victims, it was noted above that article 24 also applies to victims insofar as they are witnesses. However, States parties are also required to establish and provide protective measures to victims that are not witnesses. Article 25 (1) of the Convention provides that “each State party shall take appropriate measures, within its means to provide ... protection to victims of offences covered by this Convention, in particular in cases of threat of retaliation or intimidation”.

KEY POINTS

- The measures envisaged by articles 24 and 25 of the Organized Crime Convention are functional, in order not only to ensure the effective investigation, prosecution and adjudication of cases involving organized crime but also to protect the rights of witnesses and victims, including their rights to safety and security of person, and privacy and family life.
- Obligations for States to protect witnesses and victims are expressly established by several international human rights instruments and have also been highlighted by human rights courts and bodies.

³⁵² See also Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (United Nations, *Treaty Series*, vol. 2171, No. 27531), art. 8 (1) (a); General Assembly resolution 55/89, annex, principle 3 (b); E/CN.4/2005/102/Add.1, principle 10.

³⁵³ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 13.

³⁵⁴ Art. 12 (4).

³⁵⁵ European Court of Human Rights, *Doorson v. the Netherlands*, Application No. 20524/92, Judgment, 26 March 1996, para. 70. Compare *Breukhoven v. Czech Republic*.

³⁵⁶ Laura Salvadego, “Witness protection and inter-State cooperation: current and emerging challenges in the fight against transnational organized crime”, *German Yearbook of International Law*, vol. 58 (2016).

Assistance to victims

Where persons are victimized by transnational organized crime, effective implementation of the Organized Crime Convention is critical not only for pursuing retribution and avoiding impunity but also for ensuring access to assistance for victims. Article 25 of the Organized Crime Convention contains provisions concerning assistance to and protection of victims. Article 25 (1) requires States parties to take appropriate measures to provide assistance and protection to victims of offences covered by the Convention. Article 25 (2) and (3) further require States parties to establish appropriate procedures to provide access to compensation and restitution for victims and to enable the views and concerns of victims to be presented during criminal proceedings.

Obligations for assistance to and protection of victims are further developed in other international treaties, including the Trafficking in Persons Protocol,³⁵⁷ the case law of treaty bodies and regional human rights courts, and soft-law instruments such as the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power³⁵⁸ and the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.³⁵⁹ The Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the General Assembly and designed to assist States in their efforts to secure justice and assistance for victims of crime and abuse of power,³⁶⁰ establishes measures that should be taken by States for the benefit of victims under four headings: access to justice and fair treatment, restitution, compensation and assistance. These headings broadly correspond to the measures required by article 25 (1)–(3) of the Organized Crime Convention. The Basic Principles and Guidelines on the Right to a Remedy and Reparation further develop this framework and are expressly based on international human rights law. Paragraph 3 provides that the obligation to “respect, ensure respect for and implement international human rights law and international humanitarian law” includes positive duties, inter alia, to effectively, promptly, thoroughly and impartially investigate violations and take action against those responsible, to provide persons who claim to be victims with equal and effective access to justice, and to provide victims with effective remedies, including reparation. States parties should interpret and apply article 25 of the Organized Crime Convention in the light of this larger body of law.³⁶¹

This section of the issue paper considers the human rights dimensions of a number of issues relating to the implementation of article 25, namely, the threshold question of the definition of victims, as well as the issues concerning assistance to victims, access to and participation in criminal and other proceedings, and compensation, restitution and other forms of reparations.

Who are victims?

The Organized Crime Convention does not define the term “victim”. In line with the general approach suggested in this section, the term “victim” in the Organized Crime Convention, in particular, in article 25, should be interpreted in the light of the larger body of international law on this subject. The definitions of “victims” contained in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power and the Basic Principles and Guidelines on the Right to a Remedy and Reparation are relevant in this regard. Paragraph 1 of the former defines “victims” as follows:

Persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.

³⁵⁷ See Trafficking in Persons Protocol, arts. 6–8.

³⁵⁸ General Assembly resolution 40/34, annex.

³⁵⁹ General Assembly resolution 60/147, annex.

³⁶⁰ General Assembly resolution 40/34, para. 3.

³⁶¹ See further UNODC, *Handbook on Justice for Victims*.

The Declaration further clarifies that “a person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim” and that “the term ‘victim’ also includes, where appropriate, the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization”.³⁶² This definition is substantially reproduced, *mutatis mutandis*, in the Basic Principles and Guidelines on the Right to a Remedy and Reparation.³⁶³

Assistance to victims

Article 25 (1) of the Organized Crime Convention provides as follows:

Each State Party shall take appropriate measures within its means to provide assistance and protection to victims of offences covered by this Convention, in particular in cases of threat of retaliation or intimidation.

The measures to be taken, including, as appropriate, measures in cooperation with civil society,³⁶⁴ should be construed in the light of the broader body of international law concerning assistance to victims, should be tailored according to all relevant circumstances, such as the type and gravity of the offence and the circumstances and vulnerabilities of the victim, and should not be conditioned upon cooperation with the authorities.

In this regard, the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power envisages the following measures:

14. Victims should receive the necessary material, medical, psychological and social assistance through governmental, voluntary, community-based and indigenous means.
15. Victims should be informed of the availability of health and social services and other relevant assistance and be readily afforded access to them.
16. Police, justice, health, social service and other personnel concerned should receive training to sensitize them to the needs of victims, and guidelines to ensure proper and prompt aid.

Furthermore, the Declaration states that “in providing services and assistance to victims, attention should be given to those who have special needs because of the nature of the harm inflicted or because of factors such as those mentioned in paragraph 3 above”,³⁶⁵ namely, the factors of “race, colour, sex, age, language, religion, nationality, political or other opinion, cultural beliefs or practices, property, birth or family status, ethnic or social origin, and disability”.³⁶⁶

These guidelines are further developed in several instruments tailored to meet the needs of specific groups of victims. For example, the protection of privacy and identity of victims, which is particularly important in cases of trafficking in persons, is the object of specific obligations under article 6 (1) of the Trafficking in Persons Protocol. Article 6 (4) of the Trafficking in Persons Protocol, moreover, provides as follows:

Each State Party shall take into account, in applying the provisions of this article, the age, gender and special needs of victims of trafficking in persons, in particular the special needs of children, including appropriate housing, education and care.³⁶⁷

³⁶² General Assembly resolution 40/34, annex, para. 2.

³⁶³ General Assembly resolution 60/147, annex, paras. 8–9.

³⁶⁴ Trafficking in Persons Protocol, art. 6 (3); World Bank and Victim Support Europe, *The Role of Civil Society in the Development of Victims’ Rights and Delivery of Victims’ Services* (2018).

³⁶⁵ General Assembly resolution 40/34, para. 17.

³⁶⁶ *Ibid.*, para. 3.

³⁶⁷ In this regard, see also, for example, International Covenant on Economic, Social and Cultural Rights, art. 11 (Right to an adequate standard of living, including adequate food, clothing and housing), art. 12 (Right to the highest attainable standard of health) and art. 13 (Right to education) and the various rights set out in the Convention on the Rights of the Child.

Provisions concerning the tailoring of assistance to victims according to their special needs should, furthermore, be read alongside the body of international human rights law concerning the rights and needs of specific groups of people, such as the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities.

Access to and participation in criminal and other proceedings

Article 25 (3) of the Organized Crime Convention provides as follows:

Each State Party shall, subject to its domestic law, enable views and concerns of victims to be presented and considered at appropriate stages of criminal proceedings against offenders in a manner not prejudicial to the rights of the defence.

The appropriate stages and means for the views and concerns of victims to be presented and considered may vary between legal systems but, in general, may include the possibility of appearing as a witness during trial, providing a victim impact statement for consideration during sentencing or other forms of participation during trial, sentencing or other stages of criminal proceedings.

Article 25 (3) of the Organized Crime Convention is consistent with, and should be read in the light of, international human rights standards and is linked with the broader concept of access to justice for victims.³⁶⁸ Thus, the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power provides that, in addition to allowing the views and concerns of victims to be presented and considered at appropriate stages of proceedings where their personal interests are affected, States should:

- Inform victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information³⁶⁹
- Provide proper assistance to victims throughout the legal process
- Take measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation³⁷⁰

In order to fully exercise these guarantees, victims should be provided with appropriate legal aid and assistance in attending and participating in court proceedings.

Victims should, moreover, be treated with compassion and respect for their dignity, including when participating in criminal and other proceedings.³⁷¹ Victims should not be forced to participate in proceedings against their wishes.³⁷² Victims' participation in criminal and other proceedings should not lead to revictimization (through, for example, retaliation, intimidation or harassment) nor to secondary victimization, bringing victims to experience their trauma over again.³⁷³ To this end, States should adopt appropriate measures to allow victims to participate in proceedings in a manner which does not lead to revictimization or secondary victimization. These may include the possibility of conducting proceedings in camera, permitting evidence to be given from behind a screen or other barrier, permitting evidence to be given by means of video link or other

³⁶⁸ See, for example, General Assembly resolution 40/34, annex, para. 6.

³⁶⁹ See also Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council framework decision (*Official Journal of the European Union*, L 315/57, 14 November 2012), art. 6.

³⁷⁰ General Assembly resolution 40/34, annex, para. 6 (d).

³⁷¹ *Ibid.*, para. 4; Committee against Torture, general comment No. 4 (2017), para. 18.

³⁷² UNODC, *Legislative Guide for the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime* (Vienna, 2020), para. 210.

³⁷³ UNODC, *Handbook on Justice for Victims*, p. 36. Revictimization is endured by the victims at the hand of the alleged perpetrators or others, while the expression "secondary victimization" identifies behaviours and attitudes of public authorities (including law enforcement agencies, social service providers and medical staff) which cause further trauma to victims.

remote means, permitting support persons of the victim to attend, and making professional support available to the victim.³⁷⁴ Special care should be taken to avoid revictimization and secondary victimization of vulnerable victims, such as children and victims of sexual violence. In this regard, the Inter-American Court of Human Rights has, under the Inter-American Convention on Human Rights, identified an obligation of “enhanced due diligence and special protection in investigations and criminal proceedings concerning sexual violence against children and adolescents”, linked to the duty to avoid revictimization.³⁷⁵ The Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography requires States parties to adopt appropriate measures to protect the rights and interest of child victims of practices prohibited under the Protocol at all stages of the criminal justice process, including by “recognizing the vulnerability of child victims and adapting procedures to recognize their special needs, including their special needs as witnesses”.³⁷⁶

As with measures taken for the protection of witnesses under article 24, the participation of victims in criminal proceedings against offenders shall be done “in a manner not prejudicial to the rights of the defence”.³⁷⁷

Compensation, restitution and other reparations

Article 25 (2) of the Organized Crime Convention provides that “each State Party shall establish appropriate procedures to provide access to compensation and restitution for victims of offences covered by this Convention.”

Neither compensation nor restitution is defined in the Organized Crime Convention. These terms may be understood against the broader background of international human rights law. The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power contains provisions concerning both compensation and restitution. The Declaration provides that restitution should include “the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, the provision of services and the restoration of rights”.³⁷⁸ The Declaration further provides as follows:

In cases of substantial harm to the environment, restitution, if ordered, should include, as far as possible, restoration of the environment, reconstruction of the infrastructure, replacement of community facilities and reimbursement of the expenses of relocation, whenever such harm results in the dislocation of a community.³⁷⁹

Compensation may be paid by the offender, the State or other sources. The Declaration provides that when compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation to victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes or, as appropriate, their family and dependants.³⁸⁰ The obligation in article 25 (2) of the Organized Crime Convention to establish appropriate procedures for access to compensation and restitution is not, however, limited according to the type of injury or impairment suffered. The Declaration further encourages “the establishment, strengthening and expansion of national funds for compensation to victims”. Such funds may be used for the payment of compensation pursuant to the procedures envisioned by article 25 (2). Article 14 (2) of the Organized Crime Convention further requires that when acting on a request for international cooperation for purposes of confiscation pursuant to article 13 of the Convention, States parties shall, to the extent permitted by domestic law and if so requested, give priority consideration to returning the confiscated proceeds of crime or property to the requesting State party for the purposes of restitution or compensation.

³⁷⁴ See UNODC, *Model Legislative Provisions against Organized Crime*, art. 27.

³⁷⁵ Inter-American Court of Human Rights, *Case of V.R.P. V.P.C. v. Nicaragua*, paras. 150–170.

³⁷⁶ Art. 8 (1) (a).

³⁷⁷ Organized Crime Convention, art. 25 (3).

³⁷⁸ General Assembly resolution 40/34, annex, para. 8.

³⁷⁹ *Ibid.*, para. 10.

³⁸⁰ *Ibid.*, para. 12.

While article 25 (2) of the Organized Crime Convention specifically concerns compensation and restitution, international human rights law also contemplates other forms of reparations in cases of serious violations of human rights under the internationally protected right to remedy.³⁸¹ Other forms of reparations may include rehabilitation, satisfaction and guarantees of non-repetition.³⁸² Compensation, restitution and other forms of reparations must be effectively implemented without undue delay, especially in serious cases.³⁸³

In addition to reparations for individual victims, reparations can also be of a collective nature.³⁸⁴ The Inter-American Court of Human Rights³⁸⁵ and the African Commission on Human and Peoples' Rights³⁸⁶ have developed a significant line of case law concerning structural, community-oriented collective reparations. Collective reparations are indivisible and diverse measures or benefits which are awarded to collectives or groups of people in order to repair the collective harm caused by a violation of either individual or collective rights.³⁸⁷ They target whole communities, rather than only those individuals formally qualified as direct victims of serious violations of human rights. These measures often involve social programmes which cannot be divided among individuals, such as the opening of a school and a dispensary³⁸⁸ or recognizing the rights of a community to ownership of their ancestral land and restitution of such land to the community.³⁸⁹ States should ensure that collective reparation measures for particular groups of victims are clearly distinguished from general development programmes.³⁹⁰ Moreover, collective reparations should not be treated as a substitute for the individual's right to reparation.³⁹¹

The notion of collective reparations has, in particular, been developed with reference to gross violations of human rights,³⁹² notably in relation to transitional justice in post-conflict societies,³⁹³ as well as in relation to offences falling within the scope of the Organized Crime Convention, such as corruption.³⁹⁴ The Conference of Parties to the Organized Crime Convention, in its resolution 10/4, encouraged States parties to consider using confiscated proceeds of crime to give "compensation to the victims of the crime, including through the social reuse of assets for the benefit of communities". Social reuse of confiscated assets transforms illicit proceeds into opportunities to assist victims and communities affected by organized crime and can contribute to economic growth, social development and the prevention of and resilience to organized crime.

³⁸¹ See, for example, International Covenant on Civil and Political Rights, art. 2 (3); General Assembly resolution 60/147, annex, para. 18; Human Rights Committee, general comment No. 31 (2004), paras. 15–19.

³⁸² See General Assembly resolution 60/147, annex, para. 18; Human Rights Committee, general comment No. 31 (2004) para. 16; Committee against Torture, general comment No. 3 (2012) on the implementation of article 14, para. 2.

³⁸³ African Commission on Human and People's Rights, general comment No. 4 on the right to redress for victims of torture and other cruel, inhuman and degrading punishment or treatment (article 5), para. 26.

³⁸⁴ General Assembly resolution 60/147, annex, para. 13.

³⁸⁵ Inter-American Court of Human Rights, *Aloeboetoe et al. v. Suriname*, Series C No. 11, Judgment, 10 September 1993; *Moiwana Community v. Suriname*, Series C No. 124, Judgment, 15 June 2005; *Pueblo Bello Massacre v. Colombia*, Series C No. 140, Judgment, 31 January 2006. See also Diana Odier Contreras-Garduno, *Collective Reparations: Tensions and Dilemmas between Collective Reparations with the Individual Right to Receive Reparations*, Human Rights Research Series, vol. 84 (Antwerp, Belgium, Intersentia, 2018), chap. III.

³⁸⁶ African Commission on Human and People's Rights, *Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria; Sudan Human Rights Organisation and Centre on Housing Rights and Evictions v. Sudan*, Communications Nos. 279/03 and 296/05, 13–27 May 2009. See also International Commission of Jurists, *The Right to a Remedy and Reparation for Gross Human Rights Violations: A Practitioners' Guide*, revised ed. (Geneva, 2018), pp. 47–49.

³⁸⁷ Odier Contreras-Garduno, *Collective Reparations*.

³⁸⁸ Inter-American Court of Human Rights, *Aloeboetoe et al. v. Suriname*, para. 96.

³⁸⁹ African Commission on Human and People's Rights, *Center for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of the Endorois Welfare Council v. Kenya*, Communication No. 276/2003, 4 February 2010, recommendation 1.

³⁹⁰ Committee against Torture, general comment No. 4 (2017), para. 54.

³⁹¹ *Ibid.*, para. 56.

³⁹² Odier Contreras-Garduno, *Collective Reparations*, p. 4.

³⁹³ See, generally, A/69/518; A/HRC/42/45; Odier Contreras-Garduno, *Collective Reparations*.

³⁹⁴ Inter-American Commission on Human Rights, *Corruption and Human Rights in the Americas: Inter-American Standards* (OEA/Ser.L/V/II) (December 2019), paras. 273–274.

KEY POINTS

- Provisions of the Organized Crime Convention and the Protocols thereto concerning assistance to victims should be interpreted and applied in the light of the larger body of international law on this subject which includes other international treaties, international resolutions and declarations and the case law of treaty bodies and regional human rights.
- Assistance to victims should be provided regardless of whether a perpetrator is identified, apprehended, prosecuted or convicted and regardless of any familial relationship between perpetrator and victim.
- For the purpose of providing assistance to victims, the term “victim” should be interpreted broadly to include, where appropriate, the immediate family and dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.
- Measures to be taken to provide assistance and protection to victims of offences covered by the Organized Crime Convention pursuant to article 25 (1) of the Convention should be construed in the light of the broader body of international law concerning assistance to victims, should be tailored according to all relevant circumstances, such as the type and gravity of the offence and the circumstances and vulnerabilities of the victim, and should not be conditioned upon cooperation with the authorities.
- Victims should receive the necessary material, medical, psychological and social assistance through governmental, voluntary, community-based and indigenous means.
- Victims should be informed of the availability of health and social services and other relevant assistance and be readily afforded access to them.
- Police, justice, health, social service and other personnel concerned should receive training to sensitize them to the needs of victims, and guidelines to ensure proper and prompt aid.
- States should inform victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information.
- States should provide proper assistance to victims throughout the legal process.
- States should take measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation.
- Victims should be provided with appropriate legal aid and assistance in attending and participating in court proceedings.
- Victims should be treated with compassion and respect for their dignity, including when participating in criminal and other proceedings.
- Victims should not be forced to participate in proceedings against their wishes.
- Victims’ participation in criminal and other proceedings should not lead to revictimization (through, for example, retaliation, intimidation or harassment) nor to secondary victimization, bringing victims to experience their trauma over again.
- States should adopt appropriate measures to protect victims from revictimization or secondary victimization. These may include the possibility of conducting proceedings in camera, permitting evidence to be given from behind a screen or other barrier, permitting evidence to be given by means of video link or other remote means, permitting support persons of the victim to attend, and making professional support available to the victim.
- Special care should be taken to avoid the revictimization and secondary victimization of vulnerable victims, such as children and victims of sexual violence.
- The participation of victims in criminal proceedings against offenders must be done in a manner that is not prejudicial to the rights of the defence.
- Compensation and restitution for victims, as required under article 25 (2) of the Organized Crime Convention, should be understood against the broader background of international human rights law.
- In cases of substantial harm to the environment, restitution, if ordered, should include, as far as possible, restoration of the environment, reconstruction of the infrastructure, replacement of community facilities and reimbursement of the expenses of relocation, whenever such harm results in the dislocation of a community.

KEY POINTS (CONTINUED)

- When compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation to victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes or, as appropriate, their family and dependants.
- States should establish, strengthen and expand national funds for compensation to victims of organized crime.
- States should, as appropriate, make available other forms of reparations contemplated or required by international human rights law, including rehabilitation, satisfaction and guarantees of non-repetition.
- States should, as appropriate, make use of collective reparations, including through the social reuse of confiscated assets of organized criminal groups.

PREVENTION

As noted, the stated purpose of the Organized Crime Convention is “to promote cooperation to prevent and combat transnational organized crime more effectively”. While some of the measures required by the Organized Crime Convention to combat transnational organized crime may also be seen to serve a preventive function – such as confiscation and seizure and pretrial detention – other provisions are squarely aimed at the prevention of transnational organized crime. Article 31, on prevention, establishes a number of obligations in this regard. Article 31 (1) provides that “States Parties shall endeavour to develop and evaluate national projects and to establish and promote best practices and policies aimed at the prevention of transnational organized crime”. Article 31 (2) requires that States parties “endeavour, in accordance with fundamental principles of their domestic law, to reduce existing or future opportunities for organized criminal groups to participate in lawful markets with proceeds of crime, through appropriate legislative, administrative or other measures” and sets out several issues that such measures should focus on. Further provisions in article 31 concern the reintegration of convicted persons into society, the evaluation of legal instruments and administrative practices, the promotion of public awareness regarding the existence, the causes and the gravity of and the threat posed by transnational organized crime, and international cooperation in developing and promoting preventive measures.

Article 31 should be read in conjunction with other provisions of the Organized Crime Convention concerning addressing crime prevention. Article 28 concerns the collection, exchange and analysis of information on the nature of organized crime, which is of critical importance for the development of effective preventive measures pursuant to article 31. Article 29 concerns the initiation, development and improvement of training programmes for, among others, the personnel charged with the prevention of organized crime and international cooperation and assistance to that end. Article 30, concerning implementation of the Convention through economic development and technical assistance, requires States parties to make concrete efforts, in coordination with international and regional organizations and each other, to enhance cooperation to strengthen the capacity of developing countries to prevent (and combat) transnational organized crime and to provide and enhance financial, material and technical assistance to this end. Article 9 contains a specific obligation for States to adopt legislative, administrative or other effective measures to prevent the corruption of public officials.

More generally, article 31 should be read in the context of a broader trend towards an integrated approach to crime prevention, criminal justice and international cooperation in criminal matters on the one hand and the strengthening of the rule of law on the other. Crime prevention contributes to the strengthening of the rule of law, and conversely, human rights-based approaches enhance the effectiveness of crime prevention strategies and policies.

Measures taken to prevent transnational organized crime must be context-specific and tailored to the specific conditions present in the State at any given time, which includes factors such as the organization of governmental structures, the availability of resources, the organization of civil society, and the nature and

gravity of the forms of organized crime which the country faces. The Economic and Social Council's Guidelines for the Prevention of Crime provide some general guidance in this regard.³⁹⁵ The Guidelines stress that "crime prevention strategies, policies, programmes and actions should be based on a broad, multidisciplinary foundation of knowledge about crime problems, their multiple causes and promising and proven practices".³⁹⁶ Moreover, they recognize that a culture of lawfulness should be actively promoted in crime prevention and that human rights and the rule of law must be respected in all aspects of crime prevention.³⁹⁷ With respect to the prevention of organized crime specifically, the Guidelines state that Governments and civil society should endeavour to analyse and address the links between transnational organized crime and national and local crime problems. The Guidelines set out several measures to this end, some of which reflect the measures set out in article 31 of the Organized Crime Convention,³⁹⁸ and promote designing, where appropriate, crime prevention strategies to protect socially marginalized groups, especially women and children, who are vulnerable to the actions of organized criminal groups, including trafficking in persons and smuggling of migrants.³⁹⁹

Obligations to prevent serious crime, including transnational organized crime, can be seen as a corollary of the positive obligations of States to protect and fulfil human rights, as further outlined in chapter I, above. The obligation to protect requires States to take reasonable steps to prevent violations of human rights and protect individuals from such violations. Moreover, organized crime undermines States' efforts to achieve the full realization of human rights required by the obligation to fulfil. At the same time, measures taken to prevent transnational organized crime must not be in breach of States' other human rights obligations.⁴⁰⁰

States' positive obligations in this regard may include obligations to establish and maintain legislative frameworks to prevent manifestations of organized crime that risk serious human rights violations,⁴⁰¹ to appropriately train public officials,⁴⁰² to appropriately identify potential victims,⁴⁰³ to develop and use appropriate human rights indicators⁴⁰⁴ and to take special measures for the protection of groups at particular risk.⁴⁰⁵ International and regional human rights courts and treaty bodies have identified particular positive obligations of protection and prevention with regard to groups at risk of victimization.⁴⁰⁶ The Human Rights Committee has, for example, stated:

The duty to protect the right to life requires States parties to take special measures of protection towards persons in vulnerable situations whose lives have been placed at particular risk because of specific threats or pre-existing patterns of violence. Such persons include human rights defenders ..., officials fighting corruption and organized crime, humanitarian workers, journalists, prominent public figures, witnesses to crime and victims of domestic and gender-based violence and human trafficking. They may also include children, especially children in street situations, unaccompanied

³⁹⁵ Economic and Social Council resolution 2002/13, annex.

³⁹⁶ *Ibid.*, para. 11.

³⁹⁷ *Ibid.*, para. 12.

³⁹⁸ Compare the Guidelines for the Prevention of Crime (Economic and Social Council resolution 2002/13, annex), para. 27 (a) and (b), with Organized Crime Convention, art. 31 (2) (in particular, the introductory sentence and subparagraph (c)).

³⁹⁹ Guidelines for the Prevention of Crime, para. 27 (c).

⁴⁰⁰ Obokata, "Combating transnational organised crime", pp. 27–28.

⁴⁰¹ European Court of Human Rights, *Rantsev v. Cyprus and Russia*, paras. 284–289; *Chowdury and others v. Greece*, para. 104.

⁴⁰² CRC/C/83/D/25/2017; CRC/C/83/D/24/2017; CRC/C/83/D/21/2017; European Court of Human Rights, *Rantsev v. Cyprus and Russia*, para. 287.

⁴⁰³ See European Court of Human Rights, *V.C.L. and A.N. v. the United Kingdom*, Applications Nos. 77587/12 and 74603/12, Judgment, 16 February 2021, para. 160, on the failure to identify children, victims of trafficking as implying a violation of articles 4 and 6 of the European Convention on Human Rights.

⁴⁰⁴ The development of indicators is the object of specific obligations in some human rights treaties but may more generally provide concrete tools for enforcing human rights and measuring their implementation and help States assess their own progress in ensuring the enjoyment of human rights by their people. See *Human Rights Indicators: A Guide to Measurement and Implementation* (HR/PUB/12/5); OHCHR, "A human rights-based approach to data: leaving no one behind in the 2030 Agenda for Sustainable Development" (2018). See also De Schutter, *International Human Rights Law*, p. 479.

⁴⁰⁵ Inter-American Court of Human Rights, *González et al. v. Mexico*, Series C No. 205, Judgment, 16 November 2009, para. 282; *Hacienda Brasil Verde Workers v. Brazil*, para. 332.

⁴⁰⁶ See also Francesca Ippolito, *Understanding Vulnerability in International Human Rights Law* (n.p., Editoriale Scientifica, 2020).

migrant children and children in situations of armed conflict, members of ethnic and religious minorities, indigenous peoples, lesbian, gay, bisexual, transgender and intersex persons, persons with albinism, alleged witches, displaced persons, asylum seekers, refugees and stateless persons.⁴⁰⁷

A person's prior history of victimization is also an element that must be taken into account in assessing their future risk of revictimization.⁴⁰⁸

Article 31 (5) of the Organized Crime Convention recognizes the importance of media reporting for the prevention of organized crime, as it requires States parties to endeavour to promote public awareness regarding the existence, causes and gravity of and the threat posed by transnational organized crime. In that context, article 31 (5) refers to dissemination through the mass media and provides that States parties shall promote public participation in preventing and combating transnational organized crime. Under international human rights law, States may also be subject to a heightened duty of protection and prevention in relation to groups such as journalists and human rights defenders. This is not only because of the risk of victimization to such persons but also due to the important public functions they exercise. Thus, in the case of *Carvajal and others v. Colombia*, the Inter-American Court of Human Rights, in determining whether the respondent State had met its positive human rights obligations, considered it "of special note" that the combination of violence against journalists and impunity of offenders had a highly negative impact not only for the journalists and their families but also "because it has prevented communities ... from receiving information on issues of importance to them, such as the armed conflict, organized crime, the drug trade and political corruption".⁴⁰⁹ These positive human rights obligations are consistent with the purposes expressed in article 31 (5) of the Organized Crime Convention.⁴¹⁰

Regarding States' obligations to fulfil human rights, the Committee on Economic, Social and Cultural Rights has noted that:

States parties [to the International Covenant on Economic, Social and Cultural Rights] are required to mobilize the maximum of their available resources towards the fulfilment of the Covenant rights, particularly for those who are most excluded, disadvantaged and marginalized. The Committee has consistently emphasized the importance of identifying and prioritizing the needs of those groups that are disadvantaged and vulnerable to systemic and intersectional forms of discrimination.⁴¹¹

States parties must take into account the situation of at-risk, excluded, disadvantaged and marginalized groups when developing and implementing policies and measures to prevent organized crime. Moreover, policies and measures to prevent organized crime should be fully integrated into the wider 2030 Agenda on Sustainable Development. In the Doha Declaration on Integrating Crime Prevention and Criminal Justice into the Wider United Nations Agenda to Address Social and Economic Challenges and to Promote the Rule of Law at the National and International Levels, and Public Participation adopted at the Thirteenth United Nations Congress on Crime Prevention and Criminal Justice, Heads of State and Government, Ministers and Representatives of Member States recognized "the importance of effective, fair, humane and accountable crime prevention and criminal justice systems and the institutions comprising them as a central component of the rule of law" and committed themselves to "holistic and comprehensive approaches to countering crime, violence, corruption and terrorism in all their forms and manifestations, and to ensuring that those responses are implemented in a coordinated and coherent way, along with broader programmes or measures for social and economic development, poverty eradication, respect for cultural diversity, social peace and social inclusion".

⁴⁰⁷ Human Rights Committee, general comment No. 36 (2018), para. 23.

⁴⁰⁸ CCPR/C/119/D/2613/2015, paras. 8.7–8.8.

⁴⁰⁹ Inter-American Court of Human Rights, *Carvajal and others v. Colombia*, Series C No. 352, Judgment, 13 March 2018, para. 177. Committee against Torture, general comment No. 4 (2017), para. 29.

⁴¹⁰ In relation to reporting on corruption, see UNODC, *Reporting on Corruption: A Resource Tool for Governments and Journalists* (2013); UNODC, *Resource Guide on Good Practices in the Protection of Reporting Persons* (2015).

⁴¹¹ E/C.12/2019/1, para. 7.

KEY POINTS

- The various provisions contained in the Organized Crime Convention concerning the prevention of transnational organized crime should be read in the light of an integrated approach to crime prevention, criminal justice and international cooperation in criminal matters and the strengthening of the rule of law.
- The prevention of transnational organized crime contributes to the strengthening of the rule of law.
- Human rights-based approaches enhance the effectiveness of crime prevention strategies and policies.
- Measures taken to prevent transnational organized crime must be context-specific and tailored to the specific conditions present in the State at any given time, which includes factors such as the organization of governmental structures, the availability of resources, the organization of civil society, and the nature and gravity of the forms of organized crime which the country faces.
- Obligations to prevent serious crime, including transnational organized crime, can be seen as a corollary of the positive obligations of States to protect and fulfil human rights.
- States' positive human rights obligations to prevent such crime may include obligations to establish and maintain legislative frameworks to prevent manifestations of organized crime that risk serious human rights violations, to appropriately train public officials, to appropriately identify potential victims, to develop and use appropriate human rights indicators and to take special measures for the protection of groups at particular risk.
- States have particular positive obligations of protection and prevention with regard to persons in vulnerable situations whose lives have been placed at particular risk because of specific threats or pre-existing patterns of violence, such as human rights defenders, officials fighting corruption and organized crime, humanitarian workers, journalists, prominent public figures, witnesses to crime, victims of domestic and gender-based violence and human trafficking, children, especially children in street situations, unaccompanied migrant children and children in situations of armed conflict, members of ethnic and religious minorities, indigenous peoples, lesbian, gay, bisexual, transgender and intersex persons, persons with albinism, alleged witches, displaced persons, asylum seekers, refugees and stateless persons.
- States parties must take into account the situation of at-risk, excluded, disadvantaged and marginalized groups when developing and implementing policies and measures to prevent organized crime.

CONCLUSION

The present issue paper has sought to contribute to filling the gap in scholarship on human rights considerations in the implementation of the Organized Crime Convention by examining the relationship between the Convention and international human rights law.

In chapter I, this issue paper established the foundation for such an analysis by providing an introduction to both legal frameworks. In particular, the introduction to international human rights law provided a short overview of the diverse sources and institutions of international human rights law, the scope of application of human rights norms and when they may be derogated from, the difference between absolute and non-absolute rights and the different components of international human rights obligations. It explained that States' human rights obligations include obligations to respect, protect and fulfil human rights.

In chapter I it was also demonstrated how the references to human rights in the Organized Crime Convention and Protocols thereto, the *Travaux Préparatoires* and resolutions of the Conference of the Parties, as well as the reference to and use of the Organized Crime Convention and Protocols thereto by international and regional human rights courts and treaty bodies, evince an interrelationship between the Organized Crime Convention and international human rights law that has both negative and positive dimensions. International human rights law places restrictions on the ways in which States parties to the Organized Crime Convention can implement their obligations pursuant to the Convention (the negative dimension). At the same time, effective implementation of the Organized Crime Convention can be conducive to – and, in some cases, is necessary for – States' compliance with their obligations to protect and fulfil human rights (the positive dimension). States parties to the Organized Crime Convention must consider international human rights law in their strategies, policies, laws and measures for the implementation of the Convention not only to ensure compliance with international human rights law but also in order to prevent and repress transnational organized crime more effectively. In this regard, the Organized Crime Convention and international human rights law should be seen as complementary and mutually reinforcing regimes. This requires that the Organized Crime Convention be interpreted and implemented in the light of international human rights law, a conclusion that was also shown to be required by the application of the Vienna Convention on the Law of Treaties. It was further explained that in implementing the Organized Crime Convention, States parties must take into consideration the rights of four main groups: persons suspected, accused or convicted of offences covered by the Convention; other persons affected by measures adopted under the Convention for the repression of crime; victims, witnesses and persons collaborating with authorities; and persons or groups that are vulnerable to crimes covered by the Convention.

In chapter II, specific human rights issues in the implementation of specific provisions of the Organized Crime Convention were considered according to five broad groups of provisions within the Convention: criminalization and scope of application; investigation, prosecution and adjudication; international cooperation and assistance; protection and assistance; and prevention. Chapter II focused in particular on human rights issues affecting persons suspected, accused or convicted of offences covered by the Convention, as well as victims, witnesses and persons collaborating with authorities. The analysis contained in chapter II of this issue paper demonstrated how both the positive and negative dimensions of the interrelationship between the Organized Crime Convention and international human rights law must be considered when implementing various provisions of the Convention.

This paper has not purported to offer a comprehensive treatment of the interrelationship between the Organized Crime Convention and international human rights law. The introduction to this issue paper noted the limitations to its scope. In many places, this issue paper has only scratched the surface of relevant human rights considerations pertaining to particular provisions of the Organized Crime Convention. Nevertheless, it is hoped that this issue paper has provided a solid basis for consideration of how to implement the Organized Crime Convention in a way that effectively prevents and combats transnational organized crime while also effectively respecting, protecting and fulfilling human rights.

In this regard, it may be recalled that this issue paper began with an acknowledgement of a gap in scholarship on the interrelationship between the Organized Crime Convention and international human rights law. More work remains to be done to fill this gap. In particular, further work is recommended concerning the interrelationship between the Organized Crime Convention and economic, social and cultural rights, the impact of due process rights on the interpretation and implementation of the Convention, the human rights of at-risk groups in the implementation of the Convention, human rights issues relating to the exercise of extraterritorial jurisdiction to prevent and combat transnational organized crime, and the interrelationship between international human rights law and the Convention's provisions on confiscation and seizure, electronic surveillance, international law enforcement cooperation and mutual legal assistance.



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