

LEGISLATIVE GUIDE  
FOR THE IMPLEMENTATION  
OF THE  
UNITED NATIONS CONVENTION AGAINST  
TRANSNATIONAL ORGANIZED CRIME



**UNODC**

United Nations Office on Drugs and Crime

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## **Abbreviations and Acronyms**

APG	Asia/Pacific Group on Money Laundering
CARICOM	Caribbean Community
CFATF	Caribbean Financial Action Task Force
EAG	Eurasian Group
ESAAMLG	Eastern and Southern Africa Anti-Money Laundering Group
FATF	Financial Action Task Force
GAFILAT	Financial Action Task Force of Latin America
GIABA	Inter-governmental Action Group against Money Laundering in West Africa
IMF	International Monetary Fund
INTERPOL	International Criminal Police Organization
OAS	Organization of American States
OECD	Organization for Economic Cooperation and Development
UNODC	United Nations Office on Drugs and Crime

## I. Introduction

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1. The United Nations Convention against Transnational Organized Crime marks a significant milestone in the global fight against criminal organizations.<sup>1</sup> The Convention is intended to encourage States that do not have provisions against organized crime to adopt comprehensive countermeasures and to provide those States with some guidance in approaching the legislative measures involved. It also seeks to eliminate safe havens for organized crime by providing greater standardization and coordination of national legislative, administrative and enforcement measures relating to transnational organized crime, and to ensure a more efficient and effective global effort to prevent and suppress it.
2. The Convention recognizes that organized criminal groups behind various forms and manifestations of crime should be the target of criminal justice systems. Efforts should be geared towards the dismantling of those groups and protecting victims as well as witnesses. In relation to criminalization, the Convention focuses on the offence of participation in an organized criminal group and the enablers of organized criminality, namely money-laundering, corruption and obstruction of justice. The great adaptability and flexibility of the Convention stems from the expansion of the scope of application to all serious crime, including new and emerging forms of crime. The broad scope of application of the Convention enables States to afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings. The Convention further reinforces mechanisms of confiscation with the aim, inter alia, of depriving criminal groups of assets that can further criminal activities. Finally, the Convention recognizes the importance of prevention.

The Convention is supplemented by three protocols: the Protocol against the Smuggling of Migrants by Land, Air, and Sea,<sup>2</sup> the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children<sup>3</sup> and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition.<sup>4</sup>

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<sup>1</sup> United Nations, *Treaty Series*, vol. 2225, No. 39574.

<sup>2</sup> *Ibid.*, vol. 2241, No. 39574.

<sup>3</sup> *Ibid.*, vol. 2237, No. 39574.

<sup>4</sup> *Ibid.*, vol. 2326, No. 39574.

## A. Structure of this legislative guide

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3. The present legislative guide for the implementation of the United Nations Convention against Transnational Organized Crime is divided into six chapters. Following this introduction, chapter II sets out provisions and obligations applicable throughout the Convention. In chapter III, issues of substantive criminal law relating to the criminalization of transnational organized crime are discussed. chapter IV examines procedural law in the Convention to ensure effective criminalization, and chapter V presents legislative and administrative measures to enhance legal assistance and law enforcement and other forms of international cooperation. Chapter VI of this guide relates to the prevention of and national coordination against transnational organized crime.
4. The sequence of chapters and the structure of each chapter are presented thematically rather than following the Convention article by article, in order to make this legislative guide easier to use by national drafters, who may need to focus on particular issues or questions. The parts of this guide that cover specific articles of the Convention start by quoting the relevant Convention text. Each chapter is divided into several parts (marked by A, B, C, etc.), and each part is organized along the same structure, using the following four sections:
  1. Introduction
  2. Summary of main requirements
  3. Mandatory requirements
  4. Other measures, including optional issues
5. Additional references and resources are listed at the end of each part. These include references to other relevant articles in the *Convention against Transnational Organized Crime* and the Protocols thereto, relevant model legislative provisions developed by the United Nations Office on Drugs and Crime (UNODC), additional United Nations resources, and references to examples of national legislation. In the electronic version, available at [sherloc.unodc.org](http://sherloc.unodc.org), the examples of national legislation are available through hyperlinks.
6. At the end of this legislative guide, annex I lists the requirements in accordance with the Convention for States parties to report to the Secretary-General of the United Nations. Annex II lists other relevant material, documentation, toolkits, guidelines etc. developed by UNODC to outline the Convention requirements, examine their implementation and application, and assist States parties in their efforts to prevent and combat transnational organized crime more effectively.
7. Particular attention should be paid to the sections giving a summary of main requirements relevant to each article, which provide information on the essential requirements of the article concerned.

## **B. Structure of the Organized Crime Convention**

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8. The purpose of the Organized Crime Convention is to promote cooperation to prevent and combat transnational organized crime more effectively. Comprising 41 articles, the Convention:
  - Defines certain terms
  - Requires States to treat specific conduct, defined in the Convention, as crimes
  - Requires the introduction of specific control measures, such as protection of victims and witnesses or liability of legal persons
  - Provides for the confiscation of the proceeds of crime
  - Promotes international cooperation, for example through extradition, mutual legal assistance and joint investigations
  - Provides for training, research and information-sharing measures
  - Encourages preventive policies and measures
  - Contains technical provisions, such as for signature and ratification
9. The process by which the requirements of the Convention can be fulfilled will vary from State to State. Monist systems could ratify the Convention and incorporate its provisions into domestic law by official publication, while dualist systems would require implementing legislation.
10. As those responsible for preparing legislative drafts examine the priorities and obligations under the Convention, the guidance presented in the following paragraphs should be kept in mind.
11. In establishing their priorities, national legislators should bear in mind that the provisions of the Convention and the Protocols thereto do not all have the same level of obligation. In general, provisions can be grouped into the following three categories:
  - Measures that are mandatory (either absolutely or where specified conditions have been met)
  - Measures that States parties must consider applying or endeavour to apply
  - Measures that are optional
12. Whenever the phrase “States are required to” is used in the Convention, the reference is to a mandatory provision. Otherwise, the language used in the guide is “required to consider”, which means that States are strongly asked to seriously consider adopting a certain measure and to make a genuine effort to see whether adopting this measure would be compatible with their legal system. For entirely optional provisions, this guide employs the term “may wish to consider”. Occasionally, States “are required” to choose one or another option (for example, in the case of offences under article 5). In these cases, States are free to opt for one or the other or both options.

13. Several provisions in the Convention are qualified by reference to the domestic law and legal system of the States parties. While the precise formulation of this clause varies between articles, the common purpose of these phrases is to ensure that legislators adapt the language of the Convention requirements to the relevant domestic settings such that they match general principles and pre-existing laws and systems. If the phrases “in accordance with” and “required by fundamental principles of the domestic law of the State Party” are used, this does not make the Convention obligations subject to those principles; rather, the obligation here is to adopt appropriate measures in accordance with general principles and the particular application and understanding in the State party. The phrases “consistent with” or “subject to the legal principles of the State Party”, however, are safeguard clauses that limit the relevant provisions to consistency with the State party’s legal principles or subject relevant requirements to those principles. The phrase “if permitted by the basic principles of its domestic legal system” and “conditions prescribed by its domestic law” similarly limit the application of some mandatory requirements under the Convention. Where the phrase “in accordance with its domestic law and administrative procedures” is used, *lex situs* is to be applied, that is the law of the State in which the action is to occur, for example, the law in which proceeds of crime are seized.<sup>5</sup> The phrase “consistent with their respective domestic legal and administrative systems”, which is used in article 27(1), is explained in the *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*,<sup>6</sup> which states that this clause provides States parties with flexibility regarding the extent and manner of cooperation, within the object and purpose of the Convention. For example, it enables States parties to deny cooperation where it would be contrary to their domestic laws or policies to provide the assistance requested.<sup>7</sup> Such justified exceptions must, however, be consistent with the overall duties of States parties under the Convention.
14. The summary of main requirements presented in each section lists both measures that are mandatory and measures that States parties must consider applying or endeavour to apply. In the analysis that follows, measures that are mandatory are discussed first. Measures that States parties must consider applying or endeavour to apply and those that are optional are discussed together.
15. In general, articles of the Convention and the Protocols thereto describe conduct that must be criminalized by domestic law, made punishable by appropriate sanctions and made subject to the various requirements governing extradition, mutual legal assistance and other forms of assistance and cooperation.
16. In several places, the Convention and the Protocols refer to criminalization using “such legislative and other measures as may be necessary”. The reference to “other”

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<sup>5</sup> See article 14, paragraph 1, of the Convention against Transnational Organized Crime; see also section IV.D, below.

<sup>6</sup> United Nations publication, Sales No. E.06.V.5.

<sup>7</sup> *Travaux Préparatoires*, p. 244; see also section V.C, below.

measures is not intended to require or permit criminalization without legislation. Such measures are additional to, and presuppose the existence of, legislation.

17. It is recommended that national legislators check for consistency with other offences, definitions and legislative uses before relying on formulations or terminology contained in the Convention. The Convention was drafted for general purposes and is addressed to national governments. Thus, the level of abstraction is higher than that necessary for domestic legislation. National legislative drafters should therefore be careful not to incorporate parts of the text verbatim but are encouraged to adopt the spirit and meaning of the various articles.
18. The present guide makes reference to the *Travaux Préparatoires* (official records) of the negotiations of the Conventions and the Protocols thereto. The purpose of the *Travaux Préparatoires* is to track the progress of the negotiations in the open-ended intergovernmental Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, thus providing insight into the issues confronted by the Ad Hoc Committee and the solutions it found.

## II. Provisions and obligations applicable throughout the United Nations Convention against Transnational Organized Crime

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19. States parties need to be aware of a number of general provisions and requirements that may not be evident in reading a particular article of the Organized Crime Convention. These general provisions and requirements must be clearly understood by legislative drafters and policymakers and care must be taken to incorporate them when preparing legislation to implement the specific articles concerned. Otherwise, the implementing measure could be out of compliance with the requirements of the Convention.
20. It should also be noted that these general provisions, which are described below, also apply to offences established in accordance with the Protocols to the Organized Crime Convention (article 1(3) of each Protocol).<sup>8</sup>

**Article 1 of the Organized Crime Convention  
– Statement of purpose**

The purpose of this Convention is to promote cooperation to prevent and combat transnational organized crime more effectively.

21. In implementing the Convention, legislators should also be mindful of the purpose of the Convention, as stated in article 1. The statement of purpose is an intrinsic part of the Convention that must be considered when interpreting and implementing any provision under this treaty.<sup>9</sup>
22. While a separate statement of purpose may not be required in some legal systems, it is important for drafters to consider how the Convention impacts upon obligations arising from other international treaties to which the State is a party. Bearing in mind the obligation of States under the Charter of the United Nations to cooperate with one another in the promotion and observance of human rights and fundamental freedoms,<sup>10</sup> legislators need to pay particular attention to how the Organized Crime Convention interacts with international human rights law.

<sup>8</sup> See also section II.E, below.

<sup>9</sup> See articles 18, 19 and 31 of the Vienna Convention on the Law of Treaties (United Nations, *Treaty Series*, vol. 1155, No. 18232).

<sup>10</sup> See articles 55 and 56 of the Charter of the United Nations; see also the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV), annex).

## A. Implementation of the Convention

### Article 34 of the Organized Crime Convention – Implementation of the Convention

1. Each State Party shall take the necessary measures, including legislative and administrative measures, in accordance with fundamental principles of its domestic law, to ensure the implementation of its obligations under this Convention.
  2. The offences established in accordance with articles 5, 6, 8 and 23 of this Convention shall be established in the domestic law of each State Party independently of the transnational nature or the involvement of an organized criminal group as described in article 3, paragraph 1, of this Convention, except to the extent that article 5 of this Convention would require the involvement of an organized criminal group.
  3. Each State Party may adopt more strict or severe measures than those provided for by this Convention for preventing and combating transnational organized crime.
23. The purpose of article 34(1) is to ensure the implementation of laws that are consistent with constitutional requirements of the State party. It also serves to prevent new laws being put in place to implement the Convention that are practically inoperative.
  24. Implementation may be carried out through new laws or amendments of existing ones. Domestic offences that implement the terms of the Convention, whether based on pre-existing laws or newly established ones, will often correspond to offences under the Convention in name and the terms used, but this is not essential. States parties should ensure that the laws are implemented substantively in a manner that adheres as closely as possible to the terms of the Convention. Close conformity is desirable, for example to simplify extradition proceedings, but is not required as long as the full range of the conduct covered by the Convention is criminalized. Pursuant to article 11(6), the description of the offences is reserved to the domestic law of a State party.<sup>11</sup> Countries may well have offences that are different in scope, such as two or more domestic crimes covering one crime covered by the Convention, especially where this reflects pre-existing legislation and case law.
  25. It must be strongly emphasized that, while offences must involve transnationality and organized criminal groups for the Convention and its international cooperation provisions to apply, neither of these must be made elements of the domestic offence (article 34(2)). The *Travaux Préparatoires* indicate that the purpose of this paragraph is, without altering the scope of application of the Convention as described in article 3, to indicate unequivocally that the transnational element and the involvement of an organized criminal group are not to be considered elements of those offences for criminalization purposes.<sup>12</sup> That note is intended to indicate to States parties that, when implementing the Convention, they must not include in their criminalization of

<sup>11</sup> See also section III.A.3, below.

<sup>12</sup> *Travaux Préparatoires*, p. 285.

laundering of criminal proceeds (article 6), corruption (article 8) or obstruction of justice (article 23), the elements of transnationality and involvement of an organized criminal group. In the criminalization of participation in an organized criminal group (article 5), States parties must not include the element of transnationality. This provision is intended to ensure clarity for States parties in connection with their compliance with the criminalization articles of the Convention and is not intended to have any impact on the interpretation of the cooperation articles of the Convention (articles 13, 16, 18 and 27). In other words, in domestic law, the offences established in accordance with the Convention of participation in an organized criminal group, corruption, money-laundering and obstruction of justice, and the Protocol offences must apply regardless of whether the case involves transnational elements or is purely domestic. The Protocol offence of smuggling of migrants, however, is by definition transnational in nature. It should also be noted that if dual criminality is present, offenders can be extradited for one of the Convention or Protocol offences or for a serious crime even if the offence is not transnational in nature (article 16(1)).

26. The same principle applies to the involvement of an organized criminal group. Authorities will need to establish such involvement to the satisfaction of another State party in order to invoke the obligations for international assistance and extradition, but must not make it an element of the domestic offence. Thus, for example, the offences relating to money-laundering or obstruction of justice should apply regardless of whether the offence was committed by an individual or individuals associated with an organized criminal group and regardless of whether this can be proved or not.
27. It should be emphasized that the provisions of the Convention and its Protocols set only minimum standards, which States must meet for the sake of conformity. Provided that the minimum standards are met, States parties are free to exceed those standards, and in several provisions are expressly encouraged to do so (article 34(3), and, for example, article 6(2)(b)).
28. When implementing the obligations under the Organized Crime Convention, it is important for drafters to consider how these obligations interact with obligations arising from other international treaties to which the State is a party, particularly with regard to human rights issues and the administration of justice.
29. The Convention recognizes that full implementation will require technical cooperation and assistance and that, without full implementation by almost all countries, it will not be an effective instrument. States are encouraged to request such assistance from the United Nations Office on Drugs and Crime.

## B. Use of terms

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30. For the purposes of the Convention, article 2 defines a number of key terms that are repeated throughout the text. States parties are not required to introduce a legal definition in domestic legislation. The provisions of article 2 are intended to explain the terms used in order to define the scope of application and legal effects of the provisions of the Convention.

### Article 2 of the Organized Crime Convention — Use of terms

For the purposes of this Convention:

- (a) “Organized criminal group” shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit;
- (b) “Serious crime” shall mean conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty;
- (c) “Structured group” shall mean a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure;
- (d) “Property” shall mean assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to, or interest in, such assets;
- (e) “Proceeds of crime” shall mean any property derived from or obtained, directly or indirectly, through the commission of an offence;
- (f) “Freezing” or “seizure” shall mean temporarily prohibiting the transfer, conversion, disposition or movement of property or temporarily assuming custody or control of property on the basis of an order issued by a court or other competent authority;
- (g) “Confiscation”, which includes forfeiture where applicable, shall mean the permanent deprivation of property by order of a court or other competent authority;
- (h) “Predicate offence” shall mean any offence as a result of which proceeds have been generated that may become the subject of an offence as defined in article 6 of this Convention;
- (i) “Controlled delivery” shall mean the technique of allowing illicit or suspect consignments to pass out of, through or into the territory of one or more States, with the knowledge and under the supervision of their competent authorities, with a view to the investigation of an offence and the identification of persons involved in the commission of the offence
- (j) “Regional economic integration organization” shall mean an organization constituted by sovereign States of a given region, to which its member States have transferred competence in respect of matters governed by this Convention and which has been duly authorized, in accordance with its internal procedures, to sign, ratify, accept, approve or accede to it; references to “States Parties” under this Convention shall apply to such organizations within the limits of their competence.

31. The definitions in article 2 must be clearly understood in order to properly implement the provisions of the Convention in which the defined terms appear. Definitions pertaining only to particular issues, such as money-laundering and confiscation of assets, are generally discussed in the explanation of the article to which they pertain. Particular attention should be given to the following definitions of terms used more generally throughout the Convention.

*(a) Organized criminal group*

32. The Convention defines an “organized criminal group” as a structured group of three or more persons that exists over a period of time, the members of which act in concert aiming at the commission of serious crimes in order to obtain a direct or indirect financial or other material benefit (article 2 (a)).
33. The definition of “organized criminal group” includes only groups that through their activities seek to obtain, directly or indirectly, a “financial or other material benefit”. This would not, in principle, include groups such as some terrorist or insurgent groups, provided that their goals were purely non-material.<sup>13</sup> However, the Convention may still apply to crimes committed by those groups in the event that they commit crimes covered by the Convention in order to raise financial or other material benefits. In this context, in General Assembly resolution 55/25, in which the Assembly adopted the Organized Crime Convention, the Assembly also called upon all States to recognize the links between transnational organized criminal activities and acts of terrorism.<sup>14</sup>
34. While the reference to “financial or other material benefit” was intended to exclude groups with purely political or social motives, the term “material benefit” is not limited to financial, monetary or equivalent benefits. The *Travaux Préparatoires* provide that it should be interpreted broadly, to include personal benefits such as sexual gratification. This is to ensure that groups involved, for instance, in child pornography for sexual and not monetary reasons, are not excluded.<sup>15</sup>
35. The phrase “act in concert” means that the members of the organized criminal group act together. This would not be the case, for instance, if the members merely engage in simultaneous acts on their individual own account.
36. As a practical matter, some States may want or need to be more specific about some elements of this definition, such as the definition of the “period of time” for which a group has to exist. In this regard, it may be clearer to refer simply to “any period of time”.<sup>16</sup>

*(b) Structured group*

37. Under article 2 (c) of the Convention, a “structured group” is defined in the negative: as one that does not need a formal hierarchy. The term “structured group” is to be used

<sup>13</sup> See also *Legislative Guide to the Universal Anti-Terrorism Conventions and Protocols* (United Nations publication, Sales No. E.04.V.7), para. 84.

<sup>14</sup> General Assembly resolution 55/25, para. 6; see also Security Council resolution 1373 (2001), para. 4.

<sup>15</sup> *Travaux Préparatoires*, p. 17.

<sup>16</sup> UNODC, *Model Legislative Provisions against Organized Crime* (Vienna, 2012), p. 8.

in a broad sense, so as to include groups with a hierarchical or other elaborate structure, as well as non-hierarchical groups in which the roles of the members of the group are not formally specified.<sup>17</sup> Thus, a “structured group” is not necessarily a formal type of organization with a structure, continuous membership and defined roles and functions for its members. However, it must be more than randomly formed for the immediate commission of an offence (article 2 (c)).<sup>18</sup> Nevertheless, it includes all instances of crimes that involve any element of organized preparation.

38. The *Model Legislative Provisions against Organized Crime* suggest that it may be useful to delete the reference to “structured” and refer simply to “groups”. These sorts of approaches are permitted, as article 34(3) provides that States parties may adopt measures that are more strict or severe than those provided for in the Convention for preventing and combating transnational organized crime.<sup>19</sup>

(c) *Serious crime*

39. Many provisions of the Convention can be invoked with respect to serious crimes involving an organized criminal group. “Serious crime” is defined in article 2 (b) as crimes for which the maximum penalty is at least four years of deprivation of liberty or a more serious penalty.
40. This definition does not require a State party to create a definition of serious crime in its criminal law. However, it should be noted that if States parties wish to have other offences fall under the scope of application of the Convention, in particular for purposes of international cooperation, they may wish to ensure that the penalties provided in domestic legislation fulfil the conditions of the definition of “serious crime” (see article 3(1)(b)).

**Additional references and resources**

*Model Legislative Provisions against Organized Crime*

Article 3 (Definitions and use of terms)

**Additional United Nations resources**

Conference room paper on the notion of serious crime in the United Nations Convention against Transnational Organized Crime (CTOC/COP/2012/CRP.4).

Background paper by the Secretariat on criminalization of participation in an organized criminal group (article 5 of the United Nations Convention against Transnational Organized Crime(CTOC/COP/WG.2/2014/2), paras. 7-10.

<sup>17</sup> *Travaux Préparatoires*, p. 17.

<sup>18</sup> *Ibid.*, p. 15.

<sup>19</sup> *Model Legislative Provisions against Organized Crime* (2012), p. 8.

**Examples of national legislation***Definitions of “organized criminal group”*

Bulgaria, Criminal Code 1968, art. 93, para. 20

China, Criminal Law of the People’s Republic of China, art. 294

Lithuania, Criminal Code 2000, art. 25

New Zealand, Crimes Act 1961, sect. 98A

Norway, General Civil Penal Code, sect. 60a

Republic of Moldova, Criminal Code, Article 46

Romania, Law No. 39/2003 on preventing and combating organized crime, chap. 1, arts. 1 and 2

Russian Federation, Criminal Code, arts. 35 and 208-210

Switzerland, Swiss Criminal Code, art. 260 *ter*

## C. Scope of application

### Article 3 of the Organized Crime Convention – Scope of application

1. This Convention shall apply, except as otherwise stated herein, to the prevention, investigation and prosecution of:

(a) The offences established in accordance with articles 5, 6, 8 and 23 of this Convention; and

(b) Serious crime as defined in article 2 of this Convention;  
where the offence is transnational in nature and involves an organized criminal group.

2. For the purpose of paragraph 1 of this article, an offence is transnational in nature if:

(a) It is committed in more than one State;

(b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;

(c) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or

(d) It is committed in one State but has substantial effects in another State.

41. Under article 3, the Convention can be invoked for the following types of crime:
- (a) Offences established at the domestic level under the requirements of articles 5, 6, 8 and 23 of the Convention (that is, offences relative to participation in an organized criminal group, money-laundering, corruption and obstruction of justice, if they are transnational in nature and involve an organized criminal group) (article 2(a) and (b); and article 3(1)(a));
  - (b) Serious crimes as defined above, if they are transnational in nature and involve an organized criminal group (article 2 (a) and (b) and article 3(b)). For the purposes of the Convention, “serious crime” is defined in article 2 (b) as any offence carrying a maximum penalty of four years deprivation of liberty or a more serious penalty. The Convention adopts a flexible approach, which takes into account the seriousness of the acts it covers, rather than limiting itself to a predetermined and rigid list of offences. The Convention applies to offences that are transnational in nature and involve an organized criminal group. The Convention enables States parties to cooperate on a wide range of offences related to transnational organized crime and identify new forms and dimensions of transnational organized crime falling under the scope of the Convention through the threshold of the penalty as provided in domestic legislation. This flexibility considerably enhances the potential use of the Convention for the purposes of international cooperation.
  - (c) The offence is transnational (article 3(2)) if:
    - (i) It is committed in more than one State;

- (ii) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;
  - (iii) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or
  - (iv) It is committed in one State but has substantial effects in another State.
42. The Organized Crime Convention can also be invoked for offences established under any of the Protocols to the Convention to which States have become parties (article 1 of each Protocol).
43. As a global instrument with wide adherence, the Convention offers a broad scope of cooperation to address existing and emerging forms of transnational organized crime:
- (a) For example, in its resolution 66/180 of 19 December 2011, the General Assembly established a direct relationship between the implementation of the Convention and the strengthening of crime prevention and criminal justice responses to protect cultural property, especially with regard to its trafficking, for the purpose of providing the widest possible international cooperation to address such crimes, including for extradition, mutual legal assistance and the confiscation and return of stolen cultural property to its rightful owner. The General Assembly also invited States “to make trafficking in cultural property, including stealing and looting at archaeological and other cultural sites, a serious crime, as defined in article 2 of the Convention, with a view to fully utilizing that Convention for the purpose of extensive international cooperation in fighting all forms and aspects of trafficking in cultural property and related offences”;
  - (b) In 2012, the Commission on Crime Prevention and Criminal Justice, in its resolution 21/2, called upon Member States to criminalize maritime piracy and armed robbery at sea under their domestic law and “encouraged Member States to continue cooperating with each other, using relevant and applicable bilateral or multilateral instruments for law enforcement cooperation, mutual legal assistance and extradition, inter alia, the Organized Crime Convention and its Protocols and the United Nations Convention against Corruption”;
  - (c) The General Assembly has also stated, in its resolution 55/25, that it is strongly convinced that the Organized Crime Convention will constitute an effective tool and the necessary legal framework for international cooperation in combating, inter alia, such criminal activities as money-laundering, corruption, illicit trafficking in endangered species of wild flora and fauna, offences against cultural heritage and the growing links between transnational organized crime and terrorist crimes.
44. It is critical for legislators and policymakers to be aware that, according to article 3(1), the scope of application of the Convention is limited to offences that are “transnational in nature and involve an organized criminal group”. As made clear in article 34(2),<sup>20</sup>

<sup>20</sup> See section II.A, above.

the limiting factors of transnationality and involvement of an organized criminal group must not apply in domestic legislation.

45. Moreover, the sections below on article 16 (extradition) and article 18 (mutual legal assistance) contain specific provisions that govern their scope of application and should be closely reviewed. Article 16(1) establishes the scope of the obligation to provide extradition in broader terms than those of article 3 of the Convention. Extradition is to be provided with respect to the offences covered by the Convention or in cases where an offence referred to in article 3(1)(a) or (b) involves an organized criminal group and the person who is the subject of the request for extradition is located in the territory of the requested State party, provided 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.<sup>21</sup> Article 18(1) establishes the scope of the obligation to provide mutual legal assistance. It requires States parties to provide the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by the Convention as provided in article 3.<sup>22</sup>

#### Additional references and resources

##### *Model Legislative Provisions against Organized Crime*

Article 2 (Scope of application)

#### Additional United Nations resources

Commission on Crime Prevention and Criminal Justice resolution 21/2 on countering maritime piracy, especially off the coast of Somalia and in the Gulf of Guinea (*Official Records of the Economic and Social Council, 2012, Supplement No. 10 (E/2012/30 and Corr. 1 and 2), chap. I, sect. D*)

Conference of the Parties to the United Nations Convention against Transnational Organized Crime resolution 5/1 on ensuring effective implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto (CTOC/COP/2010/17), chap. I, sect. A

Background paper by the Secretariat on the criminalization of participation in an organized criminal group (article 5 of the United Nations Convention against Transnational Organized Crime) (CTOC/COP/WG.2/2014/2), paras. 11-14

General Assembly resolution 66/180 on strengthening crime prevention and criminal justice responses to protect cultural property, especially with regard to its trafficking

UNODC, *Digest of Organized Crime Cases: A Compilation of Cases with Commentaries and Lessons Learned* (Vienna, 2012), pp. 8 and 9.

<sup>21</sup> See section V.A, below.

<sup>22</sup> See section V.B, below.

## D. Protection of sovereignty

### Article 4 of the Organized Crime Convention – Protection of sovereignty

1. States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.
2. Nothing in this Convention entitles a State Party to undertake in the territory of another State the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other State by its domestic law.

46. Article 4 is the primary vehicle for protection of national sovereignty in carrying out the terms of the Convention.
47. Article 4(1) is a reflection of the fact that the United Nations itself is based on the principle of the sovereign equality of all its States Members. Based on the principles of the Charter of the United Nations, the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations<sup>23</sup> elaborates the principle of non-intervention in matters that are essentially within the domestic jurisdiction of any State. The Declaration emphasizes that no State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State, and by proscribing the use of any measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights.
48. Article 4(2) of the Convention contains a further expression of national sovereignty by stating that the Convention does not authorize States parties to perform functions within the territory of another State normally reserved to the competent authorities of that State. In practice, this means that in instances in which investigations and enforcement produce a situation in which agents of one State party will perform functions within the territory of another State, this has to occur with the approval of that other State so as not to breach the principle of territorial integrity.
49. There are also other provisions that protect national prerogatives and sovereignty set forth elsewhere in the Convention. For example, pursuant to article 11(6), nothing in the Convention affects the principle that the domestic law of a State party governs:
  - (a) The description of offences established in accordance with the Convention;
  - (b) Applicable legal defences;
  - (c) Legal principles controlling the lawfulness of conduct;
  - (d) Prosecution and punishment.

<sup>23</sup> General Assembly resolution 2625 (XXV), annex.

50. Moreover, pursuant to article 11(1), it is up to the State party concerned to determine the appropriate sanctions, while considering the gravity of the offence.

## **E. Relationship between the Convention and the Protocols**

### **Article 37 of the Organized Crime Convention – Relation with protocols**

1. This Convention may be supplemented by one or more protocols.
2. In order to become a Party to a protocol, a State or a regional economic integration organization must also be a Party to this Convention.
3. A State Party to this Convention is not bound by a protocol unless it becomes a Party to the protocol in accordance with the provisions thereof.
4. Any protocol to this Convention shall be interpreted together with this Convention, taking into account the purpose of that protocol.

### **1. Application of the Convention to the Protocol (article 37 of the Convention and article 1 of each Protocol)**

51. Article 37 of the Convention and article 1 of each of the Protocols thereto together establish the basic relationship between the Convention and its Protocols. The four instruments were drafted as a group, with general provisions against transnational organized crime (e.g., extradition and mutual legal assistance) in the Convention and elements specific to the subject matter of the Protocols in each of the Protocols (e.g., offences established in accordance with the Protocol and provisions relating to travel and identity documents).
52. As the Protocols supplement the Organized Crime Convention, to become a party to any of the Protocols, a State is required to be a State party to the Convention. This ensures that in any case that arises under a Protocol to which the State concerned is a party, all of the general provisions of the Convention will also be available and applicable. Many specific provisions were drafted on that basis: for example, the Convention contains general requirements for mutual legal assistance and other forms of international cooperation, while requirements to render specific assistance such as the verification of travel documents or the tracing of a firearm are found only in the appropriate Protocol. Additional rules established by the relevant articles deal with the interpretation of similar or parallel provisions in each instrument and the application of general provisions of the Convention to the offences established in accordance with the Protocol and its other provisions.
53. Article 1 of each Protocol and article 37 of the Convention establish the following basic principles governing the relationship between the Convention and the Protocols:
  - (a) No State can be a party to any of the Protocols unless it is also a party to the Convention (article 37(2) of the Convention). Simultaneous ratification or accession is permitted, but it is not possible for a State to be subject to any obligation under the Protocol unless it is also subject to the obligations of the Convention;

- (b) The Convention and the Protocols must be interpreted together (article 37(4) of the Convention; and article 1(1) of each Protocol). In interpreting the various instruments, all relevant instruments should be considered, and provisions that use similar or parallel language should be given generally similar meaning. In interpreting one of the Protocols, the purpose of that Protocol must also be considered, which may modify the meaning applied to the Convention in some cases (article 37(4) of the Convention);
- (c) The provisions of the Convention apply, *mutatis mutandis*, to the Protocols (article 1(2) of each Protocol). The meaning of the phrase “*mutatis mutandis*” is clarified in the *Travaux Préparatoires* as “with such modifications as circumstances require” or “with the necessary modifications”.<sup>24</sup> This means that, in applying provisions of the Convention to the Protocols, they may consequently be modified or interpreted so as to have the same meaning or effect in the Protocol as in the Convention. In other words, modifications and interpretations are permissible to take account of the circumstances that arise under the Protocols. This general rule does not apply where the drafters have specifically excluded it;
- (d) Offences established in accordance with the Protocol shall also be regarded as offences established in accordance with the Convention (article 1(3) of each Protocol). This principle, which is analogous to the “*mutatis mutandis*” requirement, is a critical link between the Protocol and the Convention. It ensures that any offence or offences established by each State pursuant to each Protocol will automatically be included in the scope of the basic provisions of the Convention governing forms of international cooperation such as extradition (article 16 of the Convention) and mutual legal assistance (article 18 of the Convention).<sup>25</sup> It also links the Protocols and the Convention by making other mandatory provisions of the Convention applicable to offences established in accordance with the Protocols. In particular, obligations in the Convention concerning money-laundering (article 6), corruption (article 8), liability of legal persons (article 10), prosecution, adjudication and sanctions (article 11), confiscation (articles 12–14), jurisdiction (article 15), extradition (article 16), mutual legal assistance (article 18), special investigative techniques (article 20), obstruction of justice (article 23), witness and victim protection and enhancement of cooperation (articles 24–26), law enforcement cooperation (article 27), training and technical assistance (articles 29 and 30) and implementation of the Convention (article 34), apply equally to the offences established in accordance with the Protocol. Establishing a similar link is therefore an important element of national legislation in the implementation of the Protocols;

<sup>24</sup> *Travaux Préparatoires*, p. 330.

<sup>25</sup> In most cases, the drafters used the phrase “offences covered by this Convention” to make this link. See, for example, article 16(1), which sets forth the scope of the obligation to extradite offenders.

- (e) The Protocols' requirements are a minimum standard. Domestic measures may be broader in scope or more severe than those required by the Protocol, as long as all obligations set forth in the Protocols have been fulfilled (article 34(3) of the Convention).

## 2. Interpretation of the Convention and the Protocols (article 37 of the Convention and article 1 of each Protocol)

54. General rules for the interpretation and application of treaties are set out in articles 31 to 33 of the Vienna Convention on the Law of Treaties<sup>26</sup> and are not discussed in detail in this legislative guide. Those general rules may be amended or supplemented by rules established in individual treaties, however, and a number of specific interpretative references appear in both the Convention and the Protocols (see, for example, article 16(14) of the Convention, which makes the principle of non-discrimination a limit on the interpretation and application of the basic obligation to extradite offenders). The dispute settlement provisions found in all four instruments also require negotiations, followed by arbitration, as the means of resolving any disputes over interpretation or application matters (see article 35 of the Convention). Specific references will be raised in relation to the subject matter to which they apply, but there are also general interpretative provisions that apply to the Protocols. Pursuant to article 37 of the Convention and article 1 of each Protocol, elements of the Convention must be taken into consideration when interpreting the Protocol.

### Additional references and resources

#### Organized Crime Convention

Article 34 (Implementation of the Convention)  
Article 35 (Settlement of disputes)

#### Protocols supplementing the Organized Crime Convention

Trafficking in Persons Protocol, articles 1 and 14  
Smuggling of Migrants Protocol, articles 1 and 19  
Firearms Protocol, article 1

<sup>26</sup> United Nations, *Treaty Series*, vol. 1155, No. 18232.

## **Related international instruments**

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Charter of the United Nations

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

Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV), annex.)

### **III. Substantive criminal law**

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55. Chapter III of this legislative guide addresses the substantive criminal law requirements of the Organized Crime Convention. The Convention sets out four specific offences that States parties are required to criminalize in their domestic laws: participation in an organized criminal group (article 5), which may be criminalized either on the basis of an agreement or conspiracy-style offence or as an offence based on criminal association, or both; money-laundering (article 6); corruption (article 8); and obstruction of justice (article 23).
56. The activities covered by these offences are vital to the success of sophisticated criminal operations and to the ability of offenders to operate efficiently, generate substantial profits and protect themselves, as well as their illicit gains, from law enforcement authorities. Those offences therefore constitutes the cornerstone of a global and coordinated effort to counter serious and well-organized criminal markets, enterprises and activities. Sections III.B–V.E, below, address each of these offences respectively.

## A. General requirements

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57. States parties are required to take certain legislative and administrative steps towards implementing the Organized Crime Convention. They are to take such measures in a manner consistent with the fundamental principles of their domestic law, as stated in article 34(1), which provides that “each State Party shall take the necessary measures, including legislative and administrative measures, in accordance with fundamental principles of its domestic law, to ensure the implementation of its obligations under this Convention.”<sup>27</sup> In relation to the substantive criminal law requirements of the Convention, this means that States parties must prohibit certain conduct as criminal offences in their domestic law. States with relevant legislation already in place must ensure that the existing provisions conform to the Convention requirements and amend — and possibly repeal — their laws if necessary.
58. Several terms that are central to the matters addressed in this chapter, such as “organized criminal group”, “structured group” and “serious crime”, are defined in article 2 of the Convention and are further discussed in section II.B, above.

### 1. Minimum standards of implementation

59. The Convention introduces minimum standards that have to be met by States parties. The mandatory provisions of the Convention serve as a threshold that States must meet for the sake of conformity, but, provided that the minimum standards are met, each State party remains free to undertake other effective measures so long as they are in accordance with the fundamental principles of its domestic law and conform with relevant obligations arising from international treaties, including human rights treaties to which the State is a party. In the light of article 34(3), States parties may opt to introduce more strict or severe measures than those provided for by the Convention.
60. Implementation of the criminalization requirements in the Convention may be carried out by promulgating new laws or amendments of existing ones. Domestic offences that implement the terms of the Convention, whether based on pre-existing laws or newly established ones, will often correspond to offences under the Convention in name and terms used, but this is not essential. Close conformity is desirable, for example to simplify mutual legal assistance, extradition proceedings and confiscation, but is not required, as long as the range of acts covered by the Convention is criminalized.
61. The criminalization of the proscribed conduct must be made through criminal law. Any other measures that need to be taken would have to be in addition to the legislation of criminal offences. The only exception to this is in regards to legal persons, including corporate entities, the liability of which can be criminal, civil or administrative, depending on the domestic legal principles (article 10(2)).<sup>28</sup>

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<sup>27</sup> See also section II.A, above.

<sup>28</sup> See section IV.B, below.

62. National drafters should focus on the meaning and spirit of the Convention rather than attempt simply to translate the Convention text or include it verbatim in new laws or amendments. The drafting and enforcement of the new offences, including legal defences and other legal principles, are left to the States parties (see article 11(6)). Therefore, they must ensure that the new legal provisions are consistent with their domestic principles and fundamental laws. This avoids the risk of conflicts and uncertainty about the interpretation of the new provisions by courts or judges, and reduces the possibility of constitutional invalidity.
63. The criminal offences mandated by the Convention or the Protocols may apply in conjunction with other provisions of the domestic law of States parties. In order to maintain the internal coherence of State party's legislation, every effort must be made to ensure that the new criminal offences are consistent with existing domestic law.

## **2. Scope of application**

64. In general, the Convention applies when the offences are transnational in nature and involve an organized criminal group. However, as described in more detail in section II.C, above, it should be emphasized that this does not mean that these elements themselves are to be included as elements of the domestic offences (see article 34(2)). On the contrary, drafters must not include them in domestic offences, unless expressly required by the Convention or the Protocols thereto. Any requirements of transnationality or organized criminal group involvement would unnecessarily complicate and hamper law enforcement and create legislative lacunae.
65. The only exception to this principle in the Convention is the offence of participation in an organized criminal group, in which case the involvement of an organized criminal group is an element of the domestic offence. Even in this case, transnationality must not be an element at the domestic level.
66. The definition of smuggling of migrants in article 3(a) of the Smuggling of Migrants Protocol includes the element of transnationality, but the domestic adaptations of that definition must not include the element of organized crime involvement.

## **3. Sanctions**

### **Article 11 of the Organized Crime Convention – Prosecution, adjudication and sanctions**

1. 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.

[...]

6. 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 and that such offences shall be prosecuted and punished in accordance with that law.

67. The offences of participation in an organized criminal group, money-laundering, corruption and obstruction of justice, — and offences criminalized on the basis of any of the three Protocols to which the State is a party — are all subject to adequate sanctions that take the gravity of the offence into account.<sup>29</sup>
68. The severity of the punishment for the offences mandated by the Convention is left to the States parties, but it must take into account the gravity of the offence (article 11(1)). The primacy of national law in this respect is affirmed by article 11(6).
69. The severity and type of punishment must, however, be in line with other relevant international obligations of the States parties. In this context, it is important to consider that several international instruments restrict the severity of punishment and the types of sanctions that may be used.<sup>30</sup> These include article 16(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,<sup>31</sup> article 6(2) of the International Covenant on Civil and Political Rights<sup>32</sup> and article 37 of the Convention on the Rights of the Child.<sup>33</sup>

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<sup>29</sup> See also section IV.C, below.

<sup>30</sup> See Economic and Social Council resolution 1984/50, annex, para. 1.

<sup>31</sup> United Nations, *Treaty Series*, vol. 1465, No. 24841.

<sup>32</sup> General Assembly resolution 2200 A (XXI), annex.

<sup>33</sup> United Nations, *Treaty Series*, vol. 1577, No. 27531.

## **B. Criminalization of participation in an organized criminal group**

### **Article 5 of the Organized Crime Convention**

#### **– Criminalization of participation in an organized criminal group**

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:
  - (a) Either or both of the following as criminal offences distinct from those involving the attempt or completion of the criminal activity:
    - (i) Agreeing with one or more other persons to commit a serious crime for a purpose relating directly or indirectly to the obtaining of a financial or other material benefit and, where required by domestic law, involving an act undertaken by one of the participants in furtherance of the agreement or involving an organized criminal group;
    - (ii) Conduct by a person who, with knowledge of either the aim and general criminal activity of an organized criminal group or its intention to commit the crimes in question, takes an active part in:
      - a. Criminal activities of the organized criminal group;
      - b. Other activities of the organized criminal group in the knowledge that his or her participation will contribute to the achievement of the above-described criminal aim;
  - (b) Organizing, directing, aiding, abetting, facilitating or counselling the commission of serious crime involving an organized criminal group.
2. The knowledge, intent, aim, purpose or agreement referred to in paragraph 1 of this article may be inferred from objective factual circumstances.
3. States Parties whose domestic law requires involvement of an organized criminal group for purposes of the offences established in accordance with paragraph 1(a)(i) of this article shall ensure that their domestic law covers all serious crimes involving organized criminal groups. Such States Parties, as well as States Parties whose domestic law requires an act in furtherance of the agreement for purposes of the offences established in accordance with paragraph 1(a)(i) of this article, shall so inform the Secretary-General of the United Nations at the time of their signature or of deposit of their instrument of ratification, acceptance or approval of or accession to this Convention.

### **1. Introduction**

70. Because the activities of organized criminal groups across national borders and frequently affect many countries at once, the need to coordinate and harmonize laws is evident. The Organized Crime Convention aims at meeting the need for a coordinated global response and at ensuring the effective criminalization of acts of participation in such groups.
71. The approaches adopted by States to criminalize participation in organized criminal groups vary depending on historical, political, and legal backgrounds. Traditionally, common law jurisdictions mostly relied on the offence of conspiracy, while civil law jurisdictions developed the offence of criminal association. These are reflected in the Convention in article 5(1)(a)(i) (the agreement-type offence) and article 5(1)(a)(ii) (the criminal association offence), respectively.

72. The main purpose of article 5 of the Convention, to be implemented by all States parties, is to establish an offence that creates criminal liability for persons who intentionally participate in or contribute to the criminal activities of organized criminal groups. The offence is aimed at tackling organized crime at its core by criminalizing acts that involve participation in or contributions to an organized criminal group.
73. Another purpose of article 5 is to extend criminal liability for different ways in which a person may participate in the commission of a serious crime involving an organized criminal group, including as organizers, directors and those who aid, abet, facilitate or counsel the commission of serious crime involving an organized criminal group. Importantly, States parties that implement the criminal association offence, contained in article 5(1)(b), are able to hold accountable those who plan, mastermind, found, finance or actively support the criminal activities of an organized criminal group but who themselves do not commit, or have not yet committed, a specific criminal offence. It is important to note that the Convention does not deal with prohibition of membership in specific organizations.
74. Article 5 serves to reduce the risk that criminal offences will be committed in the future, thus minimizing the potential for harm to occur, and seeks to criminalize conduct that has the potential to culminate in harm or damage. It also serves to enhance law enforcement, prosecution and adjudication and to enable criminal justice agencies to intervene earlier without having to wait until harm or damage is done.

## **2. Summary of main requirements**

75. In accordance with article 5(1), States parties are required to establish the following offences as crimes:
- (a) Either or both of the following:
    - (i) Agreeing with one or more persons to commit a serious crime for a financial or other material benefit;
    - (ii) Conduct by a person who, with knowledge of the aim and general criminal activity of an organized criminal group or its intention to commit the crime, takes an active part in:
      - a. Criminal activities of the organized criminal group;
      - b. Other activities of the organized criminal group in the knowledge that his or her participation will contribute to the achievement of the criminal aim;
  - (b) Organizing, directing, aiding, abetting, facilitating or counselling the commission of a crime involving an organized criminal group.
76. Under article 5(2), States parties must ensure that knowledge, intent and purpose can be established through inference from objective factual circumstances. The purpose of this paragraph is to encourage the establishment of mental (*mens rea*) elements

through the physical (actus reus) elements.

77. Article 5(3) provides that States that require the involvement of an organized criminal group for the offence of agreeing to commit a serious crime (as in paragraph 1 (a)(i)) must:
- (a) Ensure that domestic law covers all serious crimes involving organized criminal groups; and
  - (b) Inform the Secretary-General of the United Nations in that regard.
78. States that require some act in furtherance of the relevant agreement for the purposes of the offence in paragraph 1 (a)(i) must also inform the Secretary-General of the United Nations of this.

### **3. Mandatory requirements**

#### *(a) Primary criminalization requirements (article 5(1)(a))*

79. Under article 5(1)(a), States must establish either or both of the offences set forth in subparagraphs (i) and (ii) as criminal offences in their domestic laws. Both offences are designed to be preventive by creating liability distinct from the attempt or completion of the criminal activity and holding criminally liable those who associate for criminal endeavours, even if they have not yet committed an offence. When implementing the requirements under article 5(1)(a), States parties should take particular care to avoid vagueness and overbreadth of these offences.

#### *Article 5 (a)(i): Agreement-type offences*

80. The offence under article 5(1)(a)(i), is akin to the common law conspiracy model:
- Agreeing with one or more other persons to commit a serious crime for a purpose relating directly or indirectly to the obtaining of a financial or other material benefit and, where required by domestic law, involving an act undertaken by one of the participants in furtherance of the agreement or involving an organized criminal group.
81. Liability for this offence is based on an agreement to commit serious crime. The elements of the offence under article 5(1)(a)(i), combine the agreement to commit a crime with the purpose of obtaining a financial or other benefit. In essence, liability under article 5(1)(a)(i), arises when two or more persons deliberately enter into an agreement to commit a serious crime for the purpose of obtaining some material benefit. Unlike liability for attempt in certain legal traditions, there is no requirement to demonstrate that the accused came close (“proximate”) to the completion of the substantive offence (or “serious crime”).
82. For criminal liability to arise, the material or physical elements (actus reus) of article 5 (1)(a)(i), require proof of the following:
- (a) An agreement to commit a serious crime (as defined in article 2(b));
  - (b) That the agreement was between two or more persons (that is, the offender with at least one other person);

- (c) Where required by domestic law, an overt act in furtherance of the agreement.
83. States parties may include two additional requirements as an element of the offence if these are a requirement of their domestic law:
- (a) An act committed by one of the participants furthering the relevant agreement. Some jurisdictions add this “overt act” element to the offence to ensure that it covers instances in which the conspirators actually put their plans into action, so that agreements that are no more than bare intent or wishful thinking do not fall within the spectrum of criminal liability;
  - (b) The involvement of an organized criminal group.
84. The mental elements (mens rea) under article 5(1)(a)(i), require proof that:
- (a) The purpose of the agreement or the crime committed was to obtain a financial or other material benefit;
  - (b) The intention of the accused was to enter into the agreement (see article 5(1), chapeau).
85. The requirements of this offence include the intentional agreement with one or more other persons to commit a serious crime for a purpose related directly or indirectly to obtaining a financial or other material benefit. This requirement criminalizes the mere agreement to commit serious crimes for the purpose of obtaining a financial or other material benefit.
86. Proof of the element of intention is the subject of the specific provision in article 5(2). It is open to States parties to provide in their domestic law that reckless or negligent conduct should be punishable, or indeed to impose strict liability without proof of any mental element.
87. In some legal systems, the concept of intention (as a mental element) has its ordinary meaning, in the sense that a person only needs to intend to do the action for that action to have been intentional. In other legal systems, intention implies an awareness of the unlawfulness of the act. This is an issue that must be resolved with reference to local legal traditions.
88. It should be noted that the phrase “a purpose relating directly or indirectly to the obtaining of a financial or other material benefit” should be interpreted broadly, so that it can cover crimes with tangible but non-monetary objectives. For example, this phrase should be interpreted as including crimes in which the predominant motivation is sexual gratification, such as the receipt or trade of materials by members of child pornography rings, the trading of children by members of paedophile rings or cost-sharing among ring members.<sup>34</sup> Conspiracies with purely non-material objectives, such as ideological goals, are not covered by this offence.
89. Article 5(2) recognizes that in many legal systems it is permissible to use circumstantial evidence to establish the elements of criminal offences. This applies in

<sup>34</sup> *Travaux Préparatoires*, p. 17.

particular to not only the mental elements but also to the agreement itself. Accordingly, the purpose, intention or agreement elements of article 5(1)(a)(i), may be inferred from objective factual circumstances

*Article 5(1)(a)(ii): Criminal association offence*

90. Article 5(1)(a)(ii), of the Convention offers a second, distinct type of offence that is based on the criminal association laws developed in several civil law countries. It is suitable to legal systems that do not recognize conspiracy or do not allow the criminalization of a mere agreement to commit an offence. Some countries have also chosen to adopt it in addition to the conspiracy offence.
91. In contrast to the conspiracy offence under article 5(1)(a)(i), the offence under subparagraph (ii) adopts a model that makes the participation in an organized criminal group a separate offence. In essence, subparagraph (ii) attaches criminal liability to intentional contributions to organized criminal groups, not to the pursuit of a preconceived plan or agreement.
92. Article 5(1)(a)(ii), criminalizes conduct by a person, who, with knowledge of either the aim and general criminal activity of an organized criminal group or its intention to commit the crimes in question, takes an active part in:
  - (a) Criminal activities of the organized criminal group;
  - (b) Other activities of the organized criminal group in the knowledge that his or her participation will contribute to the achievement of the above-described criminal aim.
93. The physical elements of article 5(1)(a)(ii), require that the accused has been “taking an active part in” either (a) the criminal activities of the organized criminal group as defined in article 2 (a); or (b) other activities of such a group. Determining whether the person concerned has taken “an active part” is a question of fact and jurisdictions may vary in determining if and when more passive roles suffice to establish this element. The “other activities” may not constitute crimes in themselves, but they perform a supportive function for the group’s criminal activities and goals.
94. The mental elements of article 5(1)(a)(ii) require that the accused had:
  - (a) An intention to take an active part (article 5, paragraph 1, chapeau); and
  - (b) Knowledge of either:
    - (i) The aim and general criminal activity of the organized criminal group; or
    - (ii) The intention of the organized criminal group to commit crimes.
95. In addition, the definition of ‘organized criminal group’ in article 2 (a) of the Convention requires proof that the group seeks to “obtain, directly or indirectly, a financial or material benefit”.<sup>35</sup>

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<sup>35</sup> See also section II.B, above.

96. In the case of participating in criminal activities (as in article 5(1)(a)(ii)(a.)), any mental element required to prove the criminal activity in question would also apply to the participation offence. For instance, active participation in kidnapping or obstruction of justice would require the mental element for those offences.
97. If the participation relates to other, non-criminal activities of the organized criminal group, article 5(1)(a)(ii)(b.), further requires proof of knowledge that such participation will contribute to achieving the criminal aim. For instance, a person providing a bookkeeping service is performing a non-criminal activity, unless he or she knows that such conduct is supporting the activities of an organized criminal group.
98. According to article 5(2) the intention and knowledge required under article 5(1)(a)(ii), may be inferred from objective factual circumstances.

*(b) Secondary liability (article 5(1)(b))*

99. Article 5(1)(b) of the Convention extends criminal liability to persons who provide advice or assistance with respect to the commission of serious crimes involving an organized criminal group. This specifically includes persons intentionally “organizing, directing, aiding, abetting, facilitating or counselling the commission of serious crime involving an organized criminal group”. Article 5(1)(b), thus enables the prosecution of leaders, accomplices, organizers and arrangers, as well as lower-level participants, in the commission of serious crime.
100. “Aiding, abetting, facilitating or counselling” covers secondary parties and accomplices who are not themselves principal offenders. “Organizing” and “directing”, on the other hand, are extensions not commonly found (or defined) in national laws. To that end, article 5(1)(b), is intended to ensure the liability of leaders of organized criminal groups who give orders relating to, but do not themselves engage in, the commission of the actual crimes.

*(c) Inference of mental elements (article 5(2))*

101. Each State party must have the legal framework to enable the knowledge, intent, aim, purpose or agreement referred to in article 5(1), to be inferred from objective factual circumstances. If the evidence laws of a country do not permit such circumstantial evidence to be used to establish such mental state, it must revise its laws to conform to the requirements of this paragraph. This requirement is of particular importance because subjective evidence of an accused’s mental state is often impossible to obtain and this could lead to an undeserved acquittal.

*(d) General requirements*

102. In drafting legislation to implement these criminalization obligations, legislators should bear in mind the following general obligations under the Convention that are particularly relevant to the establishment of criminal offences:

- (a) Non-inclusion of transnationality in domestic offences. Transnationality must not be made an element of the domestic offence (article 34(2)).<sup>36</sup>
  - (b) Criminalization must be through legislative and other measures. The criminal offences must be established by criminal law and not simply by other measures, which would be additional to proscribing legislation;<sup>37</sup>
  - (c) The offences must be committed intentionally. The mental element required for each offence is that it be committed intentionally (article 5(1)).
  - (d) The offence should involve penalties that take into account the grave nature of the offence. Penalties should be sufficiently severe given the seriousness of the conduct required to be criminalized (article 11(1)).
  - (e) The description of the offence is reserved to the domestic law of a State party. The domestic offence established by a State to implement the criminalization requirements of the Convention need not be described in exactly the same manner as in the Convention, as long as the required conduct is criminalized (article 11(6)).
  - (f) Liability of legal persons. With respect to legal persons, the offences and liability can be criminal, civil, or administrative article 10(2)).<sup>38</sup>
  - (g) Statutes of limitation. The Convention requires that legislators establish a long statute of limitation period for the offence, in particular when alleged offenders are evading justice (article 11(5)).<sup>39</sup>
  - (h) Sentence mitigation and immunity. The Convention encourages States parties to consider mitigating sentences and granting immunity and/or leniency to individuals who decide to cooperate with the authorities (article 26(2) and (3)).<sup>40</sup> This is optional and dependent on domestic legal principles and traditions. In jurisdictions where prosecution of crimes is mandatory, however, affording immunity from prosecution would require legislation.
103. States parties whose domestic law requires the involvement of organized criminal groups for the offence of agreeing to commit a serious crime (conspiracy as in article 5(1)(a) (i)), as well as those that require an act in furtherance of such an agreement, are subject to a further procedural obligation. These States are required, at the time of signature or deposit, to inform the Secretary-General of the United Nations that their domestic law covers all serious crimes involving organized criminal groups (article 5(3)). This information should also be provided to the United Nations Office on Drugs and Crime.

<sup>36</sup> See also section II.C, above.

<sup>37</sup> *Travaux Préparatoires*, p. 45.

<sup>38</sup> See section IV.B, below.

<sup>39</sup> See section IV.C, below.

<sup>40</sup> See section IV.E, below.

#### 4. Optional measures, including optional issues

104. Aside from the optional elements of requiring an act in furtherance of the agreement or the involvement of an organized criminal group under paragraph 1 (a) (i), article 5 contains no optional provisions.
105. The Convention requires that States establish either or both of the offences under article 5(1)(a), as criminal offences in their domestic laws. The scope and application of the two offences in article 5(1)(a), are not completely identical. It is for this reason that the Convention does not set them out as mutually exclusive alternatives. Instead, States parties may wish to consider the possibility of introducing both offences to cover different types of conduct.
106. Since the Organized Crime Convention was conceived, the traditional division between common law and civil law approaches to criminalizing participation in an organized criminal group has started to fade, and the laws of individual States parties have evolved and diversified. For example, many common law jurisdictions have introduced offences criminalizing the participation in an organized criminal group in addition to existing conspiracy offences. Similarly, several civil law jurisdictions have supplemented existing criminal association offences with more specific and aggravated offences that criminalize particular types of organized criminal groups and/or particular types of involvement in or offences committed by such groups.

#### Additional references and resources

##### Organized Crime Convention

Article 2 (Use of terms)  
 Article 10 (Liability of legal persons)  
 Article 11 (Prosecution, adjudication and sanctions)  
 Article 15 (Jurisdiction)  
 Article 26 (Measures to enhance cooperation with law enforcement authorities)  
 Article 31 (Prevention)  
 Article 34 (Implementation of the Convention)

##### *Model Legislative Provisions against Organized Crime*

Article 7 (option 1) (Conspiracy)  
 Article 7 (option 2) (Criminal association)  
 Article 8 (Aiding, abetting, organizing or directing a serious crime)  
 Article 9 (Proof of intention through circumstantial evidence)

### Additional United Nations resources

Background paper by the Secretariat on criminalization of participation in an organized criminal group (article 5 of the United Nations Convention against Transnational Organized Crime) (CTOC/COP/WG.2/2014/2)

### Examples of national legislation

#### *Agreement-type offence (article 5(1)(a)(i))*

Bangladesh, Penal Code, chap. VA, sect. 120A - 120B  
 Cambodia, Criminal Code of Cambodia, Book 4 - Title 1, art. 453  
 Ethiopia, Criminal Code of Ethiopia 2004, part II - Book IV, art. 478  
 Ghana, Criminal Offences Act, Part I, sect. 23-34  
 Malaysia, Penal Code, chap. VA, sect. 120A-120B  
 Nigeria, Criminal Code Act, Part 8, arts. 516 et seq.

#### *Criminal association offences (article 5(1)(a)(ii))*

Austria, Penal Code, Special Part, arts. 278-278a  
 Brazil, Law 12.850/2013, art. 2  
 China, Criminal Law of the People's Republic of China, Part two – chap. VI, art. 294  
 Indonesia, Penal Code, Second Book, art. 169  
 Italy, Criminal Code, arts. 416 and 416 *bis*  
 Kenya, Prevention of Organised Crimes Act, Part II, arts. 3-7  
 Mexico, Federal Law against Organized Crime, art. 2  
 Mongolia, Criminal Code of Mongolia, Title Eight, art.182  
 Nicaragua, Penal Code, Title XVI, art. 393  
 Peru, Penal Code, Second Book, Title XIV, art. 317  
 Poland, Criminal Code, art. 258

#### *Jurisdictions use both types of offences*

Australia, Criminal Code (Cth), sect. 11.5 and sects. 390.3 et seq.  
 Canada, Criminal Code, sect. 465 and sects. 467.11 et seq.  
 Cyprus, chap. 154 of the Criminal Code and sect. 4 of the Law ratifying the United Nations Convention against Transnational Organized Crime and the Protocols thereto (ratification Law 11(III)/2003)  
 Ireland, conspiracy as a common law offence and Criminal Justice Act 2006, sects. 71 and 72  
 Malta, Criminal Code, arts. 48A and 83A  
 New Zealand, Crimes Act 1961, sects. 310 and 98A  
 Russian Federation, Criminal Code, arts. 35 and 210  
 South Africa, Riotous Assemblies Act 17 of 1956, sect. 18 (2), Prevention of Organised Crime Act 121 of 1998

United Kingdom, Criminal Law Act 1977, Part I – Conspiracy, sect. 1 – 3; Serious Crime Act 2015, sect. 45

United States of America, U.S.C. 18 § 371 and U.S.C. § 1961.

## **C. Criminalization of the laundering of proceeds of crime**

### **Article 6 of the Organized Crime Convention – Criminalization of the laundering of proceeds of crime**

1. Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally.

(a)(i) The conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action;

(ii) The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime;

(b) Subject to the basic concepts of its legal system:

(i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime;

(ii) Participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting facilitating and counselling the commission of any of the offences established in accordance with this article.

2. For purposes of implementing or applying paragraph 1 of this article:

(a) Each State Party shall seek to apply paragraph 1 of this article to the widest range of predicate offences;

(b) Each State Party shall include as predicate offences all serious crime as defined in article 2 of this Convention and the offences established in accordance with articles 5, 8 and 23 of this Convention. In the case of States Parties whose legislation sets out a list of specific predicate offences, they shall, at a minimum, include in such list a comprehensive range of offences associated with organized criminal groups;

(c) For the purposes of subparagraph (b), predicate offences shall include offences committed both within and outside the jurisdiction of the State Party in question. However, offences committed outside the jurisdiction of a State Party shall constitute predicate offences only when the relevant conduct is a criminal offence under the domestic law of the State where it is committed and would be a criminal offence under the domestic law of the State Party implementing or applying this article had it been committed there;

(d) Each State Party shall furnish copies of its laws that give effect to this article and of any subsequent changes to such laws or a description thereof to the Secretary-General of the United Nations;

(e) If required by fundamental principles of the domestic law of a State Party, it may be provided that the offences set forth in paragraph 1 of this article do not apply to the persons who committed the predicate offence;

(f) Knowledge, intent or purpose required as an element of an offence set forth in paragraph 1 of this article may be inferred from objective factual circumstances.

**Article 7 of the Organized Crime Convention  
– Measures to combat money-laundering**

1. Each State Party:

(a) Shall institute a comprehensive domestic regulatory and supervisory regime for banks and non-bank financial institutions and, where appropriate, other bodies particularly susceptible to money-laundering, within its competence, in order to deter and detect all forms of money-laundering, which regime shall emphasize requirements for customer identification, record-keeping and the reporting of suspicious transactions;

(b) Shall, without prejudice to articles 18 and 27 of this Convention, ensure that administrative, regulatory, law enforcement and other authorities dedicated to combating money-laundering (including, where appropriate under domestic law, judicial authorities) have the ability to cooperate and exchange information at the national and international levels within the conditions prescribed by its domestic law and, to that end, shall consider the establishment of a financial intelligence unit to serve as a national centre for the collection, analysis and dissemination of information regarding potential money-laundering.

2. States Parties shall consider implementing feasible measures to detect and monitor the movement of cash and appropriate negotiable instruments across their borders, subject to safeguards to ensure proper use of information and without impeding in any way the movement of legitimate capital. Such measures may include a requirement that individuals and businesses report the cross-border transfer of substantial quantities of cash and appropriate negotiable instruments.

3. In establishing a domestic regulatory and supervisory regime under the terms of this article, and without prejudice to any other article of this Convention, States Parties are called upon to use as a guideline the relevant initiatives of regional, interregional and multilateral organizations against money-laundering.

4. States Parties shall endeavour to develop and promote global, regional, subregional and bilateral cooperation among judicial, law enforcement and financial regulatory authorities in order to combat money-laundering.

## 1. Introduction

### *(a) The problem of money-laundering*

107. Many activities of international organized criminal groups are directed at the accumulation of wealth through illegal means, such as trafficking in drugs, smuggling and fraud. In order to enjoy the financial or other material benefits of such activities, these groups must hide the illicit origin of their funds. Money-laundering involves the concealment or disguise of the illegal origin of the proceeds of crime. As national and international efforts to deprive criminals of their illicit gains have intensified, organized criminal groups have increasingly sought to convert such gains into apparently legitimate assets. This is done by placing the proceeds in the financial system and engaging in various transactions intended to obfuscate the origin of and path taken by the money (known as “layering”), and then integrating the money into the legitimate economy through apparently legitimate transactions.

108. Through money-laundering, the influence and power of organized criminal groups increases, while the control and integrity of governments and major public institutions is compromised. If left to proliferate unchecked, money-laundering can undermine the integrity of political and judicial systems and the stability of national or international financial sectors. The operations of legitimate companies and markets can be corrupted by money-laundering, which in turn interferes with economic and other policies, distorts market conditions and ultimately produces severe systemic risks.
109. Criminal elements take advantage of the ease of capital movement, advances in technology and increases in the mobility of people and commodities, as well as the significant inconsistencies between legal provisions in various jurisdictions. As a result, assets can be transferred very quickly from place to place and, through exploitation of the existing legal asymmetries, appear finally as legitimate assets that are then available to criminal elements in any part of the world. These assets can be used to finance criminal operations, to reward past crimes and to constitute an incentive for future crimes.

*(b) The rationale for articles 6 and 7*

110. The main motive of organized criminal groups is financial or other material benefit. Taking that gain away is crucial. Combating money-laundering is thus an important part of the fight against transnational organized crime. Targeting the profits and finances of criminal groups reduces their incentive to participate in such activities and undermines the profitability of their criminal operations, inhibiting further growth and expansion of organized criminal groups. Pursuing criminal investigations of money-laundering activities also entails the investigation of financial affairs related to criminal conduct so as to establish the links between the origins of criminal proceeds and the beneficiaries thereof, as well as the intermediaries involved in the laundering process. Thus, the techniques of financial investigation provide additional tools to identify criminal networks and the scale of their criminal activities. This makes the pursuit of money-laundering investigations and prosecutions (including associated confiscation of illegal proceeds) an important means to identify and dismantle organized criminal groups. Beyond this, combating money-laundering also helps to preserve the integrity of financial institutions, both formal and informal, and to protect the smooth operation of the international financial system as a whole.
111. To prevent and combat money-laundering, it is essential that jurisdictions worldwide try to harmonize their approach, standards, and legal systems so as to enable cooperation with one another. Jurisdictions with weak or no control mechanisms render the work of money-launderers easier. Thus, the Convention seeks to provide a minimum standard for all countries to adhere to as part of their efforts to control criminal proceeds. The provisions of the Convention addressing the seizure, freezing and confiscation of proceeds are an important related measure (see articles 12-14).<sup>41</sup>

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<sup>41</sup> See section IV.D, below.

*Article 6: Criminalization of the laundering of the proceeds of crime*

112. The Convention recognizes the close link between organized criminal activities and money-laundering and builds on earlier international initiatives in that regard. Those initiatives addressed the issue through a combination of repressive and preventive measures and the Convention follows the same pattern. Article 6 of the Convention adopts the offences set out in article 3(1)(b) and (c)(i) and (ii) of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988,<sup>42</sup> which requires the criminalization of money-laundering in the context of trafficking in drugs.
113. Criminalization not only allows national authorities to organize the detection, prosecution and repression of the offence, but also provides the legal basis for international cooperation among police, judicial and administrative authorities, including mutual legal assistance and extradition. As a consequence of domestic or international initiatives, many countries already have laws on money-laundering.

*Article 7: Measures to combat money-laundering*

114. A critical part of money-laundering is placing illicit funds into the financial system. Stopping organized criminal groups from making that first step, and developing the capacity to track the movement of assets is therefore crucial. In this regard, international cooperation is again indispensable.
115. For these reasons, article 7 of the Convention introduces additional measures aimed at preventing such activities and at enlisting the assistance of financial institutions and others in preventing the introduction of criminal funds into the financial system, in detecting transactions in the system that may be of criminal origin and in facilitating the tracing of the funds involved in such transactions. Such measures have been recommended by the Financial Action Task Force (FATF) and other regional bodies and industry associations. FATF is the main intergovernmental organization to develop policies and set standards and promote effective implementation of legal, regulatory and operational measures for combating money-laundering, terrorist financing and other related threats to the integrity of the international financial system.
116. States must adopt and integrate into their financial infrastructure specific measures such as procedures for financial institutions to know their customers, keep effective records and report suspicious transactions to national authorities. These procedures need to be part of a comprehensive regulatory regime that facilitates the required domestic and international cooperative relationships. Many countries have established financial intelligence units to collect, analyse, disseminate and exchange relevant information efficiently, as needed and in accordance with their laws. States parties are asked to consider the establishment of such units, which entails a more substantial commitment of resources. More detailed information on the composition and purpose of these financial intelligence units can be found further below.

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<sup>42</sup> United Nations, *Treaty Series*, vol. 1582, No. 27627.

117. The Convention calls upon States parties to use as a guideline the relevant initiatives of regional, interregional and multilateral organizations against money-laundering. States should review the provisions they already have in place to counter money-laundering in order to ensure compliance with these initiatives. States undertaking such a review may wish to use this opportunity to implement the obligations they assume under other regional or international instruments and initiatives currently in place.
118. Another important tool to keep offenders from profiting from their crimes is a strong confiscation regime that provides for the identification, freezing, seizure and confiscation of illicitly acquired funds and property. Effective and efficient measures targeting the proceeds of crime can serve as a powerful deterrent and contribute significantly to the restoration of justice by removing the incentives for offenders to engage in illegal activities in the first place. Specific international cooperation mechanisms are also necessary to enable countries to give effect to foreign freezing and confiscation orders and to provide for the most appropriate use of confiscated proceeds and property. The provisions dealing with the identification, freezing and confiscation of crime proceeds (articles 12-14)<sup>43</sup> and international cooperation (articles 16-19, 26 and 27) thus also need to be considered in this context.<sup>44</sup>

## **2. Summary of the main requirements**

### *(a) Criminalization (article 6)*

119. Article 6 requires States parties to establish the following offences as crimes:
- (a) Conversion or transfer of proceeds of crime (article 6(1)(a)(i));
  - (b) Concealment or disguise of the nature, source, location, disposition, movement or ownership of proceeds of crime (article 6(1)(a)(ii)).
120. Subject to the basic concepts of their domestic systems, States must also criminalize:
- (a) Acquisition, possession or use of proceeds of crime (article 6(1)(b)(i));
  - (b) Participation in, association with or conspiracy to commit, attempts to commit, and aiding, abetting, facilitating and counselling the commission of any of the foregoing (article 6(1)(b)(ii)).
121. Under article 6, States parties must also:
- (a) Apply these offences to proceeds generated by a wide range of criminal conduct (article 6(2)(a)-(c));
  - (b) Provide a copy of its laws giving effect to this article (and subsequent changes to such laws) to the United Nations (article 6(2)(d));

<sup>43</sup> See also section IV.D, below,

<sup>44</sup> See also chap. V, below.

- (c) Ensure that knowledge, intent and purpose can be established through inference from objective factual circumstances article 6(2)(f).

*(b) Measures to combat money-laundering (article 7)*

122. Article 7 requires States parties to take additional measures, including:
- (a) Establish a regulatory and supervisory regime for banks and non-bank financial institutions, emphasizing requirements of customer identification, record-keeping and the reporting of suspicious transactions (article 7(1)(a));
  - (b) Ensure that administrative, regulatory, law enforcement and other authorities have the capacity to cooperate and exchange information at both national and international levels (article 7(1)(b));
  - (c) Use as a guideline the relevant initiatives of regional, interregional and multilateral organizations against money-laundering (article 7(3)).
123. States parties are also required under article 7 to:
- (a) Consider implementing feasible measures to detect and monitor the movements of cash and negotiable instruments across their borders, such as reporting requirements for substantial cross-border transfers (article 7(2));
  - (b) Endeavour to develop and promote global, regional, subregional and bilateral cooperation among authorities to combat money-laundering (article 7(4)).

### **3. Mandatory requirements**

*(a) Definitions and terminology*

124. Article 2 (e) of the Convention defines “proceeds of crime” as “any property derived from or obtained, directly or indirectly, through the commission of an offence”.
125. “Property” is defined as “assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to, or interest in, such assets” (article 2(d)).
126. The terms “laundering of proceeds of crime” and “money-laundering” should be treated as synonymous.<sup>45</sup>

*(b) Criminalization (article 6)*

*(i) Offences under article 6(1)*

127. Article 6 of the Convention requires that each State establish the four offences described below relating to money-laundering, in accordance with fundamental principles of its domestic law, when they are committed intentionally.

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<sup>45</sup> *Travaux Préparatoires*, p. 62.

- a. Conversion or transfer of proceeds of crime (article 6(1)(a)(i))
128. Article 6(1)(a)(i) makes it an offence to convert or transfer property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action. States parties must take legislative and other measures to establish this offence as a criminal offence.
129. The term “conversion or transfer” includes instances in which financial assets are converted from one form or type to another, for example, by using illicitly generated cash to purchase real estate or the sale of illicitly acquired real estate, as well as instances in which the same assets are moved from one place or jurisdiction to another or from one bank account to another.
130. With respect to the mental elements required, the conversion or transfer must be intentional, the accused must have knowledge at the time of conversion or transfer that the assets are criminal proceeds and the act or acts must be done for the purpose of either concealing or disguising their criminal origin, for example by helping to prevent their discovery, or helping a person evade criminal liability for the crime that generated the proceeds.
131. As with all measures called for by the Convention, these are the minimum requirements, but States are free to adopt more strict or severe measures (article 34(3)).
132. The *Travaux Préparatoires* indicates that the terms “concealing or disguising” and “concealment or disguise” used in article 6(1)(a)(ii), should be understood to include preventing the discovery of the illicit origin of property.<sup>46</sup> This applies to the four acts to be criminalized under article 6(1)(a) and (b).
- b. Concealment or disguise of proceeds of crime (article 6(1)(a)(ii))
133. Article 6(1)(a)(ii) criminalizes the concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime.
134. The elements of this offence are quite broad, including the concealment or disguise of almost any aspect of or information about property.
135. With respect to the mental elements required, the concealment or disguise must be intentional and the accused must have knowledge that the property constitutes the proceeds of crime at the time of the act. This mental state is less stringent than for the offence set forth in article 6(1)(a)(i). Accordingly, drafters should not require proof that the purpose of the concealment or disguise is to frustrate the tracing of the asset or to conceal its true origin. The *Travaux Préparatoires* specify that concealment of illicit

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<sup>46</sup> Ibid.

origin should be understood to be covered by article 6(1)(a) and (b). However, drafters should also consider concealment for other purposes, or in cases where no purpose has been established, to be included.<sup>47</sup>

- c. Acquisition, possession or use of proceeds of crime (Article 6(1)(b)(i))
  - 136. Article 6(1)(b)(i) criminalizes the “acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime”. This is the mirror image of the offences under article 6(1)(a)(i) and (ii), in that while those provisions impose liability on the providers of illicit proceeds, this paragraph imposes liability on recipients who acquire, possess or use property.
  - 137. The mental elements are the same as for the offence under article 6(1)(a)(ii): there must be an intent to acquire, possess or use, and the accused must have knowledge, at the time this occurred, that the property was the proceeds of crime. No particular purpose for the acts is required.
  - 138. The offence set forth under article 6(1)(b)(i) is to be established subject to the basic concepts of the legal system of the State. This safeguard clause recognizes that States parties may use different systems of classifying the various forms of involvement and set different boundaries for criminal liability, especially in relation to attempt and preparation.
- d. Participation in, association with or conspiracy to commit, attempt to commit, aiding, abetting, facilitating and counselling the commission of any of the foregoing (article 6(1)(b)(ii))
  - 139. The offence in article 6(1)(b)(ii) involves the “participation in, association with or conspiracy to commit, attempts to commit, and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article”.
  - 140. These terms are not defined in the Convention, allowing for certain flexibility in domestic legislation. States parties should refer to the way these additional forms of criminal liability are established in their domestic systems and ensure that they apply to the other offences established pursuant to this article.
  - 141. The knowledge, intent or purpose, as required for these offences, may be inferred from objective factual circumstances (article 6(2)(f)). Drafters could see that their evidentiary provisions enable such inference with respect to the mental state, rather than requiring direct evidence, such as a confession, before the mental state is deemed proven.
- e. Other general requirements

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<sup>47</sup> Ibid.

142. States parties must furnish copies of their laws giving effect to article 6 and of any subsequent changes to such laws, or a description thereof, to the Secretary-General of the United Nations (article 6(2)(d)). Such materials should be provided to the United Nations Office on Drugs and Crime.
143. In drafting legislation to implement these criminalization obligations, legislators should also bear in mind the following general obligations under the Convention that are particularly relevant to the establishment of criminal offences:
- (a) Non-inclusion of transnationality in domestic offences. Transnationality must not be made an element of the domestic offence (article 34(2));
  - (b) Non-inclusion of “organized criminal group” in domestic offences. As with transnationality above, the involvement of an organized criminal group must not be made an element of the domestic offence (article 34(2));
  - (c) Criminalization must be through legislative and other measures. The criminal offences must be established by criminal law and not simply by other measures, which would be additional to the proscribing legislation;<sup>48</sup>
  - (d) The offences must be committed intentionally. The mental element required for each offence is that it be committed intentionally;
  - (e) The offence should be liable to penalties that take into account the grave nature of the offence. Penalties should be sufficiently severe, given the seriousness of the conduct required to be criminalized (article 11(1));
  - (f) The description of the offence is reserved to the domestic law of a State party. The domestic offence established by a State to implement the criminalization requirements of the Convention need not be described in exactly the same manner as in the Convention, as long as the required conduct is criminalized (article 11(6));
  - (g) Liability of legal persons. With respect to legal persons, the offences and liability can be criminal, civil or administrative (article 10(2));
  - (h) Statutes of limitation. The Convention requires that legislators establish a long statute of limitation period for the offence, in particular when alleged offenders are evading justice (article 11(5));
  - (i) Sentence mitigation and immunity. The Convention encourages States parties to consider mitigating sentences and granting immunity and/ or leniency to individuals who decide to cooperate with the authorities (article 26(2) and (3)). This is optional and dependent on domestic legal principles and traditions. In jurisdictions where prosecution of crimes is mandatory, however, affording immunity from prosecution would require legislation.

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<sup>48</sup> Ibid., p. 45.

(ii) *Predicate offences, article 6(2)(a)–(c)*

144. Article 2 (h) of the Convention defines a “predicate offence” as “any offence as a result of which proceeds have been generated that may become the subject of” any of the money-laundering offences established under article 6.<sup>49</sup>
145. Many countries already have laws on money-laundering, but there are many variations in the definition of predicate offences. Other States have an exhaustive list of predicate offences set forth in their legislation. Still other States define predicate offences generically as including all crimes, or all serious crimes, or all crimes subject to a defined penalty threshold.
146. Article 6(2)(a), requires that the money-laundering offences be applicable to the “widest range of predicate offences”. Paragraph 2 (b) requires that the predicate offences include the offences established in accordance with articles 5, 8 and 23 of the Convention, and with article 1(3) of each of the Protocols to which States are or are considering becoming parties, as well as all “serious crimes” (article 6(2)(b); see also article 2 (b), for the definition of “serious crimes”).<sup>50</sup>
147. States that limit the application of money-laundering measures to an exhaustive list of predicate offences must amend that list accordingly and, “at a minimum”, include a “comprehensive range of offences associated with organized criminal groups” (article 6(2)(b)). The *Travaux Préparatoires* add that the words “associated with organized criminal groups” are intended to indicate “criminal activity of the type in which organized criminal groups engage”.<sup>51</sup>
148. Regardless of the manner in which States parties choose to identify predicate offences, it is important to bear in mind that it should not be necessary that a person be convicted of a predicate offence when proving that property is the proceeds of crime.
149. Predicate offences may not be exclusively offences committed in the territory of the State applying the Convention. States must provide for offences committed in other jurisdictions to be included, provided that the conduct is a crime where it was committed as well as in the State applying the Convention (article 6(2)(c)). In other words, this requires dual criminality.

(iii) *Cases where predicate and money-laundering offences cannot apply to the same offender, article 6(2)(e)*

150. The constitutions or fundamental legal principles of some States do not permit the prosecution and punishment of an offender for both the predicate offence and the laundering of proceeds from that offence. This reflects a particular understanding of

<sup>49</sup> For purposes of defining money-laundering offences, the assets involved are the “proceeds of crime”. By contrast, the seizure and confiscation provisions apply to “instrumentalities” as well as to proceeds of crime, that is, property used in or destined for use in crime (article 12(1)(b)).

<sup>50</sup> See also Financial Action Task Force, *International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation: The FATF Recommendations* (Paris, February 2012).

<sup>51</sup> *Travaux Préparatoires*, p. 62; see also *International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation*.

the principle of double jeopardy, which forbids the same act being the subject of two different offences. Thus, in such a State party, for example, a public official, who has accepted a bribe and then intentionally conceals the proceeds of this offence, might be found guilty of passive bribery, but would not be found guilty of the separate offence of laundering the proceeds of crime, (so-called “self-laundering”). The Convention acknowledges this issue and allows for the non-application of the money-laundering offences to those who committed the predicate offence, but only by countries whose fundamental principles so provide (article 6(2)(e)).

151. In some States, on the other hand, money-laundering is set out as an independent offence, such that a person who commits the predicate offence and the offence of money-laundering may be convicted for both offences. Thus, in such a State party, a public official who has accepted a bribe and then intentionally conceals the proceeds of this offence can be found guilty of passive bribery and of money-laundering.
152. The *Travaux Préparatoires* indicate that article 6(2)(e) takes into account legal principles of several States where prosecution or punishment of the same person for both the predicate offence and the money-laundering offence is not permitted. Those States confirmed that they did not refuse extradition, mutual legal assistance or cooperation for purposes of confiscation solely because the request was based on a money-laundering offence the predicate offence of which was committed by the same person.<sup>52</sup>

(c) *Measures to combat money-laundering (article 7)*

153. Article 7 sets out a number of measures — some mandatory, some based on best efforts, and some optional — that are intended to ensure that States parties have in place a comprehensive legal and administrative regime to deter and detect money-laundering. The overall objective is to provide a comprehensive regime that facilitates the identification of money-laundering and promotes information exchange between a range of authorities dedicated to combating money-laundering. Financial institutions and other designated entities<sup>53</sup> are required to take measures to prevent the introduction of criminal funds into the financial system and, when such funds are already in the financial system, to provide the means to identify and trace them, as well as facilitating apprehension by linking such funds to their owners and beneficial owners.<sup>54</sup> The requirements under articles 12–14 of the Convention concerning the identification, tracing and confiscation of crime and other crime-related property are also a relevant part of the overall preventative regime required to combat money-laundering effectively.

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<sup>52</sup> *Travaux Préparatoires*, p. 62.

<sup>53</sup> For a definition of “designated person or entity”, see *International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation*, pp. 114 and 115.

<sup>54</sup> A “‘beneficial owner’ refers to the natural person(s) who ultimately owns or controls a customer and/or the natural person on whose behalf a transaction is being conducted. It also includes those persons who exercise ultimate effective control over a legal person or arrangement” (*International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation*, p. 113).

154. The measures required by article 7 need to be integrated into the general financial infrastructure of each jurisdiction. Therefore, the time required for implementation of these measures will largely depend on the nature and complexity of local financial institutions, as well as the degree to which they are involved in cross-border transactions. In this process, attention should be focused on the specific context and vulnerabilities of each jurisdiction. In States that do not currently have such measures in place, the process of implementation can proceed contemporaneously with ratification, as long as the measures provided for in article 7 are in place when the Convention enters into force for the State party concerned.
155. Article 7 contains two major mandatory requirements:
- (a) To establish a comprehensive domestic regulatory and supervisory regime to deter money-laundering (article 7(1)(a));
  - (b) To ensure that agencies involved in combating money-laundering have the ability to cooperate and exchange information at the national and international levels (article 7(1)(b)).
156. In addition, States are to consider implementing measures to monitor cash movements across their borders (article 7(2)) and to endeavour to develop and promote global, regional and bilateral cooperation among relevant agencies to combat money-laundering (article 7(4)).
157. As stated earlier, the Convention builds on ongoing international initiatives to combat money-laundering. In establishing a domestic regulatory and supervisory regime, States parties are called upon to use as a guideline the relevant initiatives of regional, interregional and multilateral organizations against money-laundering (article 7(3)). The *Travaux Préparatoires* state that during the negotiations, the words “relevant initiatives of regional, interregional and multilateral organizations” were understood to refer in particular to the recommendations of the Financial Action Task Force, and, in addition, to other existing initiatives or regional, interregional and multilateral organizations against money-laundering. The *International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation: The FATF Recommendations* (last revised in February 2012) have since been adopted by the seven FATF-style regional bodies — the Asia/Pacific Group on Money Laundering, the Caribbean Financial Action Task Force, the Council of Europe Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL), the Eastern and Southern Africa Anti-Money Laundering Group, the Eurasian Group on Combating Money-Laundering and the Financing of Terrorism, the Financial Action Task Force of Latin America against Money-Laundering (GAFILAT) and the Inter-governmental Action Group against Money-Laundering in West Africa — and are also recognized by other organizations such as the Commonwealth Secretariat and the Organization of American States (OAS).<sup>55</sup> Ultimately, States parties are free to determine the best way to implement article 7.

<sup>55</sup> *Travaux Préparatoires*, p. 74.

However, it would be helpful for States parties to refer to the Financial Action Task Force *International Standards* when giving effect to articles 6 and 7. This will be further assisted by the development of a relationship with one of the organizations working to combat money-laundering.

158. The mandatory measures envisaged by article 7 are outlined in the following sections under two headings: (a) the establishment of a regulatory regime and (b) the enhancement of internal and international cooperation. The requirement under article 7 to consider other measures, such as the creation of a financial intelligence unit, is examined in section III.C.4, below.

*(i) Establishment of a regulatory regime*

159. States parties are required to establish a domestic regulatory and supervisory regime within their competence in order to deter and detect money-laundering activities (article 7(1)(a)). This regime must be comprehensive, but the precise nature and particular elements of the regime are left to States parties, provided that they require, at a minimum, banks and non-bank financial institutions to ensure:

- (a) Effective customer identification;
- (b) Accurate record-keeping;
- (c) A mechanism for the reporting of suspicious transactions.

a. Institutions subject to the requirements

160. The requirements under article 7(1)(a) extend to banks, non-bank financial institutions (including insurance companies and securities firms) and, where appropriate, other bodies particularly susceptible to money-laundering. The *Travaux Préparatoires* add that other bodies may be understood to include intermediaries, which in some jurisdictions may include stockbroking firms, other securities dealers, currency exchange bureaux or currency brokers.<sup>56</sup> Thus, this regime should apply not only to banking institutions, but also to areas of commerce where high turnover and large volumes make money-laundering likely.<sup>57</sup>

161. In many forums, the list of institutions is being expanded beyond financial institutions to include these seemingly innocuous businesses and professions. For example, recommendation 22 of the Financial Action Task Force extends, when certain conditions are met, the requirements of customer due diligence and record-keeping to casinos, real estate agents, dealers in precious metals and stones, lawyers, notaries other independent legal professionals and accountants, and trust and company service providers.

162. In recent years, increased attention has been focused on money service businesses and

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<sup>56</sup> *Ibid.*, 73.

<sup>57</sup> For a definition of “financial institutions” and the examples of financial services these institutions may provide, see also *International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation*, p. 119.

informal money or value transfer systems, such as hawala, *hundi*, *fei-ch'ien* and Internet currencies. In a growing number of jurisdictions, these are also subject to a regulatory regime for the purposes of detecting money-laundering, financing of terrorism, or other offences. The FATF also recommends extending regulation, licensing and compliance requirements to such systems and new technologies.<sup>58</sup>

b. Reporting of suspicious transactions

163. According to the *Travaux Préparatoires*, suspicious transactions may include unusual transactions that, by reason of their amount, characteristics and frequency, are inconsistent with the customer's business activity, exceed the normally accepted parameters of the market or have no clear legal basis and could constitute or be connected with unlawful activities in general.<sup>59</sup> Article 18(1)(b)(iii) of the International Convention for the Suppression of the Financing of Terrorism<sup>60</sup> defines suspicious transactions, based on the FATF definition, as all complex, unusually large transactions and unusual patterns of transactions, which have no apparent economic or obviously lawful purpose.
164. A method must be established for defining which transactions are suspicious and are thus to be reported to the relevant financial intelligence unit or other designated agency.<sup>61</sup> Some suggested indicators of suspicious transactions are set out in the *Travaux Préparatoires*.<sup>62</sup> Criteria for identifying suspicious transactions should be developed and periodically reviewed in consultation with experts knowledgeable about new methods or networks used by money-launderers.
165. The powers to be granted to regulators and staff of the financial intelligence unit to inspect records and to compel the assistance of record keepers in locating these records must also be defined. Some of these records may be covered by confidentiality requirements and banking secrecy laws that prohibit their disclosure. Therefore, States may consider implementing laws which free financial institutions from complying with such requirements.<sup>63</sup> Drafters should also ensure that the inspection and disclosure requirements are written in such a way as to protect financial institutions against civil and other claims for disclosing client records to regulators and financial intelligence units.

c. Customer identification

<sup>58</sup> See also *International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation*, recommendations 14 and 15.

<sup>59</sup> *Travaux Préparatoires*, p. 74.

<sup>60</sup> United Nations, *Treaty Series*, vol. 2178, No. 38349.

<sup>61</sup> See also *International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation*, recommendations 20 and 23.

<sup>62</sup> *Travaux Préparatoires*, p. 74.

<sup>63</sup> See also *International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation*, recommendations 21 and 23.

166. The customer identification obligation requires that holders of accounts in financial institutions and all parties to financial transactions be identified, verified and documented.<sup>64</sup> In today's understanding of customer identification, this also includes the identification of beneficial owners and customer due diligence. Records should contain sufficient information to identify all parties and the nature of the transaction, identify specific assets and the amounts or values involved, and permit the tracing of the source and destination of all funds or other assets.

d. Record-keeping

167. The requirement for record-keeping means that client and transaction records should be kept for a specified minimum period of time. Under the Financial Action Task Force recommendations, it is suggested to keep all records obtained through customer due diligence measures, account files and business correspondence, including the results of any analysis undertaken, for at least five years after the business relationship is ended, or after the date of the occasional transaction.<sup>65</sup> For States parties to the International Convention for the Suppression of the Financing of Terrorism, retention of records for five years is mandatory as stated in article 18(1)(b)(iv) of the Convention.

e. General

168. The failure of institutions to comply with requirements in respect of money-laundering should be subject to criminal, civil or administrative penalties, in accordance with domestic fundamental principles and laws.<sup>66</sup>

169. The implementation of such measures is likely to require legislation. In particular, the requirement that financial institutions must disclose suspicious transactions and the protection of those who make disclosures in good faith will require legislation to override banking secrecy laws.

(ii) *Domestic and international cooperation*

170. The United Nations Convention against Transnational Organized Crime requires that administrative, regulatory, law enforcement and other domestic authorities in charge of the efforts against money-laundering are able to cooperate at both the national and international level. This cooperation includes the exchange of information within the conditions prescribed by their domestic law (article 7(1)(b)). This must be done without limiting or detracting from, or in the words of the Convention, "without prejudice to", the requirements generated by article 18 on mutual legal assistance and article 27 on law enforcement cooperation.

<sup>64</sup> Ibid., recommendation 10.

<sup>65</sup> Ibid., recommendation 11.

<sup>66</sup> See also *International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation*, recommendation 35.

171. Furthermore, States are required to endeavour to develop and promote global, regional, subregional and bilateral cooperation among judicial, law enforcement and financial regulatory authorities in order to combat money-laundering (article 7(4)).
172. Towards this objective, the Convention requires States to consider, but does not mandate, the establishment of a financial intelligence unit, which would collect, analyse and disseminate, as appropriate, information related to money-laundering activities (article 7(1)(b)).
173. In addition, as part of the effort to develop the capacity to provide effective international cooperation, States are required to consider the implementation of measures aimed at monitoring the cross-border movement of cash and other monetary instruments (see article 7(2)).
174. In order for cooperation to be possible, domestic capabilities must be developed for the identification, collection and interpretation of all relevant information. Essentially, the Convention proposes roles for three types of entity that States could consider including as part of their strategy to combat money-laundering:
- (a) Regulatory agencies responsible for the oversight of financial institutions, such as banks or insurance entities. Such agencies would require powers to inspect financial institutions and enforce regulatory requirements through the imposition of regulatory or administrative remedies or sanctions;
  - (b) Law enforcement agencies responsible for conducting criminal investigations, with powers to investigate, arrest and detain suspected offenders while remaining subject to judicial or other safeguards;
  - (c) Financial intelligence units, whose powers are usually limited to receiving reports of suspicious transactions and activities, analysing them and disseminating information to prosecution agencies, although some such units have wider powers.
175. Legislators may wish to specify the authority of each entity to cooperate with national bodies and with other similar agencies in other countries. Legislation may also be needed to amend existing mandates and the division of labour among these entities, particularly if such entities do not already exist.<sup>67</sup> This legislation should be created or amended in accordance with each State's constitutional or other principles and the specificities of its financial services sector.
176. Some of these measures may constitute a strong challenge for countries in which the financial sector is not heavily regulated and the necessary legislation and administrative infrastructure may have to be created. It is essential to note, however, that the relevance and utility of these arrangements are not limited to the control of money-laundering, but also apply to corruption (article 7). They also strengthen confidence in the financial infrastructure, which is instrumental to sustainable social and economic development.

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<sup>67</sup> Ibid., recommendation 2.

177. Coordination of efforts and international cooperation is as central to the problem of money-laundering as it is to the other offences covered by the Convention. Beyond the general measures and processes such as extradition, mutual legal assistance and joint investigations, the Convention seeks to strengthen such coordination and cooperation.<sup>68</sup>

#### 4. Optional measures, including optional issues

178. Two types of measures are outlined below: those designed to monitor movement of funds across borders and those concerning financial intelligence units.

##### (a) *Monitoring cross-border transactions*

179. As part of the effort to develop the capacity to provide effective international cooperation against transnational organized crime, States are required seriously to consider the introduction of measures aimed at monitoring the cross-border movement of cash and other monetary instruments. Under article 7(2), States parties shall consider the implementation of feasible measures to detect and monitor the movement of cash and appropriate negotiable instruments across their borders, subject to safeguards ensuring proper use of information and without impeding in any way the movement of legitimate capital. Such measures may include a requirement that individuals and businesses report the cross-border transfer of substantial quantities of cash and bearer negotiable instruments and that States have either a disclosure or declaration system in place for incoming and outgoing cross-border movements of cash and bearer negotiable instruments.<sup>69</sup> Generally, structures based on monitoring or surveillance will require legal powers giving inspectors or investigators access to information on cross-border transactions, in particular in cases where criminal behaviour is suspected.

##### (b) *Financial intelligence units*

180. Article 7(1)(b) requires States parties to consider the establishment of financial intelligence units to serve as a national centre for the collection, analysis and dissemination of information regarding potential money-laundering. Financial intelligence units are also crucial to enable international cooperation and information exchange. Since the 1990s, many States have established such units as part of their regulatory police or other authorities. According to the *Travaux Préparatoires*, the call in article 7(1)(b) for the establishment of a financial intelligence unit is intended for cases where such a mechanism does not yet exist.<sup>70</sup>

<sup>68</sup> Ibid., recommendation 40.

<sup>69</sup> Ibid., recommendation 32.

<sup>70</sup> *Travaux Préparatoires*, p. 74.

181. The Convention does not require that a financial intelligence unit be established by law,<sup>71</sup> but legislation may still be required to institute the obligation to report suspicious transactions to such a unit and to protect financial institutions that disclose such information in good faith. In practice, the vast majority of financial intelligence units are established by law. If it is decided to draft such legislation, States may wish to consider including the following elements:
- (a) Specification of the institutions that are subject to the obligation to report suspicious transactions and definition of the information to be reported to the unit;
  - (b) Legislation defining the powers under which the unit can compel the assistance of reporting institutions to follow up on incomplete or inadequate reports;<sup>72</sup>
  - (c) Authorization for the unit to disseminate information to law enforcement agencies when it has evidence warranting prosecution, as well as authority for the unit to communicate financial intelligence information to foreign agencies, under certain conditions;
  - (d) Protection of the confidentiality of information received by the unit, establishing limits on the uses to which it may be put and shielding the unit from further disclosure;
  - (e) Definition of the reporting arrangements for the unit and its relationship with other government agencies, including law enforcement agencies and financial regulators. This also includes measures to ensure the independence of the financial investigation unit, especially its ability to receive, request, analyse, and disseminate relevant information.<sup>73</sup>

(c) *Miscellaneous*

182. States may already have money-laundering offences and controls in place that can be expanded or modified to conform to the requirements of articles 6 and 7 relating to money-laundering and those of articles 12–14 relating to confiscation, seizure and disposal of proceeds, if necessary.
183. It is worth noting that actions taken to conform to articles 6 and 7 may also bring States into conformity with other conventions and initiatives, including the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, the International Convention for the Suppression of the Financing of Terrorism and the recommendations of the Financial Action Task Force.
184. States may also wish to consider other issues, which are entirely optional, with respect to the mental element of the money-laundering offence. The Convention requires *dolus* for the offences established under article 6, that is, that the perpetrator knew that the

<sup>71</sup> See also *International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation*, recommendation 29.

<sup>72</sup> *Ibid.*, recommendation 31.

<sup>73</sup> *Ibid.*, recommendation 29.

property concerned was the proceeds of crime. States may extend the definition of this offence to include cases where the perpetrator believed, even if wrongly, that the funds were the proceeds of crime (*dolus eventualis*). Some States have included such an extension in their law. In some jurisdictions, the required mental element is that the person knew or should have known. The concepts of intentional ignorance or wilful blindness may also be used. Therefore, in certain jurisdictions, a person may be prosecuted for money-laundering where they have deliberately avoided ascertaining the criminal source of the relevant proceeds. Although it is not a requirement, this is particularly effective in money-laundering cases, where legislatures find it possible to adopt such offences.

### Additional references and resources

#### Organized Crime Convention

Article 2 (Use of terms)  
 Article 11 (Prosecution, adjudication and sanctions)  
 Article 12 (Confiscation and seizure)  
 Article 13 (International cooperation for purposes of confiscation)  
 Article 14 (Disposal of confiscated proceeds of crime or property)  
 Article 16 (Extradition)  
 Article 18 (Mutual legal assistance)  
 Article 27 (Law enforcement cooperation)  
 Article 34(3) (Implementation of the Convention)

#### Additional United Nations resources

Note by the Secretariat on money-laundering within the scope of the United Nations Convention against Transnational Organized Crime (CTOC/COP/2008/15)  
 UNODC, Commonwealth Secretariat and International Monetary Fund, *Model Provisions on Money Laundering, Terrorist Financing, Preventive Measures and Proceeds of Crime (for Common Law Systems)* (April 2009)  
 UNODC and International Monetary Fund, *Model Legislation on Money Laundering and Financing of Terrorism* (2005)  
 Financial Action Task Force, *International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation: The FATF Recommendations* (Paris, February 2012)

**Examples of national legislation***Criminalization of money-laundering*

Canada, Criminal Code, art. 462.31

*Measures to combat money-laundering*

Brazil, Law No. 12.683/2012

China, Anti-Money Laundering Law

Canada, Criminal Code, art. 462.32

Canada, Proceeds of Crime (Money Laundering) and Terrorist Financing Act

Italy, Penal Code, arts. 648, 648 *bis* and 648 *ter*

Japan, Anti-Money Laundering Law

Latvia, Law on the Prevention of Laundering of Proceeds Derived from Criminal Activity

Poland, Anti-Money Laundering Act

## **D. Criminalization of and measures against corruption**

### **Article 8 of the Organized Crime Convention – Criminalization of corruption**

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) The promise, offering or giving to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties;

(b) The solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.

2. Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences conduct referred to in paragraph 1 of this article involving a foreign public official or international civil servant. Likewise, each State Party shall consider establishing as criminal offences other forms of corruption.

3. Each State Party shall also adopt such measures as may be necessary to establish as a criminal offence participation as an accomplice in an offence established in accordance with this article.

4. For the purposes of paragraph 1 of this article and article 9 of this Convention, 'public official' shall mean a public official or a person who provides a public service as defined in the domestic law and as applied in the criminal law of the State Party in which the person in question performs that function.

### **Article 9 of the Organized Crime Convention – Measures against corruption**

1. In addition to the measures set forth in article 8 of this Convention, each State Party shall, to the extent appropriate and consistent with its legal system, adopt legislative, administrative or other effective measures to promote integrity and to prevent, detect and punish the corruption of public officials.

2. Each State Party shall take measures to ensure effective action by its authorities in the prevention, detection and punishment of the corruption of public officials, including providing such authorities with adequate independence to deter the exertion of inappropriate influence on their actions.

### **1. Introduction**

185. Organized criminal groups frequently make use of corruption in the course of their operations. Bribery and other acts of corruption are used to create or exploit opportunities for criminal operations and to protect these operations from interference from criminal justice systems and other control structures. Corruption reduces risks, increases criminal profits and is less likely to attract the same attention and

- punishment as attempts to influence public officials through intimidation or actual violence.
186. Corruption is both a driving force and a product of organized crime. The effects of corruption extend well beyond the facilitation of serious crime. The fact that public officials become compromised and act against the public interest undermines the stability of governmental systems in general and public confidence in them. When corruption reaches high levels in the government, it affects relationships among States and undermines the quality of peoples' lives as it hampers the economic and social advancement of societies.
  187. While the political and economic consequences are legion, there are additional effects relative to the fight against serious transnational crime. On the one hand, corruption fuels the demand for illegal markets, such as trafficking in persons, smuggling of migrants and trafficking in firearms and ammunition. Moreover, corrupt officials facilitate efforts by organized criminal groups to obstruct justice, intimidate witnesses and victims and otherwise impede the international cooperative processes the Convention seeks to promote, including by possibly refusing to extradite serious transnational criminals.
  188. No country has been immune to some level of corrupt practices. The international community and the wider public in all societies have been constantly demanding greater openness and accountability from the holders of public office. Consequently, many national, regional and international initiatives have focused on various aspects of the problem of corruption. Since the Convention entered into force, many other international treaties, declarations and best practice guidelines have been developed by a great range of international organizations and non-governmental organizations worldwide.
  189. The United Nations has been prominent among international organizations dealing with measures to combat corruption. In its resolution 55/61 of 4 December 2000, the General Assembly recognized that an effective international legal instrument against corruption, independent of the Organized Crime Convention was desirable and decided to establish an ad hoc committee for the negotiation of such an instrument. The Convention approved by the Ad Hoc Committee was then adopted by the General Assembly in its resolution 58/4 of 31 October 2003.
  190. The Convention against Corruption is the only legally binding universal anti-corruption instrument. The Convention's far-reaching approach and the mandatory character of many of its provisions make it a unique tool for developing a comprehensive response to a global problem. The Convention covers five main areas: prevention, criminalization and law enforcement measures, international cooperation, asset recovery and technical assistance and information exchange. The Convention addresses many different forms of corruption, such as trading in influence, abuse of power and various acts of corruption in the private sector. A further significant development was the inclusion of a specific chapter of the Convention dealing with the

recovery of assets, a major concern for countries that pursue the assets of former leaders and other officials accused or found to have engaged in corruption. In addition, the Conference of the States Parties to the United Nations Convention against Corruption adopted its resolution 3/1, in November 2009, to establish a mechanism for the review of the implementation of the Convention.

191. It must be recognized that a significant part of the complex problem of corruption does not necessarily involve organized criminal groups. Nevertheless, the Organized Crime Convention does not leave out this vital enabler of transnational organized crime. The Convention recognizes that the fight against such serious crime cannot be effective unless all contributors to the global effort take active steps to harmonize their laws and criminalize corrupt practices.
192. Along the lines of other initiatives, the Organized Crime Convention covers three types of corruption offence in the public sector: active bribery, which is the giving of bribes; passive bribery, which is the acceptance of bribes; and participation as an accomplice to bribery. In addition to these mandatory offences, States are required to consider criminalizing other forms of corruption, including bribery of foreign officials, in respect of which drafters of national legislation may also wish to consult the Organization for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 1997. The Organized Crime Convention also requires the introduction of legislative and other measures designed to prevent, detect and punish corrupt practices and enhance accountability.

## **2. Summary of the main requirements**

### *(a) Criminalization of corruption (article 8)*

193. The mandatory offences under article 8 are:
  - (a) Active bribery, defined as the promise, offering or giving to a public official of an undue advantage, in order to act or refrain from acting in matters relevant to official duties. Legislation is required to implement this provision;
  - (b) Passive bribery, defined as the solicitation or acceptance by a public official of an undue advantage, in order to act or refrain from acting in matters relevant to official duties. Legislation is also required in this regard;
  - (c) Participation as an accomplice in either of the above offences.

### *(b) Measures against corruption (article 9)*

194. The mandatory measures under article 9 are:
  - (a) Adoption of legislative or other measures, as appropriate and consistent with the legal system of the State, in order:

- (i) To promote integrity;
  - (ii) To prevent, detect and punish corruption of public officials;
  - (iii) To ensure effective action by officials;
  - (b) Endowing anti-corruption authorities with sufficient independence to deter undue influence.
195. States parties are also required to consider establishing corruption of foreign or international public servants, and other forms of corruption, as domestic criminal offences.

### 3. Mandatory requirements

196. The offences that are mandatory under article 8(1) relate only to the promise, offering, giving, solicitation or acceptance of bribes by domestic public officials and, for some countries, persons providing a public service.

#### *(a) Definitions and terminology*

197. For the purposes of article 8(1) and article 9 (and only for those provisions), the Convention defines public official to mean a public official or a person who provides a public service as defined in the domestic law and as applied in the criminal law of the State party in which the person in question performs that function (article 8(4)). The concept of a person who provides a public service applies to specific legal systems. The reason it is explicitly mentioned in this article is that the Convention's negotiators intended to facilitate cooperation among States that have this notion in their legal systems.<sup>74</sup>
198. The definition of public officials in article 2 (a) of the Convention against Corruption is also instructive: "(a) 'Public official' shall mean: (i) any person holding a legislative, executive, administrative or judicial office of a State Party, whether appointed or elected, whether permanent or temporary, whether paid or unpaid, irrespective of that person's seniority; (ii) any other person who performs a public function, including for a public agency or public enterprise, or provides a public service, as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party; (iii) any other person defined as a "public official" in the domestic law of a State Party. However, for the purpose of some specific measures contained in Chapter II of this Convention, "public official" may mean any person who performs a public function or provides a public service as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party".

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<sup>74</sup> *Travaux Préparatoires*, p. 86.

199. The question of bribery involving officials of other countries (“foreign public officials”) and international civil servants is addressed by article 8(2) of the Organized Crime Convention, which requires that States give serious consideration to the introduction of such an offence. The definition of “foreign public officials” in article 2 (b) of the Convention against Corruption may be instructive: “‘foreign public official’ shall mean any person holding a legislative, executive, administrative or judicial office of a foreign country, whether appointed or elected; and any person exercising a public function for a foreign country, including for a public agency or public enterprise”. Article 2 (c) of the Convention against Corruption defines “official of a public international organization” to mean “an international civil servant or any person who is authorized by such an organization to act on behalf of that organization. Article 16 of the Convention against Corruption creates an obligation for States parties to criminalize bribery of foreign public officials and officials of public international organizations.
200. The Organized Crime Convention does not cover issues relating to corruption in the private sector. These are addressed in articles 12 and 21 of the Convention against Corruption.

*(b) Criminalization of active and passive bribery and participation (article 8)*

201. Article 8(1) requires the establishment of two corruption-related offences: active and passive bribery. A third offence criminalizing participation in such offences is required under article 8(3).
- (i) Active bribery (article 8(1)(a))*
202. Under article 8(1)(a) States parties are required to criminalize “the promise, offering or giving to a public official (directly or indirectly) of an undue advantage (for the official himself or herself or another person or entity) in order that the official act or refrain from acting in the exercise of his or her official duties”.
203. The language, scope and elements of article 8(1)(a) of the Organized Crime Convention are identical to the offence of (active) bribery of national public officials in article 15 (a) of the Convention against Corruption.<sup>75</sup> Noteworthy is the difference in the definition of “public official” under the two Conventions, which has been discussed in the previous section.
204. The required elements of article 8(1)(a) are those of promising, offering or actually giving something to a public official. The offence must cover instances where no gift or other tangible item is offered. An undue advantage may thus be something tangible or intangible, whether pecuniary or non-pecuniary.
205. The undue advantage does not have to be given immediately or directly to a public official of the State. It may be promised, offered or given directly or indirectly. A gift,

<sup>75</sup> See also UNODC, *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, 2nd ed. (Vienna, 2012), paras. 193-198.

concession or other advantage may be given to some other person, such as a relative or political organization with the intention that it will influence the relevant public official's conduct. Some national legislation might cover the promise and offer under provisions regarding the preparation for a crime, the attempt, or complicity to commit bribery. When this is not the case, legislators need to specifically cover promising, which implies an agreement between the bribe giver and the bribe-taker, and offering, which does not imply the agreement of the prospective bribe taker. The undue advantage or bribe must be linked to the official's duties.

206. The required mental element for this offence is that the conduct must be intentional. In addition, some link must be established between the offer or advantage and inducing the official to act or refrain from acting in the course of his or her official duties. Therefore, not only must the action of giving or offering an undue advantage be intentional, the purpose of this action must be to influence the official's actions. Since the conduct covers cases of merely offering a bribe, that is, even including cases where it was not accepted and could therefore not have affected conduct, the link must be that the accused intended not only to offer the bribe, but also to influence the conduct of the recipient, regardless of whether or not this actually took place.
207. It should be noted that unlike article 5(2) of the Organized Crime Convention, there is no provision in article 8 of the Convention stating that intention may be inferred from objective factual circumstances, although most legal systems take this approach regardless. The Convention against Corruption contains a separate general provision on this matter in its article 28.
- (ii) *Passive bribery (article 8(1)(b))*
208. Under article 8(1)(b) States parties are required to criminalize "the solicitation or acceptance by a public official (directly or indirectly) of an undue advantage (for the official himself or herself or another person or entity) in order that the official act or refrain from acting in the exercise of his or her official duties."
209. This offence is the passive version of the offence in article 8(1)(a). The required elements are soliciting or accepting the bribe. The link with the influence of official conduct must also be established. As with the offence of active bribery, the undue advantage may be for the official or some other person or entity. The solicitation or acceptance must be by the public official or through an intermediary, that is, solicitation or acceptance can be made directly or indirectly.
210. The mental element is only that of intending to solicit or accept the undue advantage for the purpose of altering one's conduct in the course of official duties.
211. The language, scope and elements of article 8(1)(b) of the Organized Crime Convention are identical to the offence of (passive) bribery of national public officials in article 15 (b) of the Convention against Corruption.<sup>76</sup> Noteworthy is the difference in the definition of "public official" under the two conventions, which has been

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<sup>76</sup> Ibid., paras. 199-204.

discussed in the previous section.

(iii) *Participation as an accomplice in bribery offences (article 8(3))*

212. Under article 8(3) of the Organized Crime Convention, States parties are required to ensure that participation as an accomplice in any of the required offences is also criminalized.<sup>77</sup> Some States already have laws of general application establishing liability for aiding and abetting, participation as an accomplice and similar forms of liability. These States need to ensure that these provisions apply to the corruption offences.

(c) *Other general requirements*

213. In drafting legislation to implement the criminalization obligations under article 8, legislators should bear in mind the following general obligations under the Convention that are particularly relevant to the establishment of criminal offences:
- (a) Non-inclusion of transnationality in domestic offences. Transnationality must not be made an element of the domestic offence (article 34(2));
  - (b) Non-inclusion of “organized criminal group” in domestic offences. As with transnationality, above, the involvement of an organized criminal group must not be made an element of the domestic offence (article 34(2));
  - (c) Criminalization must be through legislative and other measures. The criminal offences must be established by criminal law and not simply by other measures, which would be additional to the proscribing legislation;<sup>78</sup>
  - (d) The offence should be liable to penalties that take into account the grave nature of the offence. Penalties should be sufficiently severe given the seriousness of the conduct required to be criminalized (article 11(1));
  - (e) The description of the offence is reserved to the domestic law of a State party. The domestic offence established by a State to implement the criminalization requirements of the Convention need not be described in exactly the same manner as in the Convention, as long as the required conduct is criminalized (article 11(6));
  - (f) Liability of legal persons. With respect to legal persons, the offences and liability can be criminal, civil or administrative (article 10(2));
  - (g) Statutes of limitation. The Convention requires that legislators establish a long statute of limitation period for the offence, in particular when alleged offenders are evading justice (article 11(5));
  - (h) Sentence mitigation and immunity. The Convention encourages States parties to consider mitigating sentences and granting immunity and/ or leniency to individuals who decide to cooperate with the authorities (article 26(2) and (3)).

<sup>77</sup> See also article 27 of the Convention against Corruption.

<sup>78</sup> *Travaux Préparatoires*, p. 45.

This is optional and dependent on domestic legal principles and traditions. In jurisdictions where prosecution of crimes is mandatory, however, affording immunity from prosecution would require legislation.

*(d) Other mandatory measures against corruption (article 9)*

214. Article 9 contains some general requirements regarding anti-corruption mechanisms that States parties must put in place in order to implement the Convention. These requirements are not necessarily legislative in nature and will depend on the traditions, laws and procedures of individual States.
215. In addition to the legislative and other measures of article 8, States are required to adopt measures designed to promote integrity and to prevent, detect and punish corruption of public officials. To that end, article 9(1) mandates that States take legislative, administrative or other effective measures to the extent that this is appropriate and consistent with their legal system.
216. Further, the Convention requires that States take measures to ensure effective action by domestic authorities in the prevention, detection and punishment of corruption of public officials, including providing such authorities with adequate independence to deter the exertion of inappropriate influence on their actions (article 9(2)).
217. In practice, many States have anti-corruption commissions or other designated agencies that are mandated with the measures flagged by article 9. The Convention against Corruption contains more extensive provisions relating to the prevention, detection and punishment of the corruption of public officials that may be instructive.<sup>79</sup>

#### **4. Optional measures, including optional issues**

218. Beyond the three mandatory offences described in section III.D.3, the Organized Crime Convention also requires that States consider the establishment of additional offences dealing with corruption of foreign officials or officials of international organizations, as well as other forms of corruption. States may also consider the introduction of special aggravated offences or aggravating factors for corruption involving an organized criminal group.
219. According to article 8(2), of the Convention against Corruption, States parties shall consider extending the offences under article 8(1) to cases that involve any foreign public official or international civil servant. Article 16 of the Convention against Corruption contains two offences criminalizing active and passive corruption of foreign officials and official of a public international organization that may be instructive:
  - (a) Under article 16(1) of the Convention against Corruption, States must establish as a criminal offence, when committed intentionally, the promise, offering or giving to a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official

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<sup>79</sup> See, in particular, articles 5-14 of the Convention against Corruption.

himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business.

- (b) Article 16(2) of the Convention against Corruption requires that States parties consider establishing as a criminal offence, when committed intentionally, the solicitation or acceptance by a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.
220. Under article 8(2) of the Organized Crime Convention, States must also consider criminalizing other forms of corruption, in accordance with their fundamental legal principles and taking into account their historical context. This may include, for instance, any of the offences under articles 17–24 of the Convention against Corruption, such as embezzlement, misappropriation or other diversion of property by a public official (article 17); trading in influence (article 18); abuse of functions (article 19); illicit enrichment (article 20); bribery in the private sector (article 21); embezzlement of property in the private sector (article 22); and concealment (article 24).
221. Article 9(1) of the Organized Crime Convention also advocates the adoption of “administrative or other effective measures to promote integrity and to prevent, detect and punish the corruption of public officials”. In addition to the measures outlined above, this may also include disciplinary measures and sanctions and other administrative measures to promote integrity.

### Additional references and resources

#### Organized Crime Convention

Article 6 (Criminalization of the laundering of the proceeds of crime)  
 Article 7 (Measures to combat money-laundering)  
 Article 10 (Liability of legal persons)  
 Article 11 (Prosecution, adjudication and sanctions)  
 Article 16 (Extradition)  
 Article 18 (Mutual legal assistance)  
 Article 23 (Criminalization of obstruction of justice)  
 Article 24 (Protection of witnesses)  
 Article 34 (Implementation of the Convention)

### **Additional United Nations resources**

UNODC, *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, 2nd ed. (Vienna, 2012)

UNODC, *United Nations Guide for Anti-Corruption Policies* (November 2003)

Study entitled “State of implementation of the United Nations Convention against Corruption: criminalization, law enforcement and international cooperation” (CAC/COSP/2013/CRP.7)

### **Examples of national legislation**

Austria, Penal Code, §§ 304 et seq.

Belarus, Criminal Code, art. 430

Canada, Criminal Code, art. 188 et seq.

Hong Kong, China, Anti-bribery legislation

Kenya, Anti-Corruption and Economic Crimes Act 2003 and 2003 Public Officer Ethics Bill

Singapore, Prevention of Corruption Act, chap. 224. 25/81

United States, 18 U.S.C., §§201-225 & 15 U.S.C., §§78dd-1, et seq.

United Kingdom, Bribery Act 2010

## **E. Criminalization of obstruction of justice**

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### **Article 23 of the Organized Crime Convention – Criminalization of obstruction of justice**

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) The use of physical force, threats or intimidation or the promise, offering or giving of an undue advantage to induce false testimony or to interfere in the giving of testimony or the production of evidence in a proceeding in relation to the commission of offences covered by this Convention;

(b) The use of physical force, threats or intimidation to interfere with the exercise of official duties by a justice or law enforcement official in relation to the commission of offences covered by this Convention. Nothing in this subparagraph shall prejudice the right of States Parties to have legislation that protects other categories of public officials.

### **1. Introduction**

222. Organized criminal groups maintain or expand their wealth, power and influence by seeking to undermine systems of justice. Threats, coercion and violence are often used to pervert the course of justice, for example, by creating or presenting false evidence, giving false testimony, or by influencing or intimidating witnesses. No justice can be done if actors in the criminal justice process are intimidated, threatened or corrupted.
223. The Organized Crime Convention addresses primarily crimes that play a facilitative role in the commission of other serious transnational crimes. It is thus fitting and necessary that article 23 should deal with the problem of obstruction of justice, complementing the provisions addressing the intimately linked issues of corruption, protection of witnesses and victims and international cooperation. The purpose of article 23 of the Convention is to protect those involved in bringing members of organized criminal groups to justice. Through article 23, the Convention recognizes that it is all too common for members of organized criminal groups to eliminate witnesses, use physical force against police investigators, and threaten judges and prosecutors. Indeed, many people have lost their lives or faced serious attacks on themselves in their quest to bring organized criminal groups and their associates to justice.
224. In accordance with article 23, States parties shall criminalize the obstruction of justice in their domestic laws in relation to the commission of offences covered by the Convention. The Convention does not require States parties to introduce specific offences for the obstruction of justice involving organized criminal groups; indeed, article 34, paragraph 2, mandates that States parties criminalize obstruction of justice independently of the involvement of an organized criminal group or transnationality.

225. Article 34, paragraph 3, of the Convention also permits States parties to “adopt more strict or more severe measures than those provided for by the Convention for preventing and combating transnational organized crime”. That is to say, States parties are at liberty to cast their domestic offences wide enough to capture the full range of obstruction of justice, including instances that are not related to the offences established in accordance with the Convention or any of the Protocols to which the States concerned are also parties. The commission of the obstruction of justice by organized criminal groups may also be conceived as an aggravating circumstance.
226. In many jurisdictions, offences relating to intimidation, threats and physical force apply to conduct directed against any person, and do not contain special provisions for the intimidation, threats, or physical forces against persons participating in criminal justice processes. In turn, offences criminalizing undue influence and other unlawful interference with administrative and criminal justice processes usually focus on the offering or accepting of bribes and other forms of corruption, but make no special mention of the use of threats, intimidation or the like. Elsewhere, domestic laws make provisions for “crimes concerning obstruction of the performance of official duties” that capture the obstruction and interference with the execution of official duties by government officials, without specific mention of judicial processes or specific types of official duties. Legislators should bear in mind, that these various offences should cover the range of conduct, scope and spirit of article 23.

## **2. Summary of the main requirements**

227. Article 23 requires the establishment of the following two criminal offences:
- (a) Use of physical force, threats or intimidation or the promise, offering or giving of an undue advantage either to induce false testimony or to interfere in the giving of testimony or the production of evidence in proceedings in relation to offences covered by the Convention (article 23 (a));
  - (b) Use of physical force, threats or intimidation to interfere with the exercise of official duties by a justice or law enforcement official in relation to offences covered by the Convention (article 23 (b)).

## **3. Mandatory requirements**

228. The Convention requires that States establish two criminal offences set out in article 23 (a) and (b).

(a) *Influencing or interfering with testimony (article 23 (a))*

229. The offence under article 23 (a) relates to efforts to influence potential witnesses and others in a position to provide the authorities with relevant evidence. The obligation is

to criminalize the use both of corrupt means, such as bribery, and of coercive means, such as the use or threat of violence: States parties are required to criminalize the use of physical force, threats or intimidation or the promise, offering or giving of an undue advantage to induce false testimony or to interfere in the giving of testimony or the production of evidence in proceedings in relation to the commission of offences covered by the Convention.

230. Depending on whether or not the term is already sufficiently clear in national law, it may be necessary to further define “undue advantage”. The concept of “undue advantage” also appears in the Convention against Corruption. The *Legislative Guide for the Implementation of the United Nations Convention against Corruption* notes that “an undue advantage may be something tangible or intangible, whether pecuniary or non-pecuniary”.<sup>80</sup>
231. The use of force, threats and inducements for false testimony can occur at any time regardless of whether formal proceedings are in progress or not. Although the term ‘proceeding’ will generally refer to judicial proceedings before criminal courts, the scope of the offence or offences established in the domestic implementation of article 23(a) need not be limited to the trial stage. The *Travaux Préparatoires* to article 23 indicate that “the term “proceeding” is intended to cover all official governmental proceedings”.<sup>81</sup> This ‘may include the pre-trial stage of a case’, which is of particular significance in civil law systems. Article 23 need not be applied to private proceedings relating to conduct covered by the Convention, such as arbitral proceedings.
232. States are required to apply the offence to all proceedings related to offences covered by the Convention. This includes three groups of offences: the offences established in accordance with articles 5, 6, 8 and 23 of the Convention; serious crime; and the offences established in accordance with any of the three Protocols to which the State concerned is also a party.

*(b) Interfering with official duties (article 23(b))*

233. Article 23 (b) requires States parties to criminalize interference with the actions of judicial or law enforcement officials: the use of physical force, threats or intimidation to interfere with the exercise of official duties by a justice or law enforcement official in relation to the commission of offences covered by the Convention. The requirement extends to force, threats and intimidation that interfere both directly and indirectly with the exercise of official duties by a justice or law enforcement official.
234. The conduct involving force, threats, or intimidation has to be employed ‘to interfere with the exercise of official duties by a justice or law enforcement official’. This would generally include police and other law enforcement personnel as well as judges, magistrates and other members of the judiciary. Specific roles and titles necessarily vary depending on the structure and operation of the domestic criminal justice system

<sup>80</sup> *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, para. 196.

<sup>81</sup> *Travaux Préparatoires*, p. 215.

and those working within it. Recognizing these differences, the second sentence of article 23 (b) explicitly permits States parties to broaden the categories of public officials covered by domestic offences that give effect to article 23 (b).

235. The bribery element is not included in this paragraph because justice and law enforcement officials are considered to be public officials, the bribery of whom is already covered by article 8 of the Convention.

*(c) Other general requirements*

236. In drafting legislation to implement these criminalization obligations, legislators should bear in mind the following general obligations under the Convention that are particularly relevant to the establishment of criminal offences:

- (a) Non-inclusion of transnationality in domestic offences. Transnationality must not be made an element of the domestic offence (article 34(2));
- (b) Non-inclusion of “organized criminal group” in domestic offences. As with transnationality, above, the involvement of an organized criminal group must not be made an element of the domestic offence (article 34(2));
- (c) Criminalization must be through legislative and other measures. The criminal offences must be established by criminal law and not simply by other measures, which would be additional to the proscribing legislation;<sup>82</sup>
- (d) The offences must be committed intentionally. The mental element required for each offence is that it be committed intentionally and there is no obligation to cover conduct committed with a lesser mental state;
- (e) The offence should be liable to penalties that take into account the grave nature of the offence. Penalties should be sufficiently severe, given the seriousness of the conduct required to be criminalized (article 11(1));
- (f) The description of the offence is reserved to the domestic law of a State party. The domestic offence established by a State to implement the criminalization requirements of the Convention need not be described in exactly the same manner as in the Convention, as long as the required conduct is criminalized article 11(6));
- (g) Liability of legal persons. With respect to legal persons, the offences and liability can be criminal, civil or administrative (article 10(2));
- (h) Statutes of limitation. The Convention requires that legislators establish a long statute of limitation period for the offence, in particular when alleged offenders are evading justice (article 11(5));
- (i) Sentence mitigation and immunity. The Convention encourages States parties to consider mitigating sentences and granting immunity and/ or leniency to those individuals who decide to cooperate with the authorities (article 26(2) and (3)).

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<sup>82</sup> *Travaux Préparatoires*, p. 45.

This is optional and dependent on domestic legal principles and traditions. In jurisdictions where prosecution of crimes is mandatory, however, affording immunity from prosecution would require legislation.

237. A literal reading of article 23 may lead to concerns that the Convention requires the criminalization of certain situations in which an accused exercises his or her right to silence. In some legal systems, domestic law provides an absolute right to decline to give evidence in some circumstances. Because article 23, unlike other articles under the Organized Crime Convention, does not contain any reference to "the legal principles of the State Party", some States parties may find it difficult to criminalize obstruction of justice while ensuring that this right to silence can be exercised lawfully. It is for this reason that the *Travaux Préparatoires* indicate that it was understood that some countries may not cover cases where a person has the right not to give evidence and an undue advantage is provided for the exercise of that right.<sup>83</sup>
238. Article 23 creates primary liability for the person inducing or interfering independent of the criminal liability of the other person giving false testimony or the like. Offences based on article 23 are complementary to provisions creating liability as a participant in or accessory to the perjury, false statements, false oaths, fabrication of false evidence or similar offences committed by another person. For these reasons, it is important that States parties criminalize obstruction of justice in the way envisaged by article 23 independently from offences relating to perjury. States parties may, in addition, choose to create specific offences for situations in which the person inducing the obstruction of justice and the person giving false testimony etc. collude or otherwise collaborate.
239. The relationship between obstruction of justice and perjury and similar offences is not further addressed by the Convention. What these offences have in common is that they serve to protect criminal justice processes from undue interference. Distinct from perjury, article 23 criminalizes the person who causes others to give false testimony or to otherwise interfere in criminal proceedings involving one of the offences under the Convention. The Convention contains no provisions and no further guidance on the criminalization of the person who, for example, has been induced to give false testimony or who because of threats or intimidations interferes with evidence or testimony.
240. Article 23 contains no explicit reference to situations in which an accused attempts to influence, pervert, or obstruct the course of justice but where his or her efforts fail to produce the desired outcome. This may be the case, for example, where the accused is stopped before his or her efforts have taken effect or where the person who is the object of the coercion or other undue influence resists the accused's efforts. The offences in article 23 (a) and (b) cover attempts as well as the completed offence. In other words, for the offence in article 23(a) it suffices to show that the accused acted with the intention "to

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<sup>83</sup> *Travaux Préparatoires*, p. 216.

induce false testimony or to interfere in the giving of testimony, or the production of evidence”; it is not necessary to prove that the conduct actually resulted in false testimony to be given or false evidence to be produced. Equally, in the offence under article 23 (b) it is not required to show that the exercise of the official’s duties were actually interfered with; any intention to do so fulfils the elements of the offence. The question of whether the domestic offences that give effect to article 23 can be attempted is a matter of the criminal law of the individual State party.

#### **4. Other measures, including optional issues**

241. There are no optional provisions in article 23.
242. Unlike article 5(2) of the Convention, there is no reference in article 23 that the intention “may be inferred from objective factual circumstances”. Article 5(2) recognizes that in many legal systems it is permissible to use circumstantial evidence to establish the mental elements of criminal offences. Although article 23 does not include this specific reference, the proof of the mental element will almost always require an inference from the circumstance in which the accused acted.

#### **Additional references and resources**

##### **Organized Crime Convention**

Article 8 (Criminalization of corruption)  
 Article 9 (Measures against corruption)  
 Article 11 (Prosecution, adjudication and sanctions)  
 Article 16 (Extradition)  
 Article 18 (Mutual legal assistance)  
 Article 24 (Protection of witnesses)  
 Article 25 (Assistance to and protection of victims)  
 Article 34 (Implementation of the Convention)

##### ***Model Legislative Provisions against Organized Crime***

Article 10 (Obstruction of justice)

### **Examples of national legislation**

#### *False testimony and false evidence*

- Bangladesh, The Penal Code, chap. XI, sects. 191 et seq.
- Brazil, Criminal Code, Title XI, chap. III, art. 343
- Cambodia, Criminal Code of the Kingdom of Cambodia, Book 4 - Title 2, arts. 518-528 and 546-549
- China, Criminal Law of the People's Republic of China, Part Two - chap. VI, art. 305 et seq.
- Costa Rica, Código Penal, Title XIV, art. 317
- El Salvador, Código Penal, Title XV, art. 307
- Mongolia, Criminal Code, Title Nine, art. 256
- Nicaragua, Código Penal, Title XXI, art. 478
- Nigeria, Criminal Code Act, Part 3, art. 121
- Philippines, Witness Protection, Security and Benefit Act, sect. 17
- Russian Federation, Criminal Code, art. 309
- Uganda, The Penal Code Act, chap. X, art.94ff
- Venezuela (Bolivarian Republic of), Código Penal, Book Two - Title IV, art. 242

#### *Interference with the exercise of official duties*

- Bangladesh, The Penal Code, chap. X, sect. 186
- Brazil, Criminal Code, Title XI, chap. III, art. 344
- China, Criminal Law of the People's Republic of China, Part Two— chap. VI, art. 315ff
- South Africa, Prevention of Organised Crime Act. 1998, chap. 8, sect. 75
- Uganda, The Penal Code Act, chap. X, art. 107
- Vanuatu, Penal Code, Part 2, arts. 73-73A
- Venezuela (Bolivarian Republic of), Código Penal, Book Two — Title IV, arts. 243-249

## **Related international instruments**

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Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (United Nations, *Treaty Series*, vol. 1465, No. 24841)

Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (*Corruption and Integrity Improvement Initiatives in Developing Countries* (United Nations publication, Sales No. E.98.III.B.18))

Convention on the Rights of the Child (United Nations, *Treaty Series*, vol. 1577, No. 27531)

Financial Action Task Force, *International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation: The FATF Recommendations* (Paris, February 2012)

International Convention for the Suppression of the Financing of Terrorism (United Nations, *Treaty Series*, vol. 2178, No. 38349)

International Covenant on Civil and Political Rights (General Assembly resolution 2200 A (XXI), annex)

United Nations Convention against Corruption, United Nations, *Treaty Series*, vol. 2349, No. 42146

United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (United Nations, *Treaty Series*, vol. 1582, No. 27627)

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#### **IV. Procedural law to ensure effective criminalization**

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243. The Organized Crime Convention contains several provisions to ensure the effective application and operation of the Convention and, in particular, its criminalization requirements. This includes provisions relating to jurisdiction to prosecute and punish the Convention offences (article 15), liability of legal persons for Convention offences (article 10), provisions relating to prosecution, adjudication and sanctions (article 11), confiscation and seizure of proceeds of crime (article 12), protection of witnesses and victims (articles 24–26), special investigative techniques (article 20) and the establishment of a criminal record (article 22).

## A. Jurisdiction over offences

### Article 15 of the Organized Crime Convention – Jurisdiction

1. Each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offences established in accordance with articles 5, 6, 8 and 23 of this Convention when:
    - (a) the offence is committed in the territory of that State Party; or
    - (b) the offence is committed on board a vessel that is flying the flag of that State Party or an aircraft that is registered under the laws of that State Party at the time that the offence is committed.
  2. Subject to article 4 of this Convention, a State Party may also establish its jurisdiction over any such offence when:
    - (a) the offence is committed against a national of that State Party;
    - (b) the offence is committed by a national of that State Party or a stateless person who has his or her habitual residence in its territory; or
    - (c) the offence is:
      - (i) One of those established in accordance with article 5, paragraph 1, of this Convention and is committed outside its territory with a view to the commission of a serious crime within its territory;
      - (ii) One of those established in accordance with article 6, paragraph 1 (b) (ii), of this Convention and is committed outside its territory with a view to the commission of an offence established in accordance with article 6, paragraph 1 (a) (i) or (ii) or (b) (i), of this Convention within its territory.
  3. For the purposes of article 16, paragraph 10, of this Convention, each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offences covered by this Convention when the alleged offender is present in its territory and it does not extradite such person solely on the ground that he or she is one of its nationals.
  4. Each State Party may also adopt such measures as may be necessary to establish its jurisdiction over the offences covered by this Convention when the alleged offender is present in its territory and it does not extradite him or her.
  5. If a State Party exercising its jurisdiction under paragraph 1 or 2 of this article has been notified, or has otherwise learned, that one or more other States Parties are conducting an investigation, prosecution or judicial proceeding in respect of the same conduct, the competent authorities of those States Parties shall, as appropriate, consult one another with a view to coordinating their actions.
- [...].

### 1. Introduction

244. Offenders frequently engage in acts in the territories of more than one State and try to evade jurisdiction by moving between States. The main concern of the international community is that no serious crimes go unpunished and that all parts of the crime are punished wherever they took place. Jurisdictional gaps that enable fugitives to find

safe havens need to be reduced or eliminated. In cases where a criminal group is active in several States that may have jurisdiction over the conduct of the group, the international community seeks to ensure that there is a mechanism available for those States to facilitate coordination of their respective efforts.

245. The jurisdiction to prosecute and punish such crimes is addressed in article 15 of the Convention. Subsequent articles provide a framework for cooperation among States that have already exercised such jurisdiction. It is anticipated that there will be cases in which many States parties will be called upon to cooperate in the investigation, but only a few of them will be in a position to prosecute the offenders.
246. The Convention requires that States establish jurisdiction when the offences are committed in their territory or on board aircraft and vessels registered under their laws.<sup>84</sup> States are also required to establish jurisdiction over Convention offences in cases where they do not extradite a person on grounds of nationality. In these cases, the general principle *aut dedere aut judicare* (extradite or prosecute) would apply (see articles 15(3) and 16(10)).
247. In addition, article 15(2) invites States to consider the establishment of jurisdiction in cases where their nationals are victimized, where the offenders are nationals of that State party or stateless persons residing in its territory, or where the offences of participation in an organized criminal group or money-laundering are committed outside its territory with a view to the commission of an offence within its territory. Finally, States are required to consult with other interested States in appropriate circumstances in order to avoid, as much as possible, the risk of improper overlapping of exercised jurisdictions.
248. Provisions similar to those under article 15 of the Organized Crime Convention can be found in other international legal instruments, including, for instance, article 42 of the Convention against Corruption and article 4 of the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988.

## 2. Summary of the main requirements

249. In accordance with article 15(1), each State party must be able to assert jurisdiction over the offences established in accordance with articles 5, 6, 8 and 23 of the Organized Crime Convention when these are committed:
- (a) In its territory;
  - (b) On board a ship flying its flag;
  - (c) On board an aircraft registered under its laws.
250. In addition, under article 15(3), in cases where an alleged offender is in the territory of

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<sup>84</sup> See also the United Nations Convention on the Law of the Sea (United Nations, *Treaty Series*, vol. 1833, No. 31363), especially articles 27, 92(1), 94 and 97.

a State and the State does not extradite him or her solely on the ground that he or she is their national (see article 16(10)), that State must be able to assert jurisdiction over the following conduct committed even outside of its territory:

- (a) Offences established in accordance with articles 5, 6, 8 and 23, when they involve an organized criminal group;
  - (b) Serious crime that involves an organized criminal group;
  - (c) Offences included in the Protocols to which States are parties.
251. States may already have jurisdiction over the specified conduct, but they must ensure that they have jurisdiction for conduct committed both inside and outside of their territory by one of their nationals. Therefore, additional legislation may be required.
252. Each State party must also, as appropriate, consult with other States parties that are also exercising jurisdiction over the same conduct, in order to coordinate their actions (article 15(5)).

### **3. Mandatory requirements**

253. States parties are required to establish jurisdiction where the offence involved is actually committed in their territory or aboard vessels flying their flag or aircraft registered under that State's laws. They must also have jurisdiction to prosecute certain offences committed outside their territory, if the offender is one of their nationals who cannot be extradited for prosecution elsewhere on the sole basis of their nationality. That is, States must be able to apply the principle of *aut dedere aut judicare* (articles 15(3) and 16(10)).

#### *(a) Territoriality principle (article 15(1))*

254. Article 15(1) requires that States assert jurisdiction on the basis of the territorial principle. This paragraph requires each State party to establish its jurisdiction over the offences established in accordance with articles 5, 6, 8 and 23 of the Organized Crime Convention and over any offence established in accordance with any of the Protocols supplementing the Convention to which the State is a party, when committed:
- (a) In its territory;
  - (b) On board a ship flying its flag;
  - (c) On board an aircraft registered under its laws.
255. States parties whose penal jurisdiction does not currently extend to all of the conduct made punishable in articles 5, 6, 8 and 23 committed in their territory or on board the above-described ships or aircraft, will need to supplement their existing jurisdiction regime. In addition to the obligations under article 15(1), States parties may wish to clarify in their domestic laws that territorial jurisdiction also includes jurisdiction over territorial waters.

(b) *Extended jurisdiction under article 15(3)*

256. The Convention also requires that States parties are able to assert jurisdiction over offences committed outside their territory by their own nationals, in cases in which the person is in the country of nationality and extradition to the country in which the offence occurred is denied on grounds of nationality. This provision requires States to assert jurisdiction over the offences covered by the Convention in order to be able to meet the obligation under article 16(10), which is that they must submit a case for domestic prosecution if extradition has been refused on grounds of the nationality of the offender. In order to understand the nature of the obligation imposed by this paragraph, a review of a number of factors is necessary.
257. Firstly, article 15(1) already requires States parties to have jurisdiction over offences committed in their territory and on their ships and aircraft.
258. Secondly, the obligation to establish jurisdiction over offences committed abroad is limited to the establishment of jurisdiction over a State party's nationals when that State has refused to extradite solely on the ground of nationality regardless of where the offence was committed. This application is an essential component of the obligation imposed by article 16(10). States parties are not required to establish jurisdiction over offences committed by non-nationals under the terms of this paragraph.
259. Thirdly, jurisdiction must be extended over the offences covered by the Convention. This means not only the offences established in accordance with articles 5, 6, 8 and 23, but also all other offences covered by the Convention, that is, serious crimes involving an organized criminal group when the person sought is located in the requested State, in accordance with article 16.
260. Thus, in essence, a State party that does not extradite its nationals must establish jurisdiction over:
- (a) The conduct set forth in articles 5, 6, 8 and 23 involving an organized criminal group when committed abroad by its nationals;
  - (b) Serious crime (as defined in article 2(b), under its laws involving an organized criminal group committed abroad by its nationals;
  - (c) Crimes established by Protocols to which the State is a party.

(c) *Coordination between States (article 15(5))*

261. Further specific obligations flow from article 15 with respect to the coordination of efforts when more than one State investigates a particular offence.
262. The Convention requires States that become aware that other States parties are investigating or prosecuting the same offence to consult with those countries, and, as appropriate, to coordinate their actions. In some cases, this coordination will result in one State party deferring to the investigation or prosecution of another. In other cases,

the States concerned may be able to advance their respective interests through the sharing of information they have gathered. In yet other cases, States may each agree to pursue certain actors or offences, leaving other actors or related conduct to the other interested States. This obligation to consult is operational in nature and may not require any domestic implementing legislation. These steps also need to be taken into consideration when criminal proceedings are transferred between States and when States intend to engage in joint investigations.<sup>85</sup>

263. It should be noted that the term “as appropriate” provides flexibility not to consult, if doing so may not be advisable. However, in many cases, the successful investigation and prosecution of serious offenders will hinge upon the swift coordination of efforts among concerned national authorities and coordination between States parties can ensure that time-sensitive evidence is not lost.<sup>86</sup>

#### **4. Optional measures, including optional issues**

264. Beyond the mandatory jurisdiction addressed above, the Convention encourages States parties to consider establishing jurisdiction in additional instances, in particular when their national interests have been harmed.
265. Going beyond the requirements of the Convention, States parties may also wish to review their jurisdiction to implement mandatory obligations emanating from other international treaties to which the State is a party. This would also include resolutions by the Security Council which are binding on States.
266. Article 15(2) sets forth a number of further bases for jurisdiction that States parties may assume when:
- (a) The offence is committed against one of their nationals (article 15(2)(a)) or against a habitual or permanent stateless person resident in their territory<sup>87</sup> (the so-called “passive personality principle”).
  - (b) The offence is committed by a national of that State or a stateless person who has his or her habitual residence in its territory (article 15(2)(b), the so-called “active personality principle”);
  - (c) The offence relates to activities outside their territory of an organized criminal group aimed at the commission of a serious crime inside their territory (article 15(2)(c)(i)) (the so-called “protection principle”); or
  - (d) The offence consists of participation in money-laundering outside their territory aimed at the laundering of criminal proceeds in their territory (article 15(2)(c)(ii)).

<sup>85</sup> See also section V.C, below.

<sup>86</sup> *Travaux Préparatoires*, p. 139.

<sup>87</sup> *Ibid.*

267. Article 15(2)(c)(i) and (ii) apply only to offences established under article 5(1) (participation in an organized criminal group) and article 6(1)(b)(ii) (participation in, association with or conspiracy to commit, attempts to commit and aiding and abetting the laundering of proceeds of crime). Accordingly, States may want to extend jurisdiction over only these offences when they are committed outside the territory with a view to a commission of that crime in their territory. However, equally, States may want to extend jurisdiction in this way over any Convention and Protocol offence and beyond.
268. Article 15(4) sets forth an additional non-mandatory basis for jurisdiction that States parties may wish to consider. In contrast to the mandatory establishment of jurisdiction provided for in article 15(3) to enable domestic prosecution in lieu of extradition of its nationals, paragraph 4 of article 15 stipulates on the establishment of jurisdiction over persons whom the requested State party does not extradite for reasons other than nationality (see also article 16(14)).
269. Article 15(6) makes clear that the listing of these bases for jurisdiction is not exhaustive. States parties can establish additional bases of jurisdiction without prejudice to norms of general international law and in accordance with the principles of their domestic law.

### **Additional references and resources**

#### **Organized Crime Convention**

Article 3 (Scope of application)  
 Article 5 (Criminalization of participation in an organized criminal group)  
 Article 6 (Criminalization of the laundering of proceeds of crime)  
 Article 8 (Criminalization of corruption)  
 Article 16(10) (Extradition)  
 Article 18 (Mutual legal assistance)  
 Article 23 (Criminalization of obstruction of justice)

#### ***Model Legislative Provisions against Organized Crime***

Article 6 (Jurisdiction)

#### **Examples of national legislation**

Albania, Criminal Code, arts. 6 - 8

Bangladesh, The Penal Code, chap. I, sects. 1-4  
Cambodia, Criminal Code of Cambodia, Book One—Title 1, arts. 12-23  
Chile, Penal Code, First Book, arts. 5-6  
China, Criminal Law of the People's Republic of China, Part One— chap. I, arts. 6-8  
Cuba, Código Penal, Book I—Title II, arts. 4-6  
Ethiopia, The Criminal Code of the Federal Democratic Republic of Ethiopia 2004, Part I -  
Book I, arts. 11 - 20  
Germany, Criminal Code, General Part, chap I, sects. 3-7  
Kenya, Penal Code, Part I, chap. III, sects. 5 and 6  
Malawi, Penal Code, Part I, sects. 5 and 6  
Malaysia, Penal Code, chap. I, sects. 2-4  
Mexico, Federal Penal Code, Preliminary Title, art. 4  
Namibia, Prevention of Organised Crime Act, 2004, chap. 3, sect. 8  
Nigeria, Criminal Code Act, Part 1, arts. 12-13A  
Paraguay, Penal Code, First Book – Title I, arts. 6 - 9  
Poland, Penal Code, chap. XIII, arts. 109 - 113  
Republic of Korea, Criminal Act, Part I, arts.2-6  
Russian Federation, Criminal Code, arts. 11-13  
United Kingdom, Serious and Organized Crime Act, sect. 45  
Uruguay, Penal Code, First Book - Title I, arts. 9-12

## B. Liability of legal persons

### Article 10 of the Organized Crime Convention

#### – Liability of legal persons

1. Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in serious crimes involving an organized criminal group and for the offences established in accordance with articles 5, 6, 8 and 23 of this Convention.
2. Subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative.
3. Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offences.
4. Each State Party shall, in particular, ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.

### 1. Introduction

270. Serious and organized crime is frequently committed through or under the cover of legal entities, such as companies or charitable organizations. Complex corporate structures can effectively hide the true ownership, clients or particular transactions related to crimes ranging from smuggling to money-laundering and corruption. Individual executives may reside outside the country where the offence was committed and responsibility for specific individuals may be difficult to prove. In order to remove this instrument and shield of transnational organized crime, the Organized Crime Convention requires the establishment of liability for legal entities. Article 10 on the liability of legal persons is an important recognition of the role that legal persons may play in the commission or facilitation of transnational organized crime. Liability of legal persons may also have a deterrent effect, because reputational damage can be very costly for the corporation and because it may act as a catalyst for more effective management and supervisory structures to ensure compliance.
271. The principle that corporations cannot commit crimes (*societas delinquere non potest*) used to be universally accepted. This changed initially in some common law systems. Today, the age-old debate on whether legal entities can bear responsibility for crimes has shifted to the question of how to define and regulate such responsibility.
272. National legal regimes remain quite diverse in the ways in which they address liability of legal persons, how to attribute responsibility or guilt and determine sanctions, with some States resorting to criminal penalties against the organization itself, such as fines, forfeiture of property or deprivation of legal rights, whereas others employ non-criminal or quasi-criminal measures.
273. Establishing the liability of legal persons should combine the need for effective enforcement with the need to reflect organizational fault. One of the great challenges

in imposing liability on legal persons is the need to attribute responsibility to an artificial entity. Most legal systems base their criminal laws on a combination of physical actions and mental states. As a legal person can act only through individuals, it is necessary to develop mechanisms whereby fault can be attributed to the organization. While this can be relatively straightforward in the case of physical conduct, the attribution of mental states such as “intention” or “knowledge” is more complex.

274. Broadly speaking, two models of liability for legal persons have emerged: the “nominalist” or “derivative” liability and “organizational fault”.
- (a) The nominalist theory of liability states that, as a legal person is a legal construct that can only act through individuals, the liability of the entity is dependent upon the liability of individuals. For example, a company may be held liable for a criminal offence committed by an officer or employee of the corporation. Such liability is said to be “derivative” because it links the liability of the legal person to the liability of the individual; it does not seek to find fault in the organization itself. Vicarious liability and the attribution or identification doctrine are the commonly used nominalist models to create liability for legal persons;
  - (b) In contrast to nominalist models, “realist” or “organizational” models of liability seek to reflect the culpability of the organization itself, without necessarily needing to focus on individual perpetrators. In this way, the “fault” of the organization may be found in the way in which it is structured, its policies and its failure to supervise its employees or agents. Such models may be combined with other models in order to provide a comprehensive approach to liability. The corporate culture and failure to act models fall into this category.<sup>88</sup>
275. The Convention requires that liability for offences be established both for natural persons and for legal persons. Article 10 requires States parties to take the necessary steps, in accordance with their fundamental legal principles, to provide for corporate liability. This liability can be criminal, civil or administrative, thus accommodating the various legal systems and approaches.
276. At the same time, the Convention requires that whatever sanctions (monetary or otherwise) are introduced, they must be effective, proportionate and dissuasive, in order to achieve the overall objective of deterrence.

## **2. Summary of the main requirements**

277. Article 10 of the Convention requires the establishment of liability for legal entities, consistent with the State’s legal principles, for the following:

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<sup>88</sup> For more information on the different models, see the background paper by the Secretariat on liability of legal persons, article 10 of the United Nations Convention against Transnational Organized Crime (CTOC/COP/WG.2/2014/3).

- (a) Offences established in accordance with articles 5, 6, 8 and 23, when they involve an organized criminal group;
  - (b) Serious crime that involves an organized criminal group;
  - (c) Offences included in the Protocols to which the State is a party.
278. In that regard, liability may be criminal, civil or administrative and sanctions must be effective, proportionate and dissuasive.

### **3. Mandatory requirements**

#### *(a) Offence covered by liability of legal persons (article 10(1))*

279. Article 10(1) requires that States parties adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for:
- (a) Offences established in accordance with articles 5, 6, 8 and 23, when they involve an organized criminal group;
  - (b) Serious crime that involves an organized criminal group;
  - (c) Offences included in the Protocols to which States are (or intend to become) parties.
280. “Serious crime” is defined in article 2 (b) of the Convention to mean offences punishable by deprivation of liberty of at least four years or a more serious crime. Given that a legal person cannot be imprisoned, for corporate liability this must be taken to refer to the penalty attaching to the offence in the case of a natural person.
281. Similarly, the definition of “organized criminal group” in article 2 (a) of the Convention makes reference to “a structured group of three or more persons”, which, in the context of legal entities, must be taken to mean three or more natural persons.

#### *(b) Type of liability of legal persons (article 10(2))*

282. Article 10(2) provides that, subject to the legal principles of the State party, the liability of legal persons may be criminal, civil or administrative. These different models of liability reflect different levels of condemnation and procedural protection.
283. Criminal liability reflects the highest level of condemnation that the State can impose. Such offences are typically heard by courts or equivalent bodies, and are subject to the highest levels of procedural protection.
284. For those countries that do not recognize the criminal liability of legal persons, civil or administrative liability can provide an effective alternative. These terms have different meanings in different countries, and are sometimes used interchangeably. Civil liability in this context refers to penalties imposed by courts or equivalent bodies that do not result in conviction.

285. Administrative liability is used in some legal systems where a legal person cannot commit a criminal offence. Some forms of liability provide for a public method of enforcement and the imposition of sanctions, but do not result in a conviction. They may also involve aspects of civil and criminal procedure.
286. Article 10(2) allows States parties to choose the form of liability to be applied, according to their legal principles. This is consistent with other international initiatives that acknowledge and accommodate the diversity of approaches adopted by different legal systems with respect to the liability of legal entities.

*(c) Liability of natural persons (article 10(3))*

287. Under article 10(3), the liability of legal entities must be established without prejudice to the criminal liability of the natural persons who have committed the offences. Therefore, the liability of natural persons who perpetrated the acts is in addition to any corporate liability and must not be affected by the latter. When an individual commits crimes on behalf of a legal entity, it must be possible to prosecute and sanction both the individual and the legal entity.

*(d) Sanction for legal persons (article 10(4))*

288. Article 10(4) requires that States ensure that legal persons held liable in accordance with article 10 are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.
289. This is a specific provision, which complements the more general requirement of article 11(1) that sanctions must take into account the gravity of the offence. The investigation and prosecution of transnational organized crime is comparatively lengthy. Consequently, States with legal systems providing for statutes of limitation must ensure that the limitation periods for the offences covered by the Convention and the Protocols to which they are parties are comparatively long, taking into account and in accordance with their domestic law and fundamental principles (article 11(5)).<sup>89</sup> Whereas the provisions of article 11 apply to both natural and legal persons, those of article 10 apply only to legal persons.
290. One of the major challenges for States in establishing liability for legal entities relates to the imposition of sanctions on legal persons. The stigma associated with a criminal conviction is an important feature and justification for imposing criminal liability. Although civil or administrative liability may lack the stigma of a criminal conviction, they may nonetheless produce effective organizational sanctions. Appropriate sanctions may deter future offences by the defendant organization (“specific deterrence”) and may also deter similar entities from offending (“general deterrence”). More broadly, sanctions may bring about organizational change, and in this way a legal person can be said to have been “rehabilitated”. What amounts to “effective” sanctions as required by article 10(4) is obviously dependent upon the organization

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<sup>89</sup> See also section IV.C, below.

and the circumstances of the offence. As mentioned, under article 11(1) of the Convention, sanctions must also reflect the gravity of the offence. Although this in part relates to the seriousness of the offence itself, it may also reflect the fault of the organization.

291. The most frequently used sanction against a legal entity is a fine, which is sometimes characterized as criminal, sometimes as non-criminal, and sometimes as a hybrid sanction. Other sanctions include confiscation,<sup>90</sup> restitution, or even the closing down of legal entities. In addition, States may wish to consider non-monetary sanctions available in some jurisdictions, such as withdrawal of certain advantages, suspension of certain rights, prohibition of certain activities, publication of the judgment and the appointment of a trustee and the direct regulation of corporate structures.<sup>91</sup>
292. The obligation to ensure that legal persons are subject to appropriate sanctions requires that these be provided for by legislation and should not limit or infringe on existing judicial independence or discretion with respect to sentencing.
293. Finally, it must be borne in mind that the Convention requires mutual legal assistance to the fullest extent possible under relevant laws, treaties, agreements and arrangements of the requested State party, in cases where a legal entity is subject to a criminal, civil or administrative liability (article 18(2)).<sup>92</sup>

#### **4. Optional measures, including optional issues**

##### *(a) Establishing broad liability for legal persons*

294. While some States parties may establish liability of legal persons only for the specific offences required under the Convention or other international instruments, there are benefits in addressing the liability of legal persons more broadly within their legal system. Establishing the liability of legal persons for a broader range of offences would facilitate the addressing of issues of liability, criminal procedure and sanctions and would also help avoid a patchwork of liability and sanctions and the need to update legal provisions as new offences are created. As similar obligations on liability of legal persons are found in various international instruments, establishing the liability for legal persons for a broader range of offences may therefore facilitate compliance by states with a range of obligations, rather than addressing them on a case-by-case basis. Further, article 34(3), provides that States parties may adopt more strict or severe measures for combating transnational organized crime than are provided for under the Convention.

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<sup>90</sup> See also section IV.D, below, in relation to articles 12–14 of the Convention.

<sup>91</sup> *Model Legislative Provisions against Organized Crime*, pp. 50-59.

<sup>92</sup> See also section V.B, below.

(b) *Defining “legal persons”*

295. While corporations are the dominant form of legal persons, there are many other types of legal persons, including unincorporated associations, trusts, partnerships and trade unions. The forms of legal personality and their status vary considerably between jurisdictions, and careful consideration should be given to the range of entities that may be subject to liability. This is particularly the case where liability is being established for a range of offences, criminal or otherwise. For these reasons, States parties may wish to consider defining the term legal person in national legislation.
296. The legal persons for which liability may be established also vary considerably between jurisdictions. There may be general interpretation provisions which state that references to person include, unless the contrary intention appears, legal persons. In other cases, the scope of the provision is stated in the legislation itself, which may be narrow or broader.
297. An important consideration in this context is whether the State and other governmental bodies should be subject to criminal liability. Such bodies include local authorities, State-owned corporations and government agencies. It is quite common for the State to be expressly excluded from criminal liability, and for local public authorities to have limited liability or to be excluded from criminal liability. It is also possible for legislation to provide for targeted liability by referring to specific government departments which are subject to liability. In some jurisdictions, non-profit organizations are also excluded from liability.

(c) *Investigations*

298. Although not specifically referred to under article 10 of the Convention, any model of liability may be ineffective if not supported by appropriate investigative and procedural powers.
299. First, the form of liability established for legal persons may have an impact on the relevant agencies and associated powers that are available when prosecuting these entities. It is essential that investigative authorities have the necessary powers to obtain access to relevant documents held by legal entities, as such documents may often provide evidence as to the commission of the offence.
300. Second, investigative powers may come into conflict with protections that are normally afforded to suspects/defendants. It is therefore necessary to consider whether protections, which are developed for the protection of natural persons, should also be available to legal persons. For example, the privilege against self-incrimination is an internationally recognized human right. In some jurisdictions, legal persons are unable to claim this right. This can have a significant impact on the prosecution of legal persons, as it enhances the ability for investigators to demand access to potentially incriminating material.

301. Third, it is necessary to ensure that the rules of trial procedure include an artificial person. For example, as many jurisdictions require the personal presence of the defendant, it may be necessary to establish a provision which enables a legal person to appear in the proceedings.

*(d) Due diligence*

302. As with crimes committed by natural persons, defences to liability may be available to legal persons. Of particular significance in this context is the defence of due diligence. Due diligence is, in essence, the opposite of negligence. That is, the defendant may reduce or escape liability if it is able to prove that it took all reasonable steps to ensure compliance with the relevant law. This defence is of particular importance in relation to legal persons as it is a reflection of organizational fault. Whether or not a legal person endeavoured to comply with the law is reflected in the structure and policies of the organization.

303. The precise content of due diligence varies with the nature of the offence, the circumstances of the offence and the nature of the defendant. Failure to exercise due diligence may be evidenced through, for instance, inadequate management, control, or supervision or failure to provide adequate systems for conveying relevant information to relevant persons. The due diligence defence may also involve demonstrating that an effective compliance programme is in place within the entity.

**Additional references and resources**

**Organized Crime Convention**

Article 2 (Use of terms)  
 Article 11 (Prosecution, adjudication and sanctions)  
 Article 12 (Confiscation and seizure)  
 Article 13 (International cooperation for purposes of confiscation)  
 Article 14 (Disposal of confiscated proceeds of crime or property)  
 Article 18 (Mutual legal assistance)

***Model Legislative Provisions against Organized Crime***

Article 12 (Liability of legal persons)

**Additional United Nations resources**

Background paper by the Secretariat on liability of legal persons, article 10 of the United

## Nations Convention against Transnational Organized Crime (CTOC/COP/WG.2/2014/3)

**Examples of national legislation***Criminal liability of legal persons*

- Australia, Criminal Code, chap. 2, division 12
- Bhutan, Penal Code of Bhutan, Part Six, arts. 508-512
- Botswana, Penal Code, Part I, sect. 24
- Brazil, Law No. 12.486/2013 on administrative and civil liability of legal persons for acts against public administration; see also decree No. 8.420/2015
- Cambodia, Criminal Code, Book One—Title 2, art. 42
- Chile, Law No. 20.393
- China, Criminal Law of the People's Republic of China, Part One, chap. II, arts. 30 and 31
- France, Penal Code, Title II, chap. I, arts. 121-1, 121-2 and 225-4
- Germany, Administrative Offences Act (OwiG), sects. 30 and 130
- Israel, Israeli Penal Law No. 5737 - 1977 (6th ed.), article four
- Italy, Law on liability of legal persons (legislative decree No. 231/2001 of 8 June 2001), article 5
- Kenya, Penal Code, Part I, chap. V, sect. 23
- Liberia, Penal Law, Part I, § 3.2. - § 3.4.
- Malawi, Penal Code, Part I, sect. 24
- Nicaragua, Penal Code, arts. 45 and 113
- Paraguay, Penal Code, First Book—Title II, art. 16
- Republic of Korea, Proceeds of Crime Act, art. 7
- Sierra Leone, The Criminal Procedure Acts 1965, Part V, sects. 207 and 208
- Switzerland, Swiss Criminal Code, art. 102

*Civil liability of legal persons*

- Armenia, Civil Code, Division 2, art. 60

*Administrative liability of legal persons*

- Italy, Legislative Decree No. 231 of 8 June 2001

## **C. Prosecution, adjudication and sanctions**

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### **Article 11 of the Organized Crime Convention – Prosecution, adjudication and sanctions**

1. 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.
2. Each State Party shall endeavour to ensure that any discretionary legal powers under its domestic law relating to the prosecution of persons for offences covered by this Convention are exercised to maximize the effectiveness of law enforcement measures in respect of those offences and with due regard to the need to deter the commission of such offences.
3. In the case of offences established in accordance with articles 5, 6, 8 and 23 of this Convention, each State Party shall take appropriate measures, in accordance with its domestic law and with due regard to 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.
4. Each State Party shall ensure that its courts or other competent authorities bear in mind the grave nature of the offences covered by this Convention when considering the eventuality of early release or parole of persons convicted of such offences.
5. Each State Party shall, where appropriate, establish under its domestic law a long statute of limitations period in which to commence proceedings for any offence covered by this Convention and a longer period where the alleged offender has evaded the administration of justice.
6. 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 and that such offences shall be prosecuted and punished in accordance with that law.

### **1. Introduction**

304. A concerted, global strategy against organized crime consists of interlinked components such as harmonization of legal provisions regarding serious crimes committed by organized criminal groups, detection of offences, identification and arrest of offenders, enabling the assertion of jurisdiction and facilitating smooth coordination of national and international efforts. Yet these measures are not alone sufficient. After all of the above has taken place, it is also necessary to ensure that the prosecution and sanctioning of offenders around the world is also comparatively proportionate and consistent with the harm they have caused and with the benefits they have derived from their criminal activities.
305. The penalties and the purposes of punishment provided for similar crimes in various jurisdictions diverge significantly. This divergence reflects different national traditions, priorities and policies. It is essential, however, to ensure that at least a minimum level of deterrence is applied by the international community in order to

avoid the perception that certain types of crimes “pay”, even if the offenders are convicted. In other words, the sanctions must clearly outweigh the benefits of the crime. Therefore, in addition to harmonizing substantive provisions, States need to engage in a parallel effort with respect to the issues of prosecution, adjudication and punishment.

306. In addition to the Convention, a number of international instruments provide further guidance, requirements and limits for States with respect to prosecution, adjudication and punishment. Some of these instruments relate to particular offences, as, for example, the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 or the Convention against Corruption. Others set out standards and safeguards on release pending trial, early release or parole, as, for example, the United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules)<sup>93</sup> and the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules).<sup>94</sup> Some instruments prohibit or restrict the use of certain penalties, as, for example, the Convention against Torture and other Cruel, Inhuman or Degrading Treatment, or the Safeguards guaranteeing protection of the rights of those facing the death penalty.<sup>95</sup> Other instruments again set out basic principles on the role of lawyers, prosecutors and judges.<sup>96</sup>
307. Article 11 of the Convention addresses this important aspect of the fight against transnational organized crime with respect to the offences covered by the Convention and complements the provisions relative to the liability of legal persons (article 10) and to the seizure and confiscation of proceeds of crime (see articles 12–14). Article 11 requires that States parties give serious consideration to the gravity of the offences covered by the Convention when they decide on the appropriate punishment and possibility of early release or parole. It also requires that States make an effort to ensure that any discretionary powers they have under domestic law are used to deter the offences covered by the Convention, offences established in accordance with its Protocols to which the State is a party, and “serious crimes” (article 2 (b)).
308. Because offenders may seek to flee the country where they face legal proceedings, the Convention requires that States take measures to ensure that those charged with the four offences covered by the Convention (under articles 5, 6, 8 and 23) appear at forthcoming criminal proceedings consistently with their law and the rights of the defence. This relates to decisions on the defendants’ release before trial or appeal.

<sup>93</sup> General Assembly resolution 45/110, annex.

<sup>94</sup> General Assembly resolution 65/229, annex.

<sup>95</sup> Economic and Social Council resolution 1984/50, annex.

<sup>96</sup> Basic Principles on the Role of Lawyers (*Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August–7 September 1990: report prepared by the Secretariat* (United Nations publications, Sales No. E.91.IV.2), chap. I, sect. B.3, annex); Guidelines on the Role of Prosecutors (*Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August–7 September 1990* (United Nations publications, Sales No. E.91.IV.2), chap. I, sect. C.26, annex); Basic Principles on the Independence of the Judiciary (*Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August–6 September 1985* (United Nations publications, Sales No. E.86.IV.1), chap. I, sect. D.2, annex).

309. Article 11 also addresses the question of statutes of limitation. Generally, such statutes set time limits on the commencement of proceedings against a defendant. Many States do not have such statutes, while others apply them to all matters or with limited exceptions. Where such statutes exist, the purpose is mainly to discourage delays on the part of the prosecuting authorities, or on the part of plaintiffs in civil cases. This is done in order to take into account the rights of defendants and to preserve the public interest in closure and prompt justice. Long delays often entail loss of evidence, memory lapses and changes of law and social context, and therefore increase the possibilities of some injustice. However, a balance must be achieved between the various competing interests and the length of the period of limitation, which varies considerably from State to State. Nevertheless, serious offences must not go unpunished, even if it takes longer periods of time to bring offenders to justice. This is particularly important in cases of fugitives, as the delay of instituting proceedings is beyond the control of authorities. For this reason, the Convention requires States with statutes of limitation to introduce long periods for all offences covered by the Convention, including offences established in accordance with its Protocols to which the State is a party, and serious crimes, and longer ones for alleged offenders that have evaded the administration of justice.
310. States parties are obliged to ensure that the grave nature of the offence and the need to deter its commission is taken into account in prosecution, adjudication, and correctional practices and decisions. The primacy of national law in this respect is affirmed by article 11(6).<sup>97</sup> The reference to “other legal principles controlling the lawfulness of conduct” in article 11(6) refers to issues which might not be categorized as defences in particular legal systems but which might affect the extent of criminal responsibility.

## 2. Summary of the main requirements

311. The Convention requires that States parties:
- (a) Ensure that offences covered by the Convention are subject to adequate sanctions taking the gravity of each offence into account (article 11(1));
  - (b) Ensure that any discretionary powers they may have are exercised to maximize the effectiveness of law enforcement and deterrence (article 11(2));
  - (c) Take appropriate measures to ensure the presence of defendants at criminal proceedings (article 11(3));
  - (d) Consider the grave nature of the four main offences covered by the Convention when considering early release or parole (article 11(4));
  - (e) Establish, where appropriate, long domestic statute of limitation periods for commencement of proceedings for offences covered by the Convention,

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<sup>97</sup> See also sections II.D and III.A, above.

especially when the alleged offender has evaded the administration of justice (article 11(5)).

### 3. Mandatory requirements

#### (a) Adequacy of sanctions (article 11(1))

312. Under article 11(1) each State party is to make the commission of an offence established in accordance with articles 5, 6, 8 and 23 of the Convention liable to sanctions that take into account the gravity of the offence.
313. This provision applies to the four criminalization provisions in the Convention and to the offences established in accordance with the Protocols to which States are parties (article 1(3) of each Protocol). Penalties for serious crimes under domestic law are left to the discretion of national drafters within the limits established under international law.
314. The requirement in article 11(1) is general and applies to both natural persons and legal entities. There are additional and more specific provisions regarding legal entities in article 10(4).<sup>98</sup> These provisions require that States ensure that legal persons, held liable in accordance with this article, are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.

#### (b) Prosecution (article 11(2))

315. Article 11(2) requires that States endeavour to ensure that any discretionary legal powers under their domestic law relating to the prosecution of persons for offences covered by the Convention are exercised to maximize the effectiveness of law enforcement measures in respect of those offences and with due regard to the need to deter the commission of such offences.
316. This provision refers to discretionary prosecutorial powers available in some States. These States must make an effort to encourage the application of the law to the maximum extent possible in order to deter the commission of the four offences covered by the Convention, the offences established in accordance with its Protocols to which States are parties, and serious crimes.
317. In this context, legislators need to ensure that penal provisions are construed in a precise and unambiguous way to avoid vagueness and overbreadth that could give rise to human rights violations and infringements of constitutional rights and freedoms. Particular care needs to be taken that law enforcement measures, prosecutions, and sanctions do not involve the use of torture, cruel, inhuman, or degrading treatment or punishment,<sup>99</sup> enforced disappearance,<sup>100</sup> arbitrary arrest and detention,<sup>101</sup> and

<sup>98</sup> See also section IV.B, above.

<sup>99</sup> See, in particular, articles 2, 4(1), 15 and 16 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment; part I of the Optional Protocol to the Convention against Torture and other Cruel,

extrajudicial arbitrary and summary executions,<sup>102</sup> as mandated by international human rights law.

(c) *Adjudication (article 11(3))*

318. Article 11(3) requires that, with respect to the offences established under articles 5, 6, 8 and 23, each State take appropriate measures, in accordance with its domestic law and with due regard to 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.
319. The illegal operations in which many transnational criminal groups engage generate substantial profits. Consequently, large sums of money may be available to defendants, to the effect that they can post bail and avoid detention before their trial or their appeal. The dissuasive effect of bail is correspondingly diminished. The risk that law enforcement may be undermined is therefore higher. Thus, article 11(3) points to this risk of imprudent use of pre-trial and pre-appeal releases and requires that each State take appropriate measures consistent with its law and the rights of defendants to ensure that they do not abscond.
320. The Convention also encourages a stricter post-conviction regime by requiring each State to ensure that its courts or other competent authorities bear in mind the grave nature of the offences covered by the Convention when considering the eventuality of early release or parole of persons convicted of such offences (article 11(4)).
321. Many jurisdictions allow for an early release or parole of incarcerated offenders, while others completely prohibit it. If a State party allows for early release or parole, the State party must ensure that consideration is given to the grave nature of participation in an organized criminal group, money-laundering, corruption, and obstruction of justice when a decision is made on early release or parole of an offender convicted of such offences. Conditions imposed in connection with decisions on release pending trial or appeal are to take into account the need to ensure the presence of the defendant at subsequent criminal proceedings. The *Travaux Préparatoires* further emphasize that article 11(4) does not oblige States parties to provide for early release or parole of imprisoned persons if their legal system does not provide for early release or parole.<sup>103</sup> It does, however, urge those States which provide for early release or parole to consider increasing the eligibility period, bearing in mind the gravity of the offences covered by the Convention. This may be done through consideration of aggravating

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Inhuman or Degrading Treatment; articles 7 and 10 of the International Covenant on Civil and Political Rights; and articles 19 and 37 of the Convention on the Rights of the Child.

<sup>100</sup> See article 7 of the International Convention for the Protection of All Persons from Enforced Disappearance (General Assembly resolution 61/177, annex).

<sup>101</sup> See the Universal Declaration of Human Rights (General Assembly resolution 217 A (III)), art. 9.

<sup>102</sup> See the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (Economic and Social Council resolution 1989/65, annex), para. 1.

<sup>103</sup> *Travaux Préparatoires*, p. 103.

circumstances that may be listed in domestic laws or other conventions.<sup>104</sup> The United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules) provide further guidance on release pending trial or appeal, early release, parole and other non-custodial measures at different stages of criminal proceedings.<sup>105</sup>

(d) *Statutes of limitation (article 11(5))*

322. Under article 11(5), each State party shall, where appropriate, establish under its domestic law a long statute of limitation period in which to commence proceedings for any offence covered by the Convention, as well as a longer period where the alleged offender has evaded the administration of justice.
323. Many States do not have any limitation period for criminal offences after the passage of which the crimes cannot be prosecuted. Others prescribe a general limitation period for the commencement of proceedings, which may be applied either to all crimes or with clearly defined exceptions. Still other States may simply regard the length of time since the offence took place as one relevant factor in determining whether or not to prosecute as a matter of discretion. The concern underlying such provisions centres on the right of a defendant to a fair trial, which must be balanced against the interests for swift justice, closure and fairness to victims. Many legal systems and international conventions, for example, the International Covenant on Civil and Political Rights in its article 14(3)(c) also include clauses for trial without undue delays.
324. Article 11 of the Organized Crime Convention does not require States without statutes of limitation to introduce them.
325. There are variations among States as to when the limitation period starts and how the time is counted. For example, in some countries time limits do not run until the commission of the offence becomes known (for example, when a complaint is made or the offence is discovered or reported) or when the accused has been arrested or extradited and can be compelled to appear for trial.
326. Moreover, in some systems, time limits may be stopped or extended if the accused flees or fails to appear at any stage of the proceedings. The Organized Crime Convention requires that, when an alleged offender evades the administration of justice, the drafters set a longer limitation period. The longer period is regarded as necessary in cases where accused offenders take actions to flee or otherwise evade justice proceedings. It should also be noted that in many States trial in absentia is not permitted. Therefore, it is crucial that a long statute of limitation is established to ensure the defendant faces trial.
327. These factors should be considered in setting time limits, if any, and States that do set limits should set longer periods for cases where the accused has evaded proceedings.

<sup>104</sup> See, for example, article 6 (3) of the Smuggling of Migrants Protocol, and article 3(7) of the 1988 Convention.

<sup>105</sup> Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules); see also the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules).

In such cases, the additional delay, which may make defending against the charges more difficult, is justified by the misconduct of the accused.

#### 4. Optional measures

328. The Convention seeks to encourage the application of the law, including possible discretionary prosecutorial powers, to the maximum extent possible in order to prevent and suppress the commission of these offences. In addition to legislative measures, for example, guidelines and training may be provided to prosecutors regarding when charges may be waived specifically in respect of offences related to organized crime. In this context it is relevant to note that States must encourage those who have participated in organized criminal groups to cooperate with and assist law enforcement authorities (article 26(1)) in order to pursue effective deterrence through prosecution and punishments. To provide an incentive for these participants to substantially cooperate with law enforcement, States parties are required to consider providing the possibility of mitigated punishment for such persons (article 26(2)) or of granting them immunity from prosecution (article 26(3)). Granting immunity from prosecution is an option that States may or may not be able to adopt, depending on their fundamental principles (article 26(3)).<sup>106</sup> It is important to note, however, that in jurisdictions where prosecution is in principle mandatory for all offences, such measures need additional legislation.

#### Additional references and resources

##### Organized Crime Convention

Article 2 (Use of terms)  
 Article 5 (Criminalization of participation in an organized criminal group)  
 Article 6 (Criminalization of the laundering of proceeds of crime)  
 Article 8 (Criminalization of corruption)  
 Article 10 (Liability of legal persons)  
 Article 12 (Confiscation and seizure)  
 Article 14 (Disposal of confiscated proceeds of crime or property)  
 Article 23 (Criminalization of obstruction of justice)  
 Article 26 (Measures to enhance cooperation with law enforcement authorities)

<sup>106</sup> See also section IV.E, below.

### **Protocols supplementing the Organized Crime Convention**

Trafficking in Persons Protocol, article 1, paragraph 3  
 Smuggling of Migrants Protocol, article 1, paragraph 3; and article 6, paragraph 3  
 Firearms Protocol, article 1, paragraph 3

### ***Model Legislative Provisions against Organized Crime***

Article 20 (Exercise of discretion to prosecute)  
 Article 21 (Leniency and immunity from prosecution)  
 Article 22 (Statute of limitation)

### **Additional United Nations resources**

Basic Principles on the Independence of the Judiciary (*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.2, annex.

Basic Principles on the Role of Lawyers (*Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August–7 September 1990: report prepared by the Secretariat* (United Nations publication, Sales No. E.91.IV.2), chap. I, sect. B.3, annex.

Guidelines on the Role of Prosecutors (*Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August–7 September 1990: report prepared by the Secretariat* (United Nations publication, Sales No. E.91.IV.2), chap. I, sect. C.26, annex.

Safeguards guaranteeing protection of the rights of those facing the death penalty (Economic and Social Council resolution 1984/50, annex).

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

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).

**Examples of national legislation**

Azerbaijan, Criminal Code, sect. II, art. 61

Barbados, Transnational Organized Crime (Prevention and Control) Act, Part IV, sects. 11 and 12

Finland, Criminal Code, chaps. 6 and 8

Germany, Criminal Code, chap.5, sect. 78

Iceland, Penal Code, chap. VIII, art. 70

Namibia, Prevention of Organised Crime Act, chap. 4, sects. 12-14

## **D. Identification, tracing, freezing or seizure of assets and confiscation of proceeds of crime**

### **Article 12 of the Organized Crime Convention – Confiscation and seizure**

1. 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.
2. States Parties shall adopt such measures as may be necessary to enable the identification, tracing, freezing or seizure of any item referred to in paragraph 1 of this article for the purpose of eventual confiscation.
3. If proceeds of crime have been transformed or converted, in part or in full, into other property, such property shall be liable to the measures referred to in this article instead of the proceeds.
4. If proceeds of crime have been intermingled with property acquired from legitimate sources, such property shall, without prejudice to any powers relating to freezing or seizure, be liable to confiscation up to the assessed value of the intermingled proceeds.
5. Income or other benefits derived from proceeds of crime, from property into which proceeds of crime have been transformed or converted or from property with which proceeds of crime have been intermingled shall also be liable to the measures referred to in this article, in the same manner and to the same extent as proceeds of crime.
6. For the purposes of this article and article 13 of this Convention, each State Party shall empower its courts or other competent authorities to order that bank, financial or commercial records be made available or be seized. States Parties shall not decline to act under the provisions of this paragraph on the ground of bank secrecy.
7. 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.
8. The provisions of this article shall not be construed to prejudice the rights of bona fide third parties.
9. Nothing contained in this article shall affect the principle that the measures to which it refers shall be defined and implemented in accordance with and subject to the provisions of the domestic law of a State Party.

### **Article 13 of the Organized Crime Convention – International cooperation for purposes of confiscation**

1. A State Party that has received a request from another State Party having jurisdiction over an offence covered by this Convention for confiscation of proceeds of crime, property, equipment or other instrumentalities referred to in article 12, paragraph 1, of this Convention situated in its territory shall, to the greatest extent possible within its domestic legal system:

(a) Submit the request to its competent authorities for the purpose of obtaining an order of confiscation and, if such an order is granted, give effect to it; or

(b) Submit to its competent authorities, with a view to giving effect to it to the extent requested, an order of confiscation issued by a court in the territory of the requesting State Party in accordance with article 12, paragraph 1, of this Convention insofar as it relates to proceeds of crime, property, equipment or other instrumentalities referred to in article 12, paragraph 1, situated in the territory of the requested State Party.

2. Following a request made by another State Party having jurisdiction over an offence covered by this Convention, the requested State Party shall take measures to identify, trace and freeze or seize proceeds of crime, property, equipment or other instrumentalities referred to in article 12, paragraph 1, of this Convention for the purpose of eventual confiscation to be ordered either by the requesting State Party or, pursuant to a request under paragraph 1 of this article, by the requested State Party.

3. The provisions of article 18 of this Convention are applicable, *mutatis mutandis*, to this article. In addition to the information specified in article 18, paragraph 15, requests made pursuant to this article shall contain:

(a) In the case of a request pertaining to paragraph 1 (a) of this article, a description of the property to be confiscated and a statement of the facts relied upon by the requesting State Party sufficient to enable the requested State Party to seek the order under its domestic law;

(b) In the case of a request pertaining to paragraph 1 (b) of this article, a legally admissible copy of an order of confiscation upon which the request is based issued by the requesting State Party, a statement of the facts and information as to the extent to which execution of the order is requested;

(c) In the case of a request pertaining to paragraph 2 of this article, a statement of the facts relied upon by the requesting State Party and a description of the actions requested.

4. The decisions or actions provided for in paragraphs 1 and 2 of this article shall be taken by the requested State Party in accordance with and subject to the provisions of its domestic law and its procedural rules or any bilateral or multilateral treaty, agreement or arrangement to which it may be bound in relation to the requesting State Party.

5. Each State Party shall furnish copies of its laws and regulations that give effect to this article and of any subsequent changes to such laws and regulations or a description thereof to the Secretary-General of the United Nations.

6. If a State Party elects to make the taking of the measures referred to in paragraphs 1 and 2 of this article conditional on the existence of a relevant treaty, that State Party shall consider this Convention the necessary and sufficient treaty basis.

7. Cooperation under this article may be refused by a State Party if the offence to which the request relates is not an offence covered by this Convention.

8. The provisions of this article shall not be construed to prejudice the rights of bona fide third parties.

9. States Parties shall consider concluding bilateral or multilateral treaties, agreements or arrangements to enhance the effectiveness of international cooperation undertaken pursuant to this article.

**Article 14 of the Organized Crime Convention**  
**– Disposal of confiscated proceeds of crime or property**

1. Proceeds of crime or property confiscated by a State Party pursuant to articles 12 or 13, paragraph 1, of this Convention shall be disposed of by that State Party in accordance with its domestic law and administrative procedures.
2. When acting on the request made by another State Party in accordance with article 13 of this 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 so that it can give compensation to the victims of the crime or return such proceeds of crime or property to their legitimate owners.
3. When acting on the request made by another State Party in accordance with articles 12 and 13 of this Convention, a State Party may give special consideration to concluding agreements or arrangements on:
  - (a) Contributing the value of such proceeds of crime or property or funds derived from the sale of such proceeds of crime or property or a part thereof to the account designated in accordance with article 30, paragraph 2 (c), of this Convention and to intergovernmental bodies specializing in the fight against organized crime;
  - (b) Sharing with other States Parties, on a regular or case-by-case basis, such proceeds of crime or property, or funds derived from the sale of such proceeds of crime or property, in accordance with its domestic law or administrative procedures.

## 1. Introduction

329. Criminalizing the conduct from which substantial illicit profits are made does not adequately punish or deter organized criminal groups. Even if arrested and convicted, some of these offenders will be able to enjoy their illegal gains for their personal use and for maintaining the operations of their criminal enterprises. Despite some sanctions, the perception would still remain that crime pays in such circumstances and that governments have been ineffective in removing the means for continued activities of criminal groups.
330. Practical measures to keep offenders from profiting from their crimes are necessary. One of the most important ways to do this is to ensure that States have strong confiscation regimes that provide for the identification, freezing, seizure and confiscation of illicitly acquired funds and property. Effective and efficient measures targeting the proceeds of crime can serve as a powerful deterrent and contribute significantly to the restoration of justice by removing the incentives for offenders to engage in illegal activities in the first place. Specific international cooperation mechanisms are also necessary to enable countries to give effect to foreign freezing and confiscation orders and to provide for the most appropriate use of confiscated proceeds and property.
331. Significant variation exists in the methods and approaches employed by different legal systems. Some opt for a property-based system, others for a value-based system, while

still others combine the two. The first one allows confiscation of property found to be proceeds or instrumentalities, that is, property used for the commission of crime. The second allows the determination of the value of proceeds and instrumentalities of crime and the confiscation of an equivalent value. Some States allow for value confiscation only under certain conditions (for example, the proceeds have been used, destroyed or hidden by the offender).

332. Other variations relate to the range of offences with respect to which confiscation can take place, the requirement of a prior conviction of the offender,<sup>107</sup> the required standard of proof (to the criminal or lower civil level),<sup>108</sup> the conditions under which third-party property is subject to confiscation and the power to confiscate the products or instrumentalities of crime.
333. The need for integration and the implementation of a more global approach is clear. To this end, the Convention devotes three articles to the issue.<sup>109</sup> Articles 12-14 cover domestic and international aspects of identifying, freezing and confiscating the proceeds and instrumentalities of crime.<sup>110</sup> The terms “property”, “proceeds of crime”, “freezing”, “seizure”, “confiscation” and “predicate offence” are defined in article 2 (d)–(h) as follows:
- (d) “Property” shall mean assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to, or interest in, such assets;
  - (e) “Proceeds of crime” shall mean any property derived from or obtained, directly or indirectly, through the commission of an offence;
  - (f) “Freezing” or “seizure” shall mean temporarily prohibiting the transfer, conversion, disposition or movement of property or temporarily assuming custody or control of property on the basis of an order issued by a court or other competent authority;
  - (g) “Confiscation”, which includes forfeiture where applicable, shall mean the permanent deprivation of property by order of a court or other competent authority;

<sup>107</sup> Some countries allow confiscation without conviction if the defendant has been a fugitive for a certain period of time and there is proof to the civil standard that the property is the proceeds or instrumentalities of crime. Other countries allow confiscation ordered through civil or administrative proceedings (see article 54(1)(c) of the Convention against Corruption).

<sup>108</sup> Some jurisdictions provide for a discretionary power to reverse the burden of proof, in which case the offenders have to demonstrate the legal source of the property.

<sup>109</sup> The purpose of the *Legislative Guide* is to assist national drafters by covering the basic procedures that need to be followed, rather than to explain in detail the complex issues involved, such as the administration of confiscated assets, how this is done, safeguards that would have to be introduced, etc. Most of this is part of a much broader discussion covering the issues of record-keeping, client-lawyer privileges and conditions under which records can be seized, reporting requirements, etc.

<sup>110</sup> Drafters in States intending to become party to the Firearms Protocol should note that this Protocol establishes additional principles for the confiscation of firearms and their destruction as the preferred method of disposal and should study article 6 of the Firearms Protocol and the legislative guide for the implementation of the Firearms Protocol.

- (h) “Predicate offence” shall mean any offence as a result of which proceeds have been generated that may become the subject of an offence as defined in Article 6 of this Convention.
334. Article 12 requires a State party to adopt measures, to the greatest extent possible within its legal system, to enable confiscation of proceeds, equivalent value of proceeds and instrumentalities of offences covered by the Convention. The expression “to the greatest extent possible within their domestic legal systems” is intended to reflect the variations in the way that different legal systems carry out the obligations imposed by this article. Nevertheless, countries are expected to have a broad ability to comply with the provisions of article 12. Article 12 also obligates each State party to adopt measures to enable the identification, tracing, freezing and seizing of items for the purpose of eventual confiscation. In addition, it obligates each State party to empower courts or other competent authorities to order production of bank records and other evidence for purposes of facilitating such identification, freezing and confiscation.
335. Article 13 then sets forth procedures for international cooperation in confiscation matters. These are important powers, as criminals frequently seek to hide proceeds and instrumentalities of crime in more than one jurisdiction, as well as evidence relating thereto, in order to thwart law enforcement efforts to locate and gain control over them. A State party that receives a request from another State party is required by article 13 to take particular measures to identify, trace and freeze or seize proceeds of crime for purposes of eventual confiscation. Article 13 also describes the manner in which such requests are to be drafted, submitted and executed. It is important to note that these are special procedures aimed at obtaining the proceeds of crime, as opposed to procedures that assist in the search for such proceeds as part of the evidence of crime (for example, warrants and powers of courts to exercise over property).
336. Article 14 addresses the final stage of the confiscation process: the disposal of confiscated assets. While disposal is to be carried out in accordance with domestic law, States parties are called upon to give priority to requests from other States parties for the return of such assets for use as compensation to crime victims or restoration to legitimate owners. States parties are also encouraged to consider concluding an agreement or arrangement whereby proceeds may be contributed to the United Nations to fund technical assistance activities under the Organized Crime Convention or shared with other States parties that have assisted in their confiscation.
337. Detailed provisions similar to those of the Organized Crime Convention can be found, inter alia, in article 5 of the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, in chapter V of the Convention against Corruption, and in the International Convention for the Suppression of the Financing of Terrorism. Implementing the provisions of the Organized Crime Convention would bring States closer to conformity with the other conventions.

338. In addition, the FATF recommendations on combating money-laundering and the financing of terrorism and proliferation provide guidance to countries on means of identifying, tracing, seizing and forfeiting the proceeds of crime and of freezing funds or other assets that are made available for the purpose of terrorist financing.
339. By way of comparison, chapter V of the Convention against Corruption contains a comprehensive set of provisions on asset recovery which establishes asset recovery as an autonomous and self-standing form of international cooperation in corruption-related cases. The return of assets pursuant to chapter V is seen as a “fundamental principle” and article 51 of the Convention requires States parties to afford one another the widest measure of cooperation and assistance in that regard. The Convention includes substantive provisions laying down specific measures and mechanisms for cooperation in the recovery of assets, while maintaining the flexibility that might be warranted by particular circumstances.

## **2. Summary of the main requirements**

### *(a) Confiscation and seizure (article 12)*

340. States parties must, to the greatest extent possible under their domestic systems, have the necessary legal framework to permit:
- (a) The confiscation of proceeds of crime derived from offences covered by the Convention or property the value of which corresponds to that of such proceeds (article 12(1)(a));
  - (b) The confiscation of property, equipment or other instrumentalities used in or destined for use in offences covered by the Convention (article 12(1)(b));
  - (c) The identification, tracing and freezing and/or seizure of the proceeds and instrumentalities of crime covered by the Convention, for the purpose of eventual confiscation (article 12(2));
  - (d) The application of confiscation powers to transformed or converted property and proceeds intermingled with legitimately obtained property (to the value of the proceeds in question) and to benefits or income derived from the proceeds (article 12(3)–(5));
  - (e) The power of courts or other competent authorities to order that bank, financial or commercial records be made available or be seized. Bank secrecy shall not be a legitimate reason for failure to comply (article 12(6)).

### *(b) International cooperation for purposes of confiscation (article 13)*

341. A State party, to the greatest extent possible under its system, is required:
- (a) Either to submit to its competent authorities another State party’s request for confiscation, for the purpose of obtaining an order of confiscation and giving

effect to it, or to submit to its competent authorities, with a view to giving effect to it, a confiscation order issued by another State party (article 13(1));

- (b) Upon request of another State party, to identify, trace and freeze or seize proceeds of crime, property, equipment or other instrumentalities relating to offences covered by the Convention for the purpose of eventual confiscation (article 13(2));
  - (c) To furnish copies of its laws and regulations that give effect to article 13 to the Secretary-General of the United Nations (article 13(5)).
342. Article 13(3)(a)–(c) also sets forth the types of information required for various types of requests.
343. States parties are also required to consider concluding bilateral or multilateral agreements to enhance the effectiveness of international cooperation in this area.

(c) *Disposal of confiscated proceeds of crime or property (article 14)*

344. To the extent permitted by its domestic law and if requested by a requesting State party under article 13, the confiscating State party shall give priority consideration to returning the proceeds or property to the requesting State so that it can give compensation to victims or return the proceeds or property to the legitimate owners (article 14(2)).

### 3. Mandatory requirements

(a) *Scope*

345. Articles 12–14 apply to all offences covered by the Convention. This includes the offences established in accordance with the Convention, serious crimes (article 2 (b)), and offences established in accordance with the Protocols to which States become parties.<sup>111</sup>
346. The primary legislative obligations to create powers that enable confiscation and seizure are set forth in article 12. Some additional requirements or legislative guidance may be drawn from article 13, which mainly covers international cooperation issues, and article 14, which deals with the disposal of property and other proceeds of crime.

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<sup>111</sup> Drafters who intend to ratify and implement the Firearms Protocol should note that that Protocol modifies the basic principles for tracing and disposal, as it takes into account the nature of firearms. Article 6 of the Firearms Protocol establishes additional principles for the confiscation of firearms and their destruction as the preferred method of disposal. The Protocol also defines “tracing” as it applies to firearms and contains a specific obligation to assist in tracing (articles 3(f) and 12(4)). To the extent that firearms are either proceeds of crime or instrumentalities, however, they would also be covered by articles 12–14 of the Convention (for example, in cases where States are parties to the Organized Crime Convention but not to the Firearms Protocol).

(b) *Proceeds or property subject to seizure or confiscation*  
(article 12(1), (3), (4), and (5))

347. The substantive obligation to enable confiscation and seizure is found in article 12(1), (3), (4) and (5), while procedural powers to trace, locate and gain access to assets are found in the remaining paragraphs. The substantive obligation here is to enable confiscation; it is not required that confiscation be mandatory in any particular case.
348. Article 12(1)(a) requires that States parties enable, to the greatest extent possible within their domestic legal systems, the confiscation of:
- (a) Proceeds of crime derived from offences covered by the 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 the Convention.
349. The *Travaux Préparatoires* indicate that the words “used in or destined for use in” are meant to signify an intention of such a nature that it may be viewed as tantamount to an attempt to commit a crime.<sup>112</sup>
350. Article 12(3) and (4) cover situations in which the source of proceeds or instrumentalities may not be immediately apparent, because the criminals have made their detection more difficult by mingling them with legitimate proceeds or converting them into other forms. These paragraphs require States parties to enable the confiscation of property into which such proceeds have been converted, as well as intermingled proceeds of crime up to their assessed value.
351. Article 12(5) further requires that States ensure that income or other benefits derived from investing proceeds of crime are also liable to confiscation. The *Travaux Préparatoires* indicate that the words “other benefits” are intended to encompass material benefits as well as legal rights and interests of an enforceable nature that are subject to confiscation.<sup>113</sup>

(c) *Obligations to adopt procedural powers (article 12(2) and (6))*

352. The investigative capability needed to implement articles 12–14 fully will depend to a large degree on non-legislative elements, such as ensuring that law enforcement agencies and prosecutors are properly trained and provided with adequate resources. In most cases, however, legislation will also be necessary to ensure that adequate powers exist to support the tracing and other investigative measures needed to locate and identify assets and link them to relevant crimes. Criminals who become aware that they are under investigation or charges will try to hide property and shield it from law enforcement actions. Without the ability to trace such property as offenders move it about, law enforcement efforts will be frustrated.

<sup>112</sup> *Travaux Préparatoires*, p. 115.

<sup>113</sup> *Ibid.*

353. The legislation required by article 12(2) and (6) involves:
- (a) Such measures as may be necessary to enable the identification, tracing, freezing or seizure of proceeds or other property (article 12(2));
  - (b) Powers for courts or other competent authorities to order that bank, financial or commercial records be made available or be seized (article 12(6)).
354. Article 12(6), sets forth procedural law requirements to facilitate the operation of the other provisions of the article. It requires States parties to ensure that bank records, financial records (such as those of other financial services companies) and commercial records (such as of real estate transactions or shipping lines, freight forwarders and insurers) are subject to compulsory production, for example through production orders and search and seizure or similar means that ensure their availability to law enforcement officials for purposes of carrying out the measures called for in article 12. The same paragraph establishes the principle that bank secrecy cannot be raised by States as an excuse for not implementing that paragraph. As will be seen, the *Organized Crime Convention* establishes the same rule with respect to mutual legal assistance matters (see article 18(8)).<sup>114</sup>
355. These measures are very similar to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and the Convention against Corruption. Thus, many States already have such measures in place by virtue of legislation implementing these treaties. States will need to review that legislation in order to ensure that it covers the broader range of crimes covered by the Organized Crime Convention . It should also be noted that the Convention against Corruption aims at overcoming challenges States have faced in international confiscation cases and therefore introduces new elements that go beyond previous treaties. It also provides more detail on how freezing or seizure should be sought and obtained for the purpose of confiscation (article 54(2)).<sup>115</sup>

(d) *Third parties (article 12(8))*

356. Article 12(8) requires that the seizure and forfeiture requirements be interpreted as not prejudicing the rights of bona fide third parties, which would, at a minimum, exclude those with no knowledge of the offence or connection with the offender(s).
357. The system of confiscation intentionally constitutes an interference with the economic interests of individuals. For this reason, particular care must be taken to ensure that the system developed by States parties maintains the rights of bona fide third parties who may have an interest in the property in question.
358. The *Travaux Préparatoires* indicate that the interpretation of article 12 should take into account the principle in international law that property belonging to a foreign State and used for non-commercial purposes may not be confiscated except with the

<sup>114</sup> See also section V.B, below.

<sup>115</sup> See also *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, para. 733.

consent of the foreign State.<sup>116</sup> The *Travaux Préparatoires* go on to indicate that it is not the intention of the Convention to restrict the rules that apply to diplomatic or State immunity, including that of international organizations.

(e) *International cooperation requirements (article 13)*

359. Article 13 sets forth various mechanisms to enhance international cooperation with respect to confiscation. As stated above, criminals frequently seek to hide proceeds and instrumentalities of crime abroad. Thus, such mechanisms are necessary to ensure that criminals do not take advantage of national borders and differences in legal systems in order to retain their illegal profits, which may enable them to maintain the viability of their criminal enterprise, even if they are prosecuted and convicted.
360. Article 13(1) requires States parties that receive a request for confiscation from another State party to take one of two actions, to the greatest extent possible within their domestic legal systems. The requested State party must either directly submit for enforcement by its competent authorities an order issued by the requesting State party (article 13(1)(b)), or submit the request to its competent authorities in order to obtain a domestic order of confiscation, to which the requested State party would be required to give effect if granted (article 13(1)(a)).
361. The Convention provides the two alternatives in order to allow flexibility in the way States must give effect to requests for confiscation. For example, some States use a system of confiscation by which specific property is traced as derived from or used to commit an offence. Other States use a value-based system by which the value of the proceeds or instrumentalities is calculated and property up to such value is then confiscated. Problems may arise when a request from a State with one system is directed at a State using the other, unless the domestic law of the requested party has been framed in a sufficiently flexible manner.
362. Article 13(2) requires that the application of the judicial and investigative powers established under article 12 be extended to cases initiated on the basis of a request from another State party. Upon a request made by another State party having jurisdiction over an offence established in accordance with the Convention, the requested State party is required to take measures to identify, trace, and freeze or seize proceeds of crime, property, equipment or other instrumentalities referred to in article 12(1) of the Convention for the purpose of eventual confiscation to be ordered either by the requesting State party or, pursuant to a request under article 13(1), by the requested State party.
363. The *Travaux Préparatoires* indicate that the references in article 13 to article 12(1) should be understood to include reference to article 12(3)–(5),<sup>117</sup> (which apply when proceeds of crime have been converted into other property or intermingled with funds

<sup>116</sup> *Travaux Préparatoires*, p. 115.

<sup>117</sup> *Travaux Préparatoires*, p. 123.

- derived from lawful activity). Subject to domestic law and applicable treaties, States are required to take action when requested by another State party.
364. For that purpose, article 13(3) provides that the provisions of article 18 of the Organized Crime Convention (on mutual legal assistance) are applicable to produce the evidence and information necessary to justify identification, tracing, freezing or seizing and confiscation pursuant to article 13 and sets forth the contents of requests for such assistance. Under article 13(7), no obligation to cooperate, however, arises if the offence for which assistance is sought is not an offence covered by the Convention.
  365. Moreover, as in article 12(8), the international cooperation measures set forth in the article should not be construed to prejudice the rights of bona fide third parties.
  366. Legislators should ensure that the admissibility of the various documents listed in article 13(3) will not be an issue when they are filed by another State in support of requests for tracing, seizure or confiscation.
  367. Further, judicial authorities should be given the power to recognize the findings, judgments or orders of a foreign court regarding the essential elements leading to seizure and confiscation, including any finding that a crime was planned or has been committed, findings of fact respecting links between the proceeds or property and any relevant crimes and offenders or alleged offenders and orders respecting investigative powers, seizure and confiscation.
  368. The requirements of article 13 are also subject to the provisions of any other bilateral or multilateral treaties that apply to the States parties involved.
  369. The Convention states that the procedure and standards for arriving at the ultimate decision on a request for cooperation pursuant to article 13(1) or (2) is subject to, and in accordance with, the domestic law of the requested State or any relevant treaty or convention to which both the requested and requesting States are party (article 13(4)). Drafters need to review such instruments and any existing implementing legislation with a view to avoiding inconsistencies and ensuring that any current procedures that are more expeditious or extensive than those required by article 13 are not adversely affected by new legislative amendments.
  370. Again, these measures are very similar to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and the Convention against Corruption. States parties will need to review their legal framework to determine whether it requires amendment to apply to the broad class of crime covered by the Organized Crime Convention and whether it is flexible enough to enable assistance to be provided to States parties using a different system of confiscation than they currently have in place.
  371. Each State party must furnish copies of its laws and regulations that give effect to article 13 to the Secretary-General of the United Nations (article 13(5)). These materials should be provided to the United Nations Office on Drugs and Crime.

#### 4. Other measures, including optional issues

##### (a) *Burden of proof*

372. In creating the judicial powers to order seizure and forfeiture, national drafters should consider issues relating to the applicable burden of proof. In some systems, confiscation is treated as a civil matter, with the attendant “balance of probabilities” standard. In others, confiscation is considered a criminal punishment, for which the higher “beyond a reasonable doubt” standard should be applied and may in some cases be required by constitutional or other human rights standards.
373. To some extent, this may depend on whether there have already been one or more convictions in related criminal prosecutions. Since these entail a judicial finding that the crime was committed based on the higher criminal standard of proof, the lower civil standard may then apply in subsequent confiscation proceedings on the question of whether the property involved was derived from, used in, or destined for use in the committed offence.
374. Article 12(7) permits shifting the burden of proof to the defendant to show that alleged proceeds of crime were actually from legitimate sources (reverse burden of proof). Because countries may have constitutional or other constraints on such shifting of the burden of proof, countries are only required to consider implementing this measure to the extent that it is consistent with their domestic law.
375. Similarly, legislators may wish to consider adopting the related practice in some legal systems of not requiring a criminal conviction as a prerequisite to obtaining an order of confiscation, but providing for confiscation based on a lesser burden of proof to be applied in proceedings.

##### (b) *Accommodation of diverse systems*

376. Article 12(9) recognizes that, because of wide variations in domestic legal systems, States parties are not bound to implement the provisions of article 12 by following any particular formula (such as by adopting the precise wording of the article), but have the flexibility to carry out their obligations in a manner consistent with their domestic legal framework.

##### (c) *Additional treaties*

377. Article 13(9) encourages States parties to consider concluding treaties, agreements or arrangements to enhance the effectiveness of international cooperation.

##### (d) *Disposal of confiscated proceeds or property (Article 14)*

378. Article 14 governs the disposal of confiscated proceeds and property, but does not impose any mandatory requirements. Generally, as noted in article 14(1) disposal is governed by domestic law and administrative procedures. However, article 14(2) and (3) call for the consideration of specific disposal options. The disposal regime under

article 14 builds on that set out in the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988.<sup>118</sup>

379. Article 14(2) requires that, where permitted by domestic law, priority consideration should be given to returning proceeds or property to a requesting State for compensation of, or return to, victims. For most confiscation systems, a key objective is to restore to victims property taken from them by criminals and it is extremely useful to provide for a procedure under domestic law to enable sharing of confiscated assets with domestic and foreign victims.<sup>119</sup>
380. Article 14(3)(a) calls for giving special consideration to contributing proceeds or property to the United Nations Crime Prevention and Criminal Justice Fund for use against organized crime (see also article 30(2)(c) and General Assembly resolution 55/25, para. 9).
381. Article 14(3)(b) calls for giving special consideration to sharing confiscated funds with other States parties on a regular or case-by-case basis. The *Travaux Préparatoires* indicate that, when feasible, States parties would examine whether it would be appropriate, in conformity with individual guarantees embodied in their domestic law, to use confiscated assets to cover the cost of assistance provided pursuant to article 14(2).<sup>120</sup>
382. Asset sharing is a powerful, yet underutilized weapon against organized crime. It can encourage enhanced cooperation among law enforcement authorities with respect to locating, freezing and confiscating proceeds of crime, as the foreign authorities that provide assistance leading to the confiscation may receive a portion of the funds for official use in their further crime fighting efforts. Agreements among a number of States already provide for such mutually beneficial disposition of confiscated assets and countries are encouraged to provide for this mechanism. States may be able to utilize the example mechanism set out in the Model Bilateral Agreement on the Sharing of Confiscated Proceeds of Crime or Property covered by the 1988 Convention.<sup>121</sup>
383. In some countries, such provisions may involve legislative amendments or international agreements making these options available and creating procedures whereby they can be considered in appropriate cases.

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<sup>118</sup> States parties should be aware, however, that the system of disposal and return established by article 57 of the Convention against Corruption departs fundamentally from that of article 14 of the Organized Crime Convention .

<sup>119</sup> See also section IV.E, below.

<sup>120</sup> *Travaux Préparatoires*, p. 128.

<sup>121</sup> Economic and Social Council resolution 2005/14, annex.

### Additional references and resources

#### Organized Crime Convention

Article 2 (Use of terms)  
 Article 6 (Criminalization of the laundering of proceeds of crime)  
 Article 18 (Mutual legal assistance)  
 Article 24 (Protection of witnesses)  
 Article 25 (Assistance to and protection of victims)  
 Article 34 (Implementation of the Convention)

#### Protocols supplementing the Convention against Transnational Organized Crime

Trafficking in Persons Protocol (article 1, paragraph 3)  
 Smuggling of Migrants Protocol (article 1, paragraph 3)  
 Firearms Protocol (article 1, paragraph 3)

#### Additional United Nations resources

*Manual on International Cooperation for the Purposes of Confiscation of Proceeds of Crime*, prepared by UNODC (2012).

Model Bilateral Agreement on the Sharing of Confiscated Proceeds of Crime or Property (Economic and Social Council resolution 2005/14, annex).

*Model Legislation on Money Laundering and Financing of Terrorism* (for civil law jurisdictions), prepared by UNODC and the International Monetary Fund (2005), chap. III

*Model Provisions on Money Laundering, Terrorist Financing, Preventive Measures and Proceeds of Crime (for Common Law Legal Systems)*, prepared by UNODC, the Commonwealth Secretariat and the International Monetary Fund (2009)

#### Examples of national legislation

Albania, Criminal Code, art. 36  
 Algeria, Penal Code, art. 93  
 Australia, Proceeds of Crime Act 1991  
 Austria, Confiscation, Forfeiture and other relevant texts, including article 20 (a)-(c) of the Penal Code, articles 1441 and 445 of the Code of Criminal Procedure and articles 50 and 64 of the Extradition and Mutual Legal Assistance Law

Botswana, Proceeds of Serious Crime Act 1990

Germany, Criminal Code, Title Seven, sects. 73 - 74f

New Zealand, Proceeds of Crime Act 1991

Poland, Criminal Code, Chapter V, arts. 44, 45 and 52

United States, 18 U.S.C. §§981 through 986; 28 U.S.C. §§2461 through 2467

## **E. Protection of witnesses and victims**

### **Article 24 of the Organized Crime Convention**

#### **– Protection of witnesses**

1. 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.
2. The measures envisaged in paragraph 1 of this article may include, inter alia, without prejudice to the rights of the defendant, including the right to due process:
  - (a) Establishing procedures for the physical protection of such persons, such as, to the extent necessary and feasible, relocating them and permitting, where appropriate, non-disclosure or limitations on the disclosure of information concerning the identity and whereabouts of such persons;
  - (b) Providing evidentiary rules to permit witness testimony to be given in a manner that ensures the safety of the witness, such as permitting testimony to be given through the use of communications technology such as video links or other adequate means.
3. States Parties shall consider entering into agreements or arrangements with other States for the relocation of persons referred to in paragraph 1 of this article.
4. The provisions of this article shall also apply to victims insofar as they are witnesses.

### **Article 25 of the Organized Crime Convention**

#### **– Assistance to and protection of victims**

1. 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.
2. Each State Party shall establish appropriate procedures to provide access to compensation and restitution for victims of offences covered by this Convention.
3. 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.

### **Article 26 of the Organized Crime Convention**

#### **– Measures to enhance cooperation with law enforcement authorities**

1. Each State Party shall take appropriate measures to encourage persons who participate or who have participated in organized criminal groups:
  - (a) To supply information useful to competent authorities for investigative and evidentiary purposes on such matters as:
    - (i) The identity, nature, composition, structure, location or activities of organized criminal groups;

- (ii) Links, including international links, with other organized criminal groups;
  - (iii) Offences that organized criminal groups have committed or may commit;
  - (b) To provide factual, concrete help to competent authorities that may contribute to depriving organized criminal groups of their resources or of the proceeds of crime.
2. Each State Party shall consider providing for the possibility, in appropriate cases, of mitigating punishment of an accused person who provides substantial cooperation in the investigation or prosecution of an offence covered by this Convention.
  3. Each State Party shall consider providing for the possibility, in accordance with fundamental principles of its domestic law, of granting immunity from prosecution to a person who provides substantial cooperation in the investigation or prosecution of an offence covered by this Convention.
  4. Protection of such persons shall be as provided for in article 24 of this Convention.
  5. Where a person referred to in paragraph 1 of this article located in one State Party can provide substantial cooperation to the competent authorities of another State Party, the States Parties concerned may consider entering into agreements or arrangements, in accordance with their domestic law, concerning the potential provision by the other State Party of the treatment set forth in paragraphs 2 and 3 of this article.

## **1. Introduction**

384. The ability to provide effective protection of witnesses as well as assistance to and protection of victims is critically important for ensuring successful investigation and prosecution of offences covered by the Convention. Articles 24 and 25 of the Convention deal with measures relating to victim assistance and the protection of victim and witnesses. Furthermore, article 26 provides for measures to encourage the cooperation of persons who have participated in an organized criminal group but decide to substantially cooperate with authorities for the investigation or prosecution of such criminal group, so called collaborators of justice. Such measures include forms of leniency or immunity from prosecution, as well as measures to protect such persons.

### *(a) Protection of witnesses*

385. The ability to provide effective protection to witnesses at the investigation stage, throughout the criminal proceedings and, in some cases, beyond the proceedings is critically important for ensuring successful investigation and prosecution of offences covered by the Convention. Witnesses are likely to encounter risk as a consequence of their involvement with the investigation and prosecution of organized criminal groups. Such groups often have the means and the incentive to resort to intimidation or retaliation against witnesses in defence of their financial and other interests and with the purpose of disrupting criminal proceedings targeting them. Therefore, criminal justice system actors need to have appropriate resources and methods at their disposal to counter such threats and risks effectively.

386. Article 24 requires that States take appropriate measures within their means to provide

effective protection from potential retaliation or intimidation for witnesses in criminal proceedings who give testimony concerning offences covered by the Convention, and, as appropriate, for their relatives and other persons close to them. In some cases the officials (investigators, prosecutors and judges) involved with the case may come under threat and require protection. As noted in article 24(2)(a), protection measures may include, for instance, measures for physical protection, relocation and non-disclosure or limitation on the disclosure of information concerning the identity or whereabouts of such persons and providing evidentiary rules to permit witness testimony to be given in a manner that ensures their safety, such as, permitting the use of communications technology and video links or other adequate means.

387. The Convention gives States parties discretion to determine what is meant by “effective protection”. Furthermore, the provision of appropriate (protection) measures will depend on the means States parties have at their disposal. In this regard States parties, when deciding how to organize the provision of effective protection of witnesses as required under the Convention, may wish to consider the latest developments in the field of protection of witnesses both in national jurisdictions and internationally. These developments emphasize the importance of incorporating witness protection considerations into the investigative planning and activities at the earliest stage possible; the specific sensitivity, expertise and training of relevant criminal justice system actors relating to vulnerable victim-witnesses; the establishment of a covert witness protection programme; proportionality of protection measures to the identified threats as established by a threat assessment; expanding protection to cover not only physical safety but also protection of psychological well-being, privacy and dignity; the inclusion of a range of procedural protection measures in the criminal procedure or evidentiary rules; the application these measures in a coherent and complimentary manner; and the consent of the witness.
388. Any witness protection measure taken should be based on formalized threat assessment and be proportionate to the evaluated risk. Such a threat assessment should evaluate the threats and risks rising from a particular investigation to victims and witnesses. Moreover, it should be emphasized that to safeguard the human rights of victims and witnesses, protection measures should be taken only with the consent of the person. At the same time, protection measures are difficult to apply if the witness does not cooperate with authorities and may endanger him/herself as well as others.
389. Considering the closed nature of many organized criminal groups and the secretive character of their activities, insider information can be a very powerful tool and valuable source in the process of investigating and prosecuting criminal offences. The ability to provide effective protection to such insider witnesses who agree to provide substantial cooperation is critically important for ensuring their cooperation.
390. These collaborating witnesses (or “collaborators of justice”) are special witnesses, as they may be subject to prosecution themselves as a result of their direct or indirect participation in an organized criminal group. Some States with formal witness protection programmes promote the cooperation of such witnesses who would be

eligible for a witness protection programme through the granting of immunity from prosecution or comparative lenience, under certain conditions, which vary from State to State. Such witnesses, who may be at a very high risk, are often admitted to a witness protection programme and serve their sentences under special penitentiary regimes, where appropriate.

391. The Organized Crime Convention requires that States take measures to encourage such cooperation in accordance with their fundamental legal principles. The specific steps to be taken are left to the discretion of States, which are required to consider providing for the possibility of adopting immunity or leniency provisions.
392. With regard to victim-witnesses, it is important to emphasize the need to apply support, assistance as well as protection measures in a coherent and complementary manner. The aim is to create conditions where witnesses are able to participate in the process, whether by giving statements or testimony, in safe conditions despite the type of crime, level of threat, individual circumstances or vulnerabilities that otherwise could prevent the person from providing a truthful, accurate and complete statement and testimony.
393. Victim assistance and support measures and effective witness protection measures represent different aspects of a holistic and modern approach to witness protection. Witness assistance and support measures aim at creating conditions where a witness feels safe and reassured to provide a truthful, accurate and complete statement. These measures may be as simple as providing an accurate explanation and ample advance notice of the proceedings, an accompanying support person for the interview or in the court house, an escort to the courtroom, other general emotional or psychosocial support or addressing other practical concerns the witness might have in relation to testimony. In addition to these measures, it should be noted that the transfer of proceedings, pursuant to article 21 of the Organized Crime Convention can have a potentially beneficial impact in terms of witness protection.<sup>122</sup>
394. Operational police protection measures are aimed at enhancing the physical protection of the witness without placing the person in a protection programme. These measures, along with good investigative practices, which aim at limiting the witness's exposure to potential threats, provide the basis of all other protection measures. Such measures could include temporary relocation or placement in a safe house, close protection arrangements, area or location surveillance, increased patrolling, static postings of officers, increasing the security of the residence of the witness, installation of alarm systems and a specific pre-designed protocol to activate an armed response capacity to a witness emergency.
395. Good investigative practices, which aim at limiting the exposure of witnesses to potential threats, should take into account the recommendations of the threat assessment and be amended, where appropriate. They include keeping investigations confidential, minimizing the exposure and contact that victims and witnesses have

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<sup>122</sup> See also section V.C, below.

with investigators, ensuring that all information about a suspect's criminal background, alleged ties with organized criminal groups and acts of intimidation or threats made against witnesses, are made known to prosecutors and judges.

396. Procedural protections refer to measures granted by the authority conducting the proceedings which permit witnesses to testify free of intimidation and fear. These measures can be applied in cases where vulnerable victim-witnesses or witnesses who are at risk, are required to testify. Procedural protection measures are aimed at both protecting witnesses and preventing their re-victimization by limiting their exposure to the public or the media, the accused or threats during the trial. Procedural measures may include closing the court; giving evidence from behind a screen or other barrier; giving evidence via video link or other remote means; non-disclosure of identity; use of voice distortion and facial disguise; judicial discretion to review and edit written materials, deciding what does not have to be disclosed and can be edited out; attendance of support persons; and sealing records of the trial. The application of such measures may require enacting or amendments to evidentiary rules.
397. Where the threat to witnesses is too significant to keep them safe merely by means of operational and procedural measures, a formal witness protection programme may be required to ensure the safety of witnesses. Witness protection programmes are covert programmes, subject to strict admission criteria, that provide for the relocation and possibly change of identity of witnesses whose lives are at great risk because of their cooperation with law enforcement authorities.
398. Witness protection programmes are very complex undertakings, designated for cases where extraordinary measures are necessary in order to guarantee the witness's safety. Considering the impact on the lives of the protected persons, relocation and identity change should be measures of last resort only. Further issues to take into consideration are the consistency of the programmes with government structures and functions and the principle of separation from investigative agencies, operational autonomy from the police, international cooperation and confidentiality of operations.

*(b) Protection of victims*

399. For justice to be served, special attention should be paid also to the victims of crime. Their protection is particularly important given the substantial harm they suffer from transnational organized crime. Article 24(4) also notes that witness protection measures shall also apply to victims insofar as they are witnesses.
400. The Organized Crime Convention further recognizes the importance of alleviating the impact of transnational organized crime on vulnerable individuals and groups and requires States to take measures to protect victims and witnesses against retaliation or intimidation and to ensure that they introduce procedures for compensation and restitution. In addition, States will have to consider the perspective of victims, in accordance with domestic legal principles and consistent with the rights of defendants.

Furthermore, it should be noted that the transfer of criminal proceedings (article 21) could be beneficial in the protection of victims.<sup>123</sup>

401. Moreover, two of the Protocols supplementing the Organized Crime Convention are especially relevant to the protection of victims. The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, provides for the criminalization and prevention of trafficking in Persons (article 5), as well as assistance for and protection and repatriation of victims (articles 6, 8 and 9(1)). The Protocol against the Smuggling of Migrants by Land, Sea and Air also seeks to protect migrants and the rights of refugees (articles 16 and 19).

## 2. Summary of the main requirements

### (a) *Protection of witnesses and victims (articles 24 and 25)*

402. Bearing in mind that some victims may also be witnesses, States are required to:
- (a) Provide effective protection for witnesses, within available means. This may include:
    - (i) Physical protection;
    - (ii) Domestic or foreign relocation;
    - (iii) Special arrangements for giving evidence;
  - (b) Establish appropriate procedures to provide access to compensation and restitution for victims of offences covered by the Convention;
  - (c) Provide opportunities for victims to present views and concerns at an appropriate stage of criminal proceedings, subject to domestic law;
  - (d) Consider relocation agreements.
- (b) *Measures to enhance cooperation with law enforcement authorities*  
(Article 26)

403. Under article 26, States must:
- (a) Take appropriate measures to encourage persons who participate or who have participated in organized criminal groups:
    - (i) To supply information for investigative and evidentiary purposes;
    - (ii) To provide factual, concrete assistance in depriving organized criminal groups of their resources or of the proceeds of crime;
  - (b) Consider providing for the possibility of mitigating punishment of an accused person who provides substantial cooperation;

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<sup>123</sup> See also section V.C, below.

- (c) Consider providing for the possibility of granting immunity from prosecution to a person who provides substantial cooperation (this may require legislation in systems not providing prosecutorial discretion).

### **3. Mandatory requirements**

404. The Organized Crime Convention recognizes the importance of protecting victims and witnesses, both as an end in itself and as a means necessary to ensure the willingness of witnesses to cooperate in reporting crime and providing the evidence needed to prosecute and convict offenders.

#### *(a) Protection of witnesses*

405. 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 the Organized Crime Convention, as appropriate, for their relatives and other persons close to them. These measures may include:

- (a) Establishing procedures for the physical protection of such persons, such as relocating them and permitting limitations on the disclosure of information concerning their identity and whereabouts;
- (b) Providing evidentiary rules, when consistent with a fair trial, to permit witness testimony to be given in a manner that ensures the safety of the witness, such as allowing witnesses to testify outside of the court room by closed-circuit television, or inside the courtroom but behind a screen; allowing witnesses to testify with a pseudonym; allowing the Court to appoint a lawyer to cross-examine the witness in certain circumstances; the imposition of publication bans; and, excluding some or all members of the public from the courtroom.

406. These requirements are mandatory, but the obligation to provide effective protection for witnesses is limited to criminal proceedings relating to offences covered by the Convention where, in the view of the implementing State party, such means are appropriate and within the means of the State party. Logically, it follows that such protection should be based on the assessment of the threat and risks in each case and to extend protection only where justified by that assessment. The obligation to provide protection is constrained by available resources and the technical capabilities of the State party concerned. This practical constraint is recognized in the drafting of the Convention in the words “within its means”.

#### *(b) Scope of protection and meaning of the term “witness”*

407. The term “witness” is not defined in article 2 of the Convention. However, article 24 specifies that a witness is somebody who gives testimony in criminal proceedings

concerning offences covered by the Convention. Commonly, the term witness is used for persons who give evidence by oath or signature, or who make sworn oral testimony. Article 24 limits the scope of protection to witnesses in criminal proceedings who give testimony concerning offences covered by the Convention, and, as appropriate, for their relatives or other persons close to them. No definition is provided to “other persons close to them” but in the context of witness protection close associates are normally family members or other persons in a close personal or professional relationship who may be at risk as a consequence of the witness’s cooperation with authorities.

408. Interpreted narrowly, the obligation to protect would only apply where testimony is actually given, or when it is apparent that testimony will be given, although the requirement to protect witnesses from potential retaliation may lead to a broader interpretation.
409. The experience of States that have witness protection programmes suggests that a broader approach to implementing this requirement will be needed to guarantee sufficient protection to ensure that witnesses are willing to cooperate with investigations and prosecutions. Legislators may therefore wish to make provisions applicable to any person who has or may have information that is or may be relevant to the investigation or prosecution of an offence covered by the Convention, whether this is produced as evidence or not, and is at risk as a consequence.
410. It should be noted also that this obligation is extended to include the protection of persons who participate or have participated in the activities of an organized criminal group and who then cooperate with or assist law enforcement, whether or not they are witnesses (article 26(4)).
411. Furthermore, legislators should also wish to take into consideration the additional requirements of the United Nations Convention against Corruption in regards to witness protection. Under articles 32 of the Convention against Corruption, and bearing in mind that some victims may also be witnesses (article 32(4)), States parties are required (article 32(1)) to provide effective protection for witnesses, within available means, which may include (article 32(2)) physical protection, domestic or foreign relocation, and special arrangements for giving evidence, (article 32(3)) to consider entering into foreign relocation agreements, and (article 32(5)) to provide opportunities for victims to present views and concerns at an appropriate stage of criminal proceedings, subject to domestic law.

(c) *Constitutional limits: confrontation and disclosure*

412. Depending on the constitutional or other legal requirements of each State party, two significant constraints may exist on what may be done to implement article 24. Both involve the basic rights of persons accused of crimes and, accordingly, article 24(2) provides that the measures implemented should be without prejudice to the rights of the defendant. For example, in some States, the giving of evidence without the

physical presence of the witness or the non-disclosure of identity have to be reconciled with constitutional or other rules allowing the accused the right to confront his or her accuser as well as the principle that court proceedings be open to public. Another example would be that in some States constitutional or other basic legal requirements include the requirement that either all information possessed by prosecutors, or all such information which may be exculpatory to the accused, must be disclosed in order to enable an adequate defence to the charges. This may include personal information or the identities of witnesses to permit proper cross-examination.

413. In cases where these interests conflict with measures taken to protect the identity or other information about a witness for safety reasons, the courts may be called upon to fashion solutions specific to each case that meet basic requirements regarding the rights of the accused while not creating a substantial risk of disclosing information to identify sensitive investigative sources or endanger witnesses or informants. Legislation establishing and circumscribing judicial discretion in such cases could be considered.
414. Central elements of witness protection are related to and aim to prevent the adverse impact of the offence of obstructing justice in article 23 of the Convention, which includes the application of threats, force and intimidation against witnesses.<sup>124</sup>

*(d) Assistance to and protection of victims*

415. Article 25(1) requires States to take appropriate measures within their means to provide assistance and protection to victims of offences covered by the Organized Crime, Convention, in particular in cases of threat of retaliation or intimidation. It should again be noted that the expression “within its means” represents a recognition of the material costs associated with protecting victims and the technical knowledge that is required.
416. Generally, the requirements for the protection of victims will be included within legislation providing protection for witnesses. Article 24(4) requires States parties to ensure that those protections will extend to all victims who are also witnesses but, to meet the requirements of article 25, legislators must either extend them to victims who are not witnesses, or adopt parallel provisions for victims and witnesses. Both article 24 and article 25 make specific reference to potential cases of retaliation or intimidation.
417. In addition to protection requirements, article 25 also requires measures to assist victims.<sup>125</sup> These measures should be complemented and enlarged by the relevant provisions of international human rights law that focus on the protection of victims — as opposed to the prosecutorial aspects of criminal proceedings. Similarly, due

<sup>124</sup> See section III.E, above.

<sup>125</sup> See also articles 6–8 of the Trafficking in Persons Protocol, which contains additional requirements for victims of trafficking.

attention should be paid to the fact that victims are entitled to protection against any act that may violate their dignity and human rights.

418. Articles 24 and 25 of the Convention address specific practical actions that States could undertake vis-à-vis the fulfilment of the right to justice, which implies that any victim can assert his or her rights and receive a fair and effective remedy, including the expectation that the person or persons responsible will be held accountable by judicial means. This right also entails the obligation on the part of the State to investigate violations, to arrest and to prosecute the perpetrators and, if their guilt is established, to punish them.<sup>126</sup>

(e) *Compensation or restitution*

419. Article 25(2) requires that at least some appropriate procedures are established to provide access to compensation or restitution. This does not require that victims are guaranteed compensation or restitution, but legislative or other measures must provide procedures whereby it can be sought or claimed.<sup>127</sup>

420. In most cases, legislation will be needed to create the necessary procedures, if they do not already exist. Generally, States have developed one or more of the following three possibilities for obtaining compensation or restitution:

- (a) Provisions allowing victims to sue offenders or others under statutory or common law torts for civil damages;
- (b) Provisions allowing criminal courts to award criminal damages, or to impose orders for compensation or restitution against persons convicted of offences;
- (c) Provisions establishing dedicated funds or schemes whereby victims can claim compensation from the State for injuries or damages suffered as the result of a criminal offence.

421. The right of victims to compensation or remedy is enshrined in several international human rights treaties.<sup>128</sup> In many States, more than one of these options may already exist. The status of existing schemes would not be affected, although amendments may be necessary to ensure that all offences covered by the Convention and its Protocols may form the basis of a claim under at least one option.

422. Countries that have none of these options available are required to establish at least one and are free to adopt more than one option.

<sup>126</sup> See also the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (General Assembly resolution 40/34, annex).

<sup>127</sup> Article 6(6) of the Trafficking in Persons Protocol, which was drafted later than the Organized Crime Convention, is clearer, referring to measures that offer victims of trafficking in persons the possibility of obtaining compensation.

<sup>128</sup> See article 2 of the International Covenant on Civil and Political Rights, article 6 of the International Convention for the Protection of All Persons from Enforced Disappearance, article 14 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment, article 39 of the Convention on the Rights of the Child, and article 8 of the Universal Declaration of Human Rights.

(f) *Victim participation in criminal proceedings*

423. Article 25(3) requires that victims are to be given an opportunity to express views and concerns at appropriate stages of criminal proceedings. In States where such opportunities do not already exist, amendments to laws governing trial procedures may be necessary. Such legislation should take the following factors into consideration:
- (a) The obligation only extends to victims of offences covered by the Convention, which includes the four offences established in accordance with the Convention, the additional offences established in accordance with the Protocols, and serious crimes as defined by article 2(b), provided that these are transnational in nature and involve an organized criminal group (article 3);
  - (b) Whether a person who sought to make his or her views or concerns known was a victim of such an offence or not would normally be a question of fact for the court hearing the case or conducting the proceedings to decide. If a victim is to be given the opportunity to appear prior to the final determination of the court as to whether the offence actually occurred and the person accused is convicted of that offence, legislation should allow the court to permit the participation based on the claims of the victim, but without prejudice to the eventual outcome in the case. If the victim is only permitted to appear in the event that the accused is convicted and prior to or after a sentence is imposed, this issue does not arise;
  - (c) Legislation should both allow for some form of expression on the part of the victim and require that it actually be considered by the court;
  - (d) The obligation is to allow concerns to be presented, which could include either written submissions or oral statements, within the procedural rules of the State party concerned;
  - (e) The obligation is to allow participation at appropriate stages and in a manner not prejudicial to the rights of the defence. In some jurisdictions, this may require precautions to ensure that victims do not disclose information that has been excluded as evidence because defence rights had been infringed, or which is so prejudicial as to infringe the basic right to a fair trial. For those reasons, many States that allow victims to appear (other than as witnesses) consider that the only appropriate stage to do so is following a conviction. If the accused is convicted, however, information relating to the impact of the crime on the victim can be relevant to sentencing.
424. The *Travaux Préparatoires* indicate that while the purpose of article 25 is 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.<sup>129</sup>

(g) *Cooperation between persons involved in organized crime and law enforcement*

425. According to article 26, each State party shall take appropriate measures to encourage persons who participate or who have participated in organized criminal groups:
- (a) To supply information useful to competent authorities for investigative and evidentiary purposes on a variety of matters;
  - (b) To provide factual, concrete help to competent authorities that may contribute to depriving organized criminal groups of their resources or of the proceeds of crime.
426. Depending on the legal system, this may require legislative amendments. States parties are required to take appropriate measures, but the substance of such measures is left to national drafters.<sup>130</sup>
427. The ability to provide effective protection to persons who are or have been members of an organized criminal group and who wish to cooperate with law enforcement authorities is critical. Provision of such protection is unlikely to be possible without a witness protection programme.

#### 4. Optional measures, including optional issues

(a) *Evidentiary law measures to protect the identity witnesses*

428. Subject to domestic legal principles and the rights of the defence, article 24(2) allows the adoption of measures such as:
- (a) Establishing procedures for the physical protection of such persons, such as, to the extent necessary and feasible, relocating them and permitting, where appropriate, non-disclosure or limitations on the disclosure of information concerning the identity and whereabouts of such persons;
  - (b) Providing evidentiary rules to permit witness testimony to be given through the use of communications technology such as videoconferencing or other means, such as use of disguises, masks, screens, etc.

(b) *Witness protection regimes*

429. Article 24(3) encourages, but does not require, States parties to enter into agreements or arrangements to relocate to other countries witnesses, their relatives and other persons close to them, who will or have testified with respect to the offences covered

<sup>129</sup> *Travaux Préparatoires*, p. 224.

<sup>130</sup> See section IV.E 4(b,) below.

by the Convention and who require protection from potential intimidation or retaliation. In practical terms, however, when targeting powerful criminal organizations, the relocation of witnesses may be the only effective method of protection.

430. Some States parties have initially managed a witness protection programme based on administrative regulations and developed legislation only at a later stage. Many elements of witness protection schemes are administrative or operational in nature, but the following elements may require legislative measures:

- (a) Powers to protect the confidentiality of the identity of witnesses, to facilitate the creation of new identities and the issuance of new identification and other documents in a secure and confidential manner. This includes powers to make arrangements with other States to permit cross-border relocations and to provide other forms of assistance in regards to the relocation of witnesses, as sending and receiving programmes may need the cooperation of third party countries;
- (b) To regulate the exercise of official discretion. It may also be advisable to consider dedicated legislation governing the following:
  - (i) The application and decision-making procedure in determining whether the witness protection programme should be applied or not in respect of a particular person, and termination of the programme;
  - (ii) Criteria for entry to the witness protection programme;
  - (iii) Procedures to be followed in the assessment of risks or threats;
  - (iv) Rights and obligations of the protected person and obligations of the protection programme;
  - (v) Safeguards to prevent the misuse of discretionary powers and funds;
  - (vi) Requirements regarding physical and information security;
  - (vii) In the case of protected persons who are or may also be offenders, limits and safeguards to protect members of the public from any potential future offences;
  - (viii) Procedures for cooperation with other States.

(c) *Sentence mitigation and immunity*

431. States are required to consider the options of immunity and mitigation of sentences for those who provide substantial cooperation under article 26(2) and (3). The experience of certain jurisdictions has highlighted the merits of such provisions in the fight against organized criminal groups involved in serious crime. That is why the Convention encourages the adoption of such options, consistent with domestic fundamental legal principles, and why it contains requirements on adequate and deterrent sanctions for serious offenders (see article 11 of the Organized Crime

Convention).<sup>131</sup> It can be noted that there are different forms of immunity. The broadest type of immunity offers complete protection from future prosecution for any matter mentioned in the immunized testimony. Because it is so broad, this form of immunity is also commonly referred to as “blanket immunity”. A form of immunity that is more commonly acceptable prevents the prosecution from using the witnesses’ statements (“use”) or any evidence derived from those statements (“derivative use”) against the witness in a criminal prosecution.

432. Possible legislative measures include the following:

- (a) The authority for judges to mitigate sentences for those convicted of offences but who have cooperated and exceptions may have to be made for any, otherwise applicable, mandatory minimum sentences. Provisions that require judges to impose more lenient sentences should be approached with caution, as they may raise concerns about judicial independence and create potential for the corruption of prosecutors;
- (b) Affording immunity from prosecution (article 26(3)), if implemented, may require legislation either creating discretion not to prosecute in appropriate cases or structuring such prosecutorial discretion as already exists. Some form of judicial review and ratification may have to be provided for, in order to set out the terms of any informal arrangements and ensure that decisions to confer immunity are binding;
- (c) Although collaborators of justice cooperate with authorities in exchange for some form of leniency in their own prosecution, they may serve some period of incarceration upon conviction. In those cases, protection measures are likely to be required. This may include family members or other close associates who may be under threat. Legislative provisions may be required in relation to special penitentiary regimes to ensure safety of such persons.

433. Where a person can provide important information to more than one State for the purposes of combating organized crime, article 26(5) encourages States parties to consider the possibility of reaching an agreement on providing mitigation of punishment or immunity to the person with respect to charges that might be brought in those States.

434. The *Travaux Préparatoires* indicate that the term “mitigating punishment” might include not only prescribed but also de facto mitigation of punishment.<sup>132</sup>

(d) *Protection of reporting persons (“whistle-blowers”)*

435. The term “whistle-blower” (also “reporting person”) refers to persons who expose or bring to public attention an irregularity or crime, especially from within an organization. In practice, whistle-blowers play an essential role in exposing organized

<sup>131</sup> See also section IV.C, above.

<sup>132</sup> *Travaux Préparatoires*, p. 233.

criminal groups, their activities, and offences such as corruption, money-laundering, fraud, and other wrongdoing.

436. Reporting persons often take on high personal risks when they collect, report or otherwise disclose instances of irregularity or crime. They may be dismissed from their employment, sued for breach of confidentiality, blacklisted, threatened, assaulted or, in some cases, killed. Protecting reporting persons from harm and retaliation is thus important to promote and facilitate the exposing of organized crime, improve the detection of organized crime, enhance transparency and accountability and reduce the capacity of wrongdoers to rely on the silence of those around them. In turn, the absence of effective protection may mean that reporting persons are more vulnerable to intimidation and retaliation and may thus be less likely to disclose information to entities or individuals who are able to effect action.
437. While the Organized Crime Convention does not specifically address whistle-blowing, international best practice demonstrates that the protection of whistle-blowers should go hand in hand with the protection of other witnesses. Article 33 of the Convention against Corruption contains a specific provision for the “protection of reporting persons”, which requires States parties to consider incorporating into their domestic legal system appropriate measures to provide protection against any unjustified treatment of any person who reports in good faith and on reasonable ground to the competent authorities any facts concerning offences established in accordance with the Convention against Corruption.
438. The generally accepted thresholds for the protection of reporting persons are “good faith”, “reasonable grounds” or a “reasonable belief of wrongdoing” such that protection shall be granted for disclosures made with a reasonable belief that the information is true at the time it is disclosed. This also means that disclosures that are knowingly false should not be protected.
439. The kind of protection a person might require depends on many factors, such as the type of information reported, the position of the person and the level of threat a person faces due to the reporting. The protection measures should ensure that the reporting person is protected from all forms of retaliation, threat, disadvantage and discrimination linked to or resulting from the disclosure. Of importance in this respect are measures such as career protection, provision of psychological support, institutional recognition of reporting, transfer within the organization and relocation to a different organization. The confidentiality of the reporting person needs to be preserved, and his or her identity may only be disclosed with the whistle-blower’s explicit consent.
440. The system of whistle-blower protection and its operation varies from State to State. In general, it is preferable for States to have dedicated legislation in order to ensure clarity and seamless application of the whistle-blower framework. Provisions relating to whistle-blowers and their protection may, for instance, be integrated into an existing Code of Criminal Procedure, into legislation setting out the mandate and powers of the

public prosecution service or, into witness protection laws, or may feature in stand-alone legislation.

441. In addition to introducing relevant legislation, States should also consider designating an authority charged with receiving whistle-blower complaints and should mandate that this authority collect and regularly publish data and information regarding the operation of whistle-blower laws. The whistle-blower complaints authority should ideally be an independent agency mandated to receive and investigate complaints of retaliation and improper investigations of whistle-blower disclosure. Relevant laws should also provide penalties for retaliation against reporting persons and other interference.

### **Additional references and resources**

#### **Organized Crime Convention**

Article 5 (Criminalization of participation in an organized criminal group)

Article 6 (Criminalization of the laundering of proceeds of crime)

Article 8 (Criminalization of corruption)

Article 11 (Prosecution, adjudication and sanctions)

Article 23 (Criminalization of obstruction of justice)

#### **Protocols supplementing the Organized Crime Convention**

Trafficking in Persons Protocol, article 1, paragraph 3

Smuggling of Migrants Protocol article 1, paragraph 3

Firearms Protocol, article 1, paragraph 3

#### ***Model Legislative Provisions against Organized Crime***

Article 26 (Safety of witnesses)

Article 27 (Judicial protection of witnesses)

Article 28 (Compensation and/or restitution by the offender)

#### **Additional United Nations resources**

Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (General Assembly resolution 40/34, annex).

Discussion paper by the Secretariat on assistance, good practices and the comparison of national legislation in the areas of identifying and protecting victims of and witnesses to organized crime (CTOC/COP/WG.2/2013/2); see annex I of the discussion paper, containing model legal provisions in relation to the establishment of a witness protection programme

*Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime* (published by UNODC in 2008).

Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime (Economic and Social Council resolution 2005/20, annex).

*Resource Guide on Good Practices in the Protection of Reporting Persons*, published by UNODC in 2015.

UNODC, *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, 2nd ed. (Vienna, 2012), pp. 121-126.

### Examples of national legislation

#### *Protection of witnesses*

Albania, Criminal Code, art. 311

Austria, Criminal Procedure Code, §§ 160, 162, 165

Bosnia and Herzegovina, Law on Protection of Witnesses under Threat and Vulnerable Witnesses

Canada, Witness Protection Program Act

China, Witness Protection Act (Taiwan Province of China)

Colombia, Law No. 418 of 1997

Germany, Witness Protection Act

Guatemala, Decree No. 21 - 2006 Ley Contra la Delincuencia Organizada, arts. 103 and 104

Italy, Decree Law No. 8 of 15 January 1991, converted, with amendments, into Act No. 82 of 15 March 1991, amended by Law No. 45 of 13 February 2001, Article 9-16 *nonies*

Kenya, Witness Protection Act

Russian Federation, Criminal Procedure Code, art. 376

Republic of Korea, Criminal Procedure Act, Part I, arts 165—165-2

South Africa, Witness Protection Act 112 of 1998, sects. 1, 15 - 19, 21 and 22

Thailand, Witness Protection Act, sects. 1-23

#### *Protection of reporting persons (whistle-blowers)*

Australia, Public Interest Disclosure Act 2013 (Cth)

Austria, Staatsanwaltschaftsgesetz, § 2a(6)

Bosnia and Herzegovina, Law on Whistle-blower Protection in the Institutions of Bosnia and

Herzegovina 2013  
 Ghana, Whistleblowers Act 2006 (Act 720)  
 Ireland, Protected Disclosures Act 2014  
 Japan, Whistle-blower Protection Act 2004  
 Malaysia, Whistle-blower Protection Act 2010, Part I – sect. 2, Part II – sect. 5, Part III – sects. 6 - 10, Part V – sect. 15  
 New Zealand, Protected Disclosures Act 2000  
 Peru, Whistle-blower Protection Act 2010  
 Republic of Korea, Anti-Corruption Act 2002, and Act on the Protection of Public Interest Whistle-blowers 2011  
 Uganda, Whistle-blowers Protection Act, Part I – sect.1, Part II – sect. 2, Part V – sect. 9 - 11, Part VI – sect.14 – 18  
 United Kingdom, Public Interest Disclosure Act 1988  
 United States, Whistleblower Protection Act  
 Zambia, Public Interest Disclosure Act 2010

*Assistance to and protection of victims*

Bosnia and Herzegovina, Law on Protection of Witnesses under Threat and Vulnerable Witnesses  
 Canada, Witness Protection Program Act  
 Canada, Victim Bill of Rights  
 Nicaragua, Penal Code, Title IV, art. 111  
 Republic of Korea, Criminal Procedure Act, Part II, arts. 294-2 - 294-3  
 Russian Federation, Federal Act No. 119-FZ of 20 August 2004 “On State protection of victims, witnesses and other parties to criminal proceedings”  
 Armenia, Criminal Procedure Code, chap. 12, arts. 98 and 99  
 Bhutan, Penal Code, Part One, arts. 36–48

Measures to enhance cooperation with law enforcement

Austria, Penal Code, General Part, art. 41a  
 Bulgaria, Criminal Code, Special Part – chap. 10, arts. 321–321a  
 Cambodia, Criminal Code, Book 4 - Title 1, arts. 453-455  
 Romania, Law No. 39/2003 on preventing and combating organized crime, chaps. II - III, arts. 3–10

## **F. Special investigative techniques**

### **Article 20 of the Organized Crime Convention – Special investigative techniques**

1. If permitted by the basic principles of its domestic legal system, each State Party shall, within its possibilities and under the conditions prescribed by its domestic law, take the necessary measures to allow for the appropriate use of controlled delivery and, where it deems appropriate, for the use of other special investigative techniques, such as electronic or other forms of surveillance and undercover operations, by its competent authorities in its territory for the purpose of effectively combating organized crime.
2. For the purpose of investigating the offences covered by this Convention, States Parties are encouraged to conclude, when necessary, appropriate bilateral or multilateral agreements or arrangements for using such special investigative techniques in the context of cooperation at the international level. Such agreements or arrangements shall be concluded and implemented in full compliance with the principle of sovereign equality of States and shall be carried out strictly in accordance with the terms of those agreements or arrangements.
3. In the absence of an agreement or arrangement as set forth in paragraph 2 of this article, decisions to use such special investigative techniques at the international level shall be made on a case-by-case basis and may, when necessary, take into consideration financial arrangements and understandings with respect to the exercise of jurisdiction by the States Parties concerned.
4. Decisions to use controlled delivery at the international level may, with the consent of the States Parties concerned, include methods such as intercepting and allowing the goods to continue intact or be removed or replaced in whole or in part.

### **1. Introduction**

442. Article 20 of the Organized Crime Convention endorses the use of special investigative techniques such as controlled delivery, electronic surveillance, and undercover operations. Special investigative techniques are defined as techniques for gathering information in such a way as not to alert the target persons, applied by law enforcement officials for the purpose of detecting and investigating crimes and suspects. These techniques are especially useful in dealing with sophisticated organized criminal groups because of the dangers and difficulties inherent in gaining access to their operations and gathering information and evidence for use in domestic prosecutions, as well as providing mutual legal assistance to other States parties. In many cases, less intrusive methods will simply not prove effective, or cannot be carried out without unacceptable risks to those involved.
443. Controlled delivery is useful in particular in cases where contraband is identified or intercepted in transit and then delivered under surveillance to identify the intended recipients or to monitor its subsequent distribution throughout a criminal organization. Legislative provisions are often required to permit such a course of action as the delivery of the contraband by a law enforcement agent or other person may itself be a crime under domestic law.

444. Undercover operations may be used where it is possible for a law enforcement agent or other person to infiltrate a criminal organization to gather evidence.
445. Electronic surveillance in the form of listening devices or the interception of communications performs a similar function and is often preferable where a close-knit group cannot be penetrated by an outsider or where physical infiltration or surveillance would represent an unacceptable risk to the investigation or the safety of investigators. Given its intrusiveness, electronic surveillance is generally subject to strict judicial control and numerous statutory safeguards to prevent abuse.
446. Since special investigative techniques such as controlled deliveries and undercover operations frequently require the cooperation and collaboration of multiple law enforcement agencies of different countries, international cooperation is essential to facilitating the smooth conduct of such operations. It is important to note that, while some forms of covert investigations may be legal in some jurisdictions, they may be unacceptable in others.
447. Article 20(1) of the Convention pertains to investigative methods that are to be applied at the domestic level. Article 20(2)–(4) provides for measures to be taken at the international level. The *Model Legislative Provisions against Organized Crime* provide some further guidance.<sup>133</sup>

## **2. Summary of the main requirements**

448. In accordance with article 20, States parties must:
- (a) Establish controlled delivery as an investigative technique available at the domestic and international level, if permitted by the basic principles of its domestic legal system;
  - (b) Have the legal ability to provide, on a case-by-case basis, international cooperation with respect to controlled deliveries, where not contrary to the basic principles of its domestic legal system;
  - (c) Where it deems it appropriate, establish electronic surveillance and undercover operations as an investigative technique available at the domestic and international level.

## **3. Mandatory requirements**

449. Article 20(1) requires States parties to establish the special investigative technique of controlled delivery, provided that this is not contrary to the basic principles of their respective domestic legal systems. When implementing these provisions, national drafters will need to consider issues such as the existence of a legislative basis and the

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<sup>133</sup> *Model Legislative Provisions against Organized Crime*, pp. 67-81.

requirement of prior judicial authorization for and conditions on the use of special investigative techniques, especially with regard to privacy and human rights, exemption from civil and criminal liability under certain circumstances, admissibility and strength of evidence obtained through such measures in court as well as supervision and control mechanisms. The decision whether to use this technique in a specific circumstance is left to the law, discretion and resources of the State concerned, as reflected by the phrase “within its possibilities and under the conditions prescribed by its domestic law”.

450. Article 20(3) provides that, in the absence of an agreement or arrangement, decisions to use such special investigative techniques at the international level shall be made on a case-by-case basis. This formulation requires a State party to have the ability to cooperate on a case-by-case basis at least with respect to controlled delivery, the establishment of which is mandatory pursuant to article 20(1) where not contrary to the basic principles of the legal system of the State concerned. For a number of countries, this provision will itself be a sufficient source of legal authority for case-by-case cooperation. In cases in which a State cannot directly implement this type of treaty provision, legislation needs to be adopted.
451. Article 20(4) clarifies that among the methods of controlled delivery that may be applied at the international level are to intercept and allow goods to continue intact, to intercept and remove goods, or to intercept and replace goods in whole or in part. It leaves the choice of method to the State party concerned. The method applied may depend on the circumstances of the particular case.

#### **4. Other measures, including optional issues**

452. Article 20(1) specifically encourages the use of electronic surveillance and undercover operations. The *Travaux Préparatoires* confirm that article 20(1) of the Convention does not imply an obligation on States parties to make provisions for the use of all the forms of special investigative techniques noted.<sup>134</sup> As mentioned earlier, these techniques may, however, be the only way law enforcement can gather the necessary evidence to obstruct the activities of often secretive organized criminal groups.
453. With regard to undercover operations, it is vital for national drafters to consider the issue of admissibility and strength of evidence obtained through infiltration and whether the undercover agent has to reveal their real identity when giving testimony. It is of crucial importance to balance the interests of justice, including the need to effectively combat transnational organized crime, with the guarantee of a fair trial of the accused. Furthermore, if legislation authorizing the use of undercover operations is introduced, national drafters also need to consider implications for the liability of police officers involved in such operations.

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<sup>134</sup> *Travaux Préparatoires*, p. 206.

454. The term “electronic surveillance” covers an array of capabilities and practices, including audio, visual, tracking, and data surveillance. Taking into account the rapidly evolving advances in technology, it is important that definitions in national law be neutral in order to allow for future developments in this area.
455. Article 20(2) encourages, but does not require, States parties to enter into agreements or arrangements to enable special investigative techniques, such as undercover investigations, electronic surveillance and controlled deliveries, to be conducted on behalf of another State, as a form of international cooperation.

### **Additional references and resources**

#### ***Organized Crime Convention***

Article 34 (Implementation of the Convention)

#### **Protocols supplementing the Organized Crime Convention**

Trafficking in Persons Protocol, article 1, paragraph 3  
 Smuggling of Migrants Protocol article 1, paragraph 3  
 Firearms Protocol, article 1, paragraph 3

#### ***Model Legislative Provision against Organized Crime***

Article 13 (Controlled delivery)  
 Article 14 (Assumed identities)  
 Article 15 (Infiltration)  
 Article 16 (Electronic surveillance)

### **Additional United Nations resources**

Background paper prepared by the Secretariat on best practices and experiences in using the United Nations Convention against Transnational Organized Crime for international cooperation and the role of regional network (CTOC/COP/WG.3/2012/2), paras. 13-16. *Current Practices in Electronic Surveillance in the Investigation of Serious and Organized Crime* (United Nations publication, Sales No. E.09.XI.19)

### **Examples of national legislation**

Australia, Measures to Combat Serious and Organized Crime Act 2001

Bulgaria, Penal Procedure Code, chap. 14, arts. 172-177

Canada, Criminal Code, sect. 25

France, Customs Code, Title II, chap. IV, sect.7, art. 67 *bis*

Iceland, Rules on special methods and operations of the police during investigation of criminal cases, chaps. I-VI, arts. 1-28

Montenegro, Criminal Procedure Code, 9. Measures of Secret Surveillance, arts. 157-162

United Kingdom, Regulation of Investigatory Powers Act 2000, Part II

#### *Controlled deliveries*

France, Customs Code, Title II, chap. IV, sect. 7, art. 67 *bis*

#### *Controlled operations*

Australia, Australian Crimes Act 1914, 15GD and 15GF

#### *Assumed identities and infiltration*

France, Penal Code, arts. 706-81 - 706-87

Denmark, Criminal Code of Procedure, Title IV, art.126 lit. g, h and p

Switzerland, Swiss Criminal Procedure Code, arts. 286 - 298

Germany, Criminal Code of Procedure, sects. 110a and 110b

#### *Electronic surveillance*

United Kingdom, United Kingdom Regulation of Investigatory Powers Act 2000

## **G. Establishment of a criminal record**

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### **Article 22 of the Organized Crime Convention – Establishment of a criminal record**

Each State Party may adopt such legislative or other measures as may be necessary to take into consideration, under such terms as and for the purpose that it deems appropriate, any previous conviction in another State of an alleged offender for the purpose of using such information in criminal proceedings relating to an offence covered by this Convention.

#### **1. Introduction**

456. Members of transnational organized criminal groups operate throughout the world and may commit offences in the jurisdictions of many different States. By sharing information on an alleged offender's criminal record, States parties help to ensure that the greatest possible body of relevant evidence is available to the State attempting to prosecute the individual.
457. There are certain circumstances where it may be relevant to take into consideration that a suspect has been convicted of an offence in another jurisdiction. Depending on national laws and procedure this may be relevant during the investigative, pre-trial, or sentencing stage or, where applicable, during bail hearings.
458. For example, it may be relevant to the sentencing judge to know that the offender has engaged in these actions before in other countries.
459. Article 22 of the Organized Crime Convention requires States parties to consider adopting measures which would allow them to take into consideration an alleged offender's previous convictions in another State. States parties could utilize this information in a criminal proceeding relating to an offence covered by the Convention.
460. It should be stressed, however, that evidence of prior convictions can also have a prejudicial effect. A record of previous offending can lead the court or jury to assume that because the individual committed another crime, that individual must have committed the present crime as well. That assumption is unfair to the alleged offender, and a conviction based upon it undermines the proper administration of justice. For that reason, the probative value of the evidence needs to be carefully weighed against the likely prejudicial effect that the evidence may have on the course of justice.

#### **2. Summary of the main requirements**

461. Under article 22, States parties may adopt legislative or other measures as may be necessary and under such terms as and for the purpose that it deems appropriate:
- (a) To take into consideration any previous conviction in another State of an alleged offender;

- (b) For the purpose of using such information in criminal proceedings relating to an offence covered by the Convention.

### 3. Mandatory requirements

462. Article 22 contains no mandatory requirements.

### 4. Other measures, including optional issues

463. In accordance with article 22, States parties may wish to consider adopting such legislative or other measures as may be necessary to take into consideration, under such terms as and for the purpose that it deems appropriate, any previous conviction in another State of an alleged offender for the purpose of using such information in criminal proceedings relating to an offence established in accordance with the Organized Crime Convention.
464. Because information regarding previous offending can be unfairly prejudicial to an alleged offender, it is crucial that clear principles and rules are established for when this information can be utilized as evidence in prosecuting an offence established under the Organized Crime Convention. Article 22 gives relevant States parties discretion in establishing the appropriate terms and purposes under which this type of evidence may be used.
465. As a practical matter, it may be necessary for States parties to put in place an administrative procedure whereby information about prior convictions can be obtained from other States parties. This could be undertaken through mutual legal assistance.<sup>135</sup>

#### Additional references and resources

##### *Model Legislative Provisions against Organized Crime*

Article 25 (Evidence of prior convictions of Convention offences)

#### Examples of national legislation

Austria, Strafregistergesetz (Criminal Register Act), §§ 9  
 Canada, Criminal Records Act  
 Finland, The Criminal Records Act 1993

<sup>135</sup> See also section V.B, below.

Germany, Zentralregistergesetz (Federal Central Register Act), §§53  
New Zealand, Criminal Records (Clean Slate) Act 2004

## Related international instruments

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Convention against Torture and other Cruel, Inhuman or Degrading Treatment  
(United Nations, *Treaty Series*, vol. 1465, No. 24841)

Convention on the Rights of the Child  
(United Nations, *Treaty Series*, vol. 1577, No. 27531)

International Convention for the Protection of All Persons from Enforced Disappearance  
(United Nations, *Treaty Series*, vol. 2716, No. 38349)

International Convention for the Suppression of the Financing of Terrorism  
(United Nations, *Treaty Series*, vol. 2178, No. 38349)

International Covenant on Civil and Political Rights  
(General Assembly resolution 2200 A (XXI), annex)

*International Standards on Combating Money Laundering and the Financing of Terrorism  
and Proliferation: the FATF Recommendations*

Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading  
Treatment  
(United Nations, *Treaty Series*, vol. 2375, No. 24841)

Principles on the effective prevention and investigation of extralegal, arbitrary and summary  
executions  
(Economic and Social Council resolution 1989/65, annex)

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

United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic  
Substances of 1988  
(United Nations, *Treaty Series*, vol. 1582, No. 27627)

United Nations Convention on the Law of the Sea  
(United Nations, *Treaty Series*, vol. 1833, No. 31363)

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

Universal Declaration of Human Rights  
(General Assembly resolution, 217 A (III))

## **V. Legislative and administrative measures to enhance legal assistance and law enforcement and other forms of international cooperation**

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466. Comprehensive, multiagency, and flexible cross-border cooperation is essential to ensure the appropriate investigation and prosecution of transnational organized crime. International cooperation in criminal justice occurs when States share information, resources, investigators, and prosecutors to achieve the common goal of combating organized criminal groups and their criminal activities.
467. The basis of international criminal justice cooperation may be formal or informal. Formal cooperation can be based on treaties, such as the Organized Crime Convention or other international, regional, or bilateral treaties. Informal cooperation generally involves direct officer-to-officer or agency-to-agency contact across borders. Generally, it is not dealt with by legislation but may sometimes be based on a memorandum of understanding between the cooperating States or their agencies.
468. The Organized Crime Convention contains a range of measures to enable and facilitate international cooperation between States parties, which are further discussed in this chapter. These measures include extradition (article 16), mutual legal assistance (article 18), joint investigations (article 19), law enforcement cooperation (article 27), transfer of sentenced persons (article 17) and transfer of criminal proceedings (article 21).
469. The Trafficking in Persons Protocol, the Smuggling of Migrants Protocol and the Firearms Protocol contain additional provisions relating to international cooperation that are further discussed in the respective legislative guide to each Protocol.

## A. Extradition

### Article 16 of the Organized Crime Convention – Extradition

1. This article shall apply to the offences covered by this Convention or in cases where an offence referred to in article 3, paragraph 1 (a) or (b), involves an organized criminal group and the person who is the subject of the request for extradition is located in the territory of the requested State Party, provided 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.
2. If the request for extradition includes several separate serious crimes, some of which are not covered by this article, the requested State Party may apply this article also in respect of the latter offences.
3. Each of the offences to which this article applies shall be deemed to be included as an extraditable offence in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.
4. If a State Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention the legal basis for extradition in respect of any offence to which this article applies.
5. States Parties that make extradition conditional on the existence of a treaty shall:
  - (a) At the time of deposit of their instrument of ratification, acceptance, approval of or accession to this Convention, inform the Secretary-General of the United Nations whether they will take this Convention as the legal basis for cooperation on extradition with other States Parties to this Convention; and
  - (b) If they do not take this Convention as the legal basis for cooperation on extradition, seek, where appropriate, to conclude treaties on extradition with other States Parties to this Convention in order to implement this article.
6. States Parties that do not make extradition conditional on the existence of a treaty shall recognize offences to which this article applies as extraditable offences between themselves.
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.
8. States Parties shall, 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.
9. 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.
10. A State Party in whose territory an alleged offender is found, if it does not extradite such person in respect of an offence to which this article applies solely on the ground that he or she is one of its nationals, shall, at the request of the State Party seeking extradition, be obliged to submit the case without undue delay to its competent authorities for the purpose of prosecution.

Those authorities shall take their decision and conduct their proceedings in the same manner as in the case of any other offence of a grave nature under the domestic law of that State Party. The States Parties concerned shall cooperate with each other, in particular on procedural and evidentiary aspects, to ensure the efficiency of such prosecution.

11. Whenever a State Party is permitted under its domestic law to extradite or otherwise surrender one of its nationals only upon the condition that the person will be returned to that State Party to serve the sentence imposed as a result of the trial or proceedings for which the extradition or surrender of the person was sought and that State Party and the State Party seeking the extradition of the person agree with this option and other terms that they may deem appropriate, such conditional extradition or surrender shall be sufficient to discharge the obligation set forth in paragraph 10 of this article.

12. If extradition, sought for purposes of enforcing a sentence, is refused because the person sought is a national of the requested State Party, the requested Party shall, if its domestic law so permits and in conformity with the requirements of such law, upon application of the requesting Party, consider the enforcement of the sentence that has been imposed under the domestic law of the requesting Party or the remainder thereof.

13. 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.

14. 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.

15. States Parties may not refuse a request for extradition on the sole ground that the offence is also considered to involve fiscal matters.

16. 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.

17. States Parties shall seek to conclude bilateral and multi-lateral agreements or arrangements to carry out or to enhance the effectiveness of extradition.

## 1. Introduction

470. Extradition is a formal and, most frequently, a treaty-based process,<sup>136</sup> leading to the return or delivery of fugitives to the jurisdiction in which they are wanted in relation to criminal activities. Since the late nineteenth century, States have signed bilateral extradition treaties in their efforts to eliminate safe shelters for serious offenders. Treaty provisions vary from State to State.

471. In the past, extradition treaties commonly contained a list of extraditable offences. These set lists create difficulties every time a new type of crime emerges with the advancement of technology and other social and economic changes. For this reason,

<sup>136</sup> In some instances, extradition may take place voluntarily and in the absence of a treaty between the States concerned. This, however, does not occur frequently.

more recent extradition treaties adopt a threshold or minimum penalty definition of extraditable offences that are tied to a minimum penalty or other criteria for establishing double criminality. The relevant threshold may be different depending on the different stages of the prosecution and trial. Defining extraditable offences in this manner obviates the need to list individual offences and renegotiate a treaty or supplement it if both States pass laws dealing with a new type of criminal activity, or if the list inadvertently fails to cover a type of criminal activity punishable by both States. These developments also generated the need for a model extradition treaty, in response to which the United Nations adopted the Model Treaty on Extradition.<sup>137</sup>

472. In addition to action by States to amend old treaties and sign new ones, some conventions on particular offences contain provisions for extradition and mutual legal assistance. One such example is the Convention against Corruption (see article 44). In addition, the need for a multilateral approach has led to several regional initiatives and instruments containing provisions on extradition.

(a) *Dual criminality*

473. The extradition obligations under the Organized Crime Convention apply if the offence for which extradition is sought is punishable under the domestic law of both the requesting State party and the requested State party. This dual criminality requirement is a deeply ingrained principle of extradition law and is expressly provided for in article 16, paragraph 1 of the Organized Crime Convention. It should be satisfied with respect to the offences established in articles 6, 8 and 23 of the Convention, since all States parties are obligated to criminalize such conduct. With respect to requests relating to offences established in accordance with article 5, if one State party chooses conspiracy to meet the requirements and another chooses the criminal association option, this alone does not preclude a finding of dual criminality. Here, the conduct must be examined to determine if it is criminalized in both States parties. Similarly, with respect to requests relating to serious crime, where States parties are not required to criminalize the same conduct, no obligation to extradite arises unless the dual criminality requirement is fulfilled.
474. In recent years, there have been some moves to change the analysis of the dual criminality requirements to avoid refusal of extradition requests in some circumstances. This has been achieved by shifting the focus on conduct rather than on categories or classifications of criminal offences under the domestic laws of the requesting and the requested State. One example of this approach can be found in article 43(2) of the Convention against Corruption, which states that: “In matters of international cooperation, whenever dual criminality is considered a requirement, it shall be deemed fulfilled irrespective of whether the laws of the requested State party place the offence within the same category of offence or denominate the offence by the same terminology as the requesting State party, if the conduct underlying the offence

<sup>137</sup> General Assembly resolution 45/116, annex, and resolution 52/88, annex.

for which assistance is sought is a criminal offence under the laws of both States parties.”<sup>138</sup>

(b) *Implementation of article 16*

475. The Organized Crime Convention sets a basic minimum standard for extradition for the offences it covers and also encourages the adoption of a variety of mechanisms designed to streamline the extradition process. The Convention encourages States to go beyond this basic standard in bilateral or regional extradition arrangements to supplement article 16 (see also article 16(7)).
476. To implement the requirements of article 16, some legislative changes may be necessary. Depending on the extent to which domestic law and existing treaties already deal with extradition, this may range from the establishment of entirely new extradition frameworks, to less extensive expansions or amendments to include new offences or make substantive or procedural changes to conform to the Organized Crime Convention.
477. In making legislative changes, drafters should note that the intention of the Convention is to ensure that the human rights of those whose extradition is sought are respected at all times and that all existing rights and guarantees applicable in the State party from whom extradition is requested are applied (see article 16(13)).
478. Generally, the extradition provisions are designed to ensure that the Convention supports and complements pre-existing extradition arrangements and does not detract from them.

## 2. Summary of the main requirements

479. Provided that the offence for which extradition is sought is punishable under the domestic laws of both the requesting and the requested State party (article 16, paragraphs 1 and 3), States parties must ensure that the following offences are deemed extraditable offences in any extradition treaties between them:
- (a) Offences established in accordance with articles 5, 6, 8 and 23 of the Organized Crime Convention that are transnational and involve an organized criminal group;
  - (b) Serious crime that is transnational and involves an organized criminal group;

<sup>138</sup> Some regional extradition treaties and arrangements go beyond the traditional dual criminality requirement by employing the principle of mutual recognition. In regions with close economic integration and cross-border areas of free movement of goods and persons in particular, mutual recognition of national criminal warrants and judgments can be a key tool. In the European Union, for example, member States agree, subject to specified grounds for refusal, to recognize and execute European arrest warrants without any further formalities and with no application of the dual criminality requirement for a list of 32 offences. Similarly, under the Caribbean Community (CARICOM) Arrest Warrant Treaty, States parties are required to make provision in national law for the arrest and detention of any requested person pursuant to a CARICOM arrest warrant issued by another State party.

- (c) Offences established in accordance with articles 5, 6, 8 and 23 that involve an organized criminal group, where the person who is to be extradited is located in the territory of the requested State party;
  - (d) Serious crime (defined in article 2(b)) that involves an organized criminal group, where the person who is to be extradited is located in the territory of the requested party;
  - (e) Offences established in accordance with the Protocols to which States are parties.
480. States parties that require a treaty basis as a prerequisite to extradition must notify the Secretary-General of the United Nations as to whether or not they will permit the Organized Crime Convention to be used as a treaty basis for extradition (article 16(5)).
481. States parties with a general statutory extradition scheme must ensure that the offences described above are deemed extraditable offences under that scheme article 16(1) and (6)). Legislation may be required if current legislation is not sufficiently broad.
482. A State party that denies an extradition request on the ground that the fugitive is its national shall submit the case for domestic prosecution in recognition of the principle *aut dedere aut judicare* (extradite or prosecute). In doing so, it shall ensure that the decision to prosecute and any subsequent proceedings are conducted with the same diligence as a serious domestic offence and shall cooperate with the requesting State party to ensure the efficiency of the prosecution (article 16(10)). Legislation may be required if current law does not permit evidence obtained from foreign sources to be used in domestic proceedings.
483. Each State party must ensure fair treatment for persons facing extradition proceedings pursuant to article 16, including enjoyment of all rights and guarantees provided for by its domestic law (article 16(13)). Legislation may be required if no specific domestic extradition procedures are provided for.
484. Each State party must ensure that extradition is not refused by it on the sole ground that the offence for which extradition is sought is also considered to involve fiscal matters (article 16(15)). Legislation may be required if existing laws or treaties are in conflict.
485. Prior to refusing extradition, a requested State party must, where appropriate, consult with the requesting State party to provide it with the opportunity to present information regarding the allegations and views on the matter (article 16(16)).
486. A State party shall endeavour to expedite extradition procedures and simplify evidentiary requirements relating thereto. Consistent with article 16(8), legislation that sets out expedited extradition procedures or clarifies evidentiary requirements may be considered.
487. A State party can discharge its obligation to submit a case for prosecution pursuant to article 16(10) by surrendering the person subject to the condition that the person will

be returned to the requested state to serve the sentence imposed as a result of the prosecution (article 16(11)).

488. Where the requested State denies extradition for enforcement of a sentence because the person sought is a national of the requested State, the State party shall consider enforcing the sentence if its law so permits (article 16(12)).

### **3. Mandatory requirements**

#### *(a) Scope (article 16(1))*

489. Article 16(1) establishes the scope of the obligation to provide extradition in broader terms than those of article 3 on the scope of application of the Convention. Extradition is to be provided with respect to the offences covered by the Convention or in cases where an offence referred to in article 3(1)(a) or (b) involves an organized criminal group and the person who is the subject of the request for extradition is located in the territory of the requested State party, provided 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. While this articulation appears complex, it consists of several key components that can be readily differentiated.
490. The extradition obligation applies to the offences covered by the Convention, which, by application of article 3 (Scope of application), means:
- (a) Offences established in accordance with articles 5, 6, 8 and 23 of the Convention that are transnational (defined in article 3(2)) and involve an organized criminal group (defined in article 2(a));
  - (b) Serious crimes (defined in article 2((b)) that are transnational and involve an organized criminal group;
  - (c) Offences established in accordance with the Protocols, to which States are parties.
491. In addition, the extradition obligation also applies where an offence referred to in article 3(1)(a) or (b) involves an organized criminal group and the person who is the subject of the request for extradition is located in the territory of the requested State party, meaning:
- (a) Offences established in accordance with articles 5, 6, 8 and 23 of the Convention, where the person who is to be extradited is located in the territory of the requested party and which involve an organized criminal group; and
  - (b) Serious crime, where the person who is to be extradited is located in the territory of the requested party and where the offence involves an organized criminal group.

492. The extradition obligation applies provided 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. This dual criminality requirement will automatically be satisfied with respect to the offences established in articles 6, 8 and 23 of the Convention, since all States parties are obligated to criminalize such conduct. However, with respect to requests relating to offences established in accordance with article 5 or to serious crime, where States parties are not required to criminalize the same conduct, no obligation to extradite arises unless this dual criminality requirement is fulfilled.

*(b) Extraditable offences in extradition treaties (article 16(3))*

493. Article 16(3) obliges States parties to consider the offences described in article 16(1) as automatically included in all extradition treaties existing between them. In addition, the parties undertake to include them in all future extradition treaties between them.

494. By virtue of article 16(3), the offences are automatically incorporated by reference into extradition treaties. Accordingly, there would normally be no need to amend them. However, if treaties are considered subordinate to domestic extradition statutes under the legal system of a particular country and its current statute is not broad enough to cover all of the offences set forth in article 16(1) amending legislation may be required.

*(c) Notification regarding application or non-application of article 16(4)  
(relevant to countries in which a treaty basis is a prerequisite to extradition,  
article 16(5))*

495. Article 16(5) does not apply to States parties that can extradite to other countries pursuant to a statute (see comments related to article 16(6) below). It applies only to States parties for which a treaty basis is a prerequisite to extradition. Such countries are required to notify the Secretary-General of the United Nations as to whether or not they will permit the Organized Crime Convention to be used as a treaty basis for extradition. The notification should be provided to the United Nations Office on Drugs and Crime. They are also, where appropriate, requested to conclude additional extradition treaties in order to expand the number of States parties to which fugitives can be extradited in accordance with this article.

*(d) Extradition on the basis of a statute (relevant to countries that provide for  
extradition by statute article 16(6))*

496. Article 16(6) mandates States parties that do not require a treaty basis for extradition (that is, States parties that provide for extradition pursuant to a statute) to include the offences described in article 16(1) as extraditable offences under their applicable statute governing extradition in the absence of a treaty.

497. Thus, where the existing statute in a particular State party governing extradition is not sufficiently broad in scope to cover the offences described in article 16(1) it will be required to enact legislation to broaden the offences covered by the existing statute.<sup>139</sup>

*(e) Conditions to extradition (article 16(7))*

498. Article 16(7) provides that grounds for refusal and other conditions to extradition (such as the minimum penalty required for an offence to be considered as extraditable) are governed by the applicable extradition treaty in force between the requesting and requested States or, otherwise, the law of the requested State. In some States, statutory grounds for refusal of extradition are linked to the constitutional obligations in relation to the protection of fundamental rights and freedoms of the person sought for extradition. Article 16(7) thus establishes no implementation requirements separate from the terms of domestic laws and treaties governing extradition.<sup>140</sup>

*(f) Prosecution where a fugitive is not extradited on grounds of nationality (article 16(10))*

499. Article 16(10) provides that where a requested State party does not extradite a person found in its territory for an offence set forth in article 16(1) on grounds that the person is its national, that State shall, at the request of the State party seeking extradition, be obliged to submit the case without undue delay to its competent authorities for the purpose of prosecution. Those authorities are to determine whether to proceed with a prosecution and conduct their proceedings in the same manner as in the case of any other offence of a grave nature under the domestic law of that State party. The States parties concerned are to cooperate with each other, in particular on procedural and evidentiary aspects, to ensure the efficiency of such prosecutions.

500. In essence, the obligation to submit a case for domestic prosecution consists of a number of distinct elements:

- (a) An extradition request concerning an offence set forth in article 16(1) must have been denied because the fugitive is a national of the requested State;
- (b) The State party seeking extradition must have requested submission for domestic prosecution in the requested State;
- (c) The State party that denied extradition must thereafter:
  - (i) Submit the case to its authorities for prosecution without undue delay;
  - (ii) Determine whether to proceed with a prosecution and conduct the proceedings in the same manner as a serious domestic crime;
  - (iii) Cooperate with the other State party in order to obtain the necessary evidence and otherwise ensure the efficiency of the prosecution.

<sup>139</sup> States parties may refer to the UNODC *Model Law on Extradition* (2004) for further guidance.

<sup>140</sup> The examples of conditions and grounds for refusal set out for States parties in the UNODC *Model Law on Extradition* (2004) may be instructive on these points.

501. Such domestic prosecutions are time consuming and resource intensive, as the crime will normally have been committed in another country. It will generally be necessary to obtain most or all of the evidence from abroad and to ensure that it is in a form that can be introduced into evidence in the courts of the State party conducting the investigation and prosecution.
502. To carry out such prosecutions, the State party concerned will first need to have a legal basis to assert jurisdiction over offences committed abroad, as required by article 15(3) of the Convention.<sup>141</sup> In addition, effective implementation of article 16(10) requires a State conducting a domestic prosecution in lieu of extradition to have mutual legal assistance laws and treaties to enable it to obtain evidence from abroad. At a minimum, effective implementation of article 18 should suffice for this purpose.<sup>142</sup> Drafters of national legislation should also ensure that domestic laws permit such evidence obtained abroad to be admissible by its courts for use in such proceedings.
503. The difficulty of successfully mounting a prosecution in these types of cases is of course compounded by the fact that the crime was not perpetrated in the State where the suspect now resides. Differences in legal traditions and systems between where the investigation was conducted and where the case is to be tried can pose further complications. This is particularly the case if there is a question as to whether the requested State has the jurisdiction to prosecute the case domestically. Mutual legal assistance should be utilized in cases of this type to aid in the proposed prosecution in the requested State. Evidence gathered to date by the requesting State can be provided, and any additional evidence can be acquired through further mutual legal assistance requests. It may also be useful to ensure effective implementation of article 21 of the Convention on transfer of criminal proceedings to facilitate the domestic prosecution in the requested State.<sup>143</sup>
504. Implementation of article 16(10) also requires allocation of adequate human and budgetary resources to enable domestic prosecution efforts to succeed. Thus, the Convention requires the investigation and prosecution to be given the same priority as would be given to a grave domestic offence.
505. The *Travaux Préparatoires* reflect the general understanding that States parties should also take into consideration the need to eliminate safe havens for offenders who commit heinous crimes in circumstances not covered by article 16(10). Several States indicated that such cases should be reduced and several States stated that the principle of *aut dedere aut judicare* (extradite or prosecute) should be followed.<sup>144</sup>
506. An alternative method of meeting the requirements of this paragraph is the surrender of a fugitive subject to the condition that the person will be returned to the requested state to serve the sentence imposed as a result of the prosecution (see article 16(11)).

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<sup>141</sup> See also section IV.A, above.

<sup>142</sup> See also section V.B, below.

<sup>143</sup> See also section V.C, below.

<sup>144</sup> *Travaux Préparatoires*, pp. 162 and 163.

(g) *Guarantees of persons undergoing the extradition process (article 16(13))*

507. Article 16(13) requires a State party to provide fair treatment to the fugitive during extradition proceedings it is conducting, including the enjoyment of all rights and guarantees that are provided for by that State's law with respect to such proceedings. In essence, this paragraph obligates States parties to ensure that they have procedures to ensure fair treatment of fugitives and that fugitives are given the opportunity to exercise such legal rights and guarantees.

(h) *Prohibition on denial of extradition for fiscal offences (article 16(15))*

508. Article 16(15) provides that States parties may not refuse a request for extradition on the sole ground that the offence is also considered to involve fiscal matters. States parties must therefore ensure that no such ground for refusal may be invoked under its extradition laws or treaties.

509. Thus, where a State party's laws currently permit such ground for refusal, amending legislation should be enacted to remedy this. Where such a ground for refusal is included in any of a State party's extradition treaties, normally the act of that country becoming party to the Organized Crime Convention, or the enactment of domestic amending legislation, would automatically invalidate the contrary provisions of an earlier treaty. Given this, only rarely, if at all, should amendments to particular treaties be required. With respect to future extradition treaties, States parties must not include such grounds for refusal.

(i) *Consultations prior to refusing (article 16(16))*

510. Article 16(16) provides that, where appropriate, the requested State party shall consult with the requesting State party before refusing extradition. This process could enable the requesting State party to present additional information or explanations that may result in a different outcome. Since there may be some cases in which additional information could never bring about a different result, the obligation is not categorical, and the requested State party retains some degree of discretion to determine when it would be appropriate to do so. Nevertheless, the *Travaux Préparatoires* indicate that the words "as appropriate" are to be understood and interpreted in the spirit of full cooperation and should not affect, to the extent possible, the obligatory nature of article 16(1) of the Convention. The *Travaux Préparatoires* emphasize that the requested States parties when applying this paragraph are expected to give full consideration to the need to bring offenders to justice through cooperation in extradition matters.<sup>145</sup>

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<sup>145</sup> Ibid., p. 163.

#### 4. Optional measures, including optional issues

##### (a) *Optional application to other offences (article 16(2))*

511. Article 16(2) of the Convention allows States parties to apply the extradition article to offences other than those set forth in article 16(1). States parties are not under any obligation to extradite for other offences, although they are encouraged to do so.
512. The *Travaux Préparatoires* indicate that the purpose of article 16(2) is to serve as an instrument for States parties wishing to avail themselves of the facility it provides and that it is not intended to broaden the scope of the article unduly.<sup>146</sup>
513. Article 16(2) is of particular relevance for “serious crimes” (as defined in article 2(b)) that do not meet the requirement under article 16(1) that an organized crime group was involved. Article 16(2) enables the requested State, but places it under no obligation, to deal with all the alleged offences involving the same alleged offender(s) in the same procedure.

##### (b) *Extradition on the basis of the Organized Crime Convention (article 16(4) and (5)(b))*

514. Article 16(4) allows, but does not require, States parties to use the Convention as a treaty basis for extradition, if such a treaty basis is a prerequisite to extradition. Alternatively, States would have to seek, where appropriate, the conclusion of treaties on extradition with other States parties to the Convention in order to implement article 16 (article 16(5)(b)).

##### (c) *Expediting extradition procedures and simplifying evidentiary requirements in extradition proceedings (article 16(8))*

515. Article 16(8) provides that States parties shall, subject to their domestic laws, endeavour to expedite extradition procedures and to simplify evidentiary requirements relating thereto in respect of the offences set forth in article 16(1). Modern extradition practice has been to simplify requirements with respect to the form of and channels of transmission for extradition requests, as well as evidentiary standards for extradition.
516. The *Travaux Préparatoires* indicate that this paragraph should not be interpreted as prejudicing in any way the fundamental legal rights of the fugitive.<sup>147</sup>
517. According to the *Travaux Préparatoires*, one example of implementation of article 16(8) would be speedy and simplified procedures of extradition, subject to the domestic law of the requested State party, for the surrender of persons sought for the purpose of extradition, subject to the agreement of the requested State party and the consent of the person in question. The consent, which should be expressed voluntarily

<sup>146</sup> Ibid., p. 162.

<sup>147</sup> Ibid.

and in full awareness of the consequences, should be understood as being in relation to the simplified procedures and not to the extradition itself.<sup>148</sup>

518. Different prosecutorial practices under different legal systems and traditions make effective interregional and international cooperation more difficult. In the field of extradition, such differences are even more acute when dealing with the documents required to be presented to the requested State and the relevant evidentiary requirements needed for granting an extradition request.
519. In view of the fact that the “prima facie evidence of guilt” has proved in practice to be a considerable impediment to extradition - not only between systems of different legal tradition but also between States with the same general traditions but differing rules of evidence - and given that several common law States have waived the requirement in prescribed circumstances, it has been recommended that States parties keep the burden of proof in extradition proceedings to a minimum and take into account in their extradition relations the need for simplification of the evidentiary requirements.<sup>149</sup>

(d) *Detention pending extradition proceedings in the requested State (article 16(9))*

520. Article 16(9) provides that the requested State party may take a fugitive into custody or take other appropriate measures to ensure his or her presence for purposes of extradition. Provisions on provisional arrest and detention pending extradition are standard features of extradition treaties and statutes and States parties should have an appropriate legal basis for such custody. However, the article imposes no specific obligation to take persons into custody in specific cases.
521. When seeking a provisional arrest, it is important to bear in mind the following:
- (a) Ideally, a request for provisional arrest or for extradition should cite the applicable provisions of the Organized Crime Convention and the fact that both the requesting and requested States are party to the Convention or its Protocols, as applicable.
  - (b) Once the provisional arrest has been made, the requesting State will have to provide all of the information needed to commence the extradition hearing within a certain time frame. Domestic laws usually establish the time limit for commencement as between 30 and 60 days.
  - (c) Early and ongoing contact with the central authority of the requested State will aid in alleviating the procedural stress that will arise once the extradition process has been set in motion.
  - (d) Provisional arrest should be used only if it is urgently needed to ensure the attendance of the suspect at subsequent hearings.

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<sup>148</sup> Ibid.

<sup>149</sup> See also article 44(9) of the Convention against Corruption.

522. Provisional arrest requests are by nature urgent. Avoiding delays at this stage can be crucial to the success of an extradition. It is thus important that the requesting State adequately justify the urgency of the request and that the requested State process provisional arrest requests in the most speedy and efficient manner possible. States parties should establish procedures for communicating and carrying out provisional arrest requests expeditiously. States with a central authority for extradition should devise a system to ensure that the authority is made immediately aware of any request transmitted.
523. It should be noted that application by a State for an International Police Criminal Organization (INTERPOL) diffusion or red notice may not always be considered by other States to be the equivalent of a request for provisional arrest, as it may not contain the degree of evidentiary detail or be in a form acceptable to every country to which it may be distributed. Accordingly, in many situations an INTERPOL notice can only serve to locate a person wanted, and a separate request for provisional arrest must follow in order to permit an arrest and initiate the process towards extradition.
524. The UNODC *Model Law on Extradition* contains relevant provisions that may be instructive.
- (e) *Conditional extradition as a basis for satisfying article 16(10) (article 16(11))*
525. Rather than conduct a domestic prosecution of a national in lieu of extradition under paragraph 10, article 16(11) provides the option of surrendering the fugitive to the State party requesting extradition for the sole purpose of conducting the trial, with any sentence to be served in the requested State party. If this option is exercised, it discharges the obligation set forth in article 16(10). The conditional extradition proposed by article 16(11) complements the possibility to transfer criminal proceedings to and from another State party under article 21 of the Convention.<sup>150</sup>
- (f) *Enforcement of a foreign sentence where extradition is refused on the ground of nationality (article 16(12))*
526. Article 16(12) calls upon a State party that has denied, on the ground of nationality, a request by another State party to extradite a fugitive to serve a sentence, to consider enforcing the sentence itself. This paragraph imposes no obligation on a State party to enact the legal framework to enable it to do so, or to actually do so under specific circumstances.
527. The *Travaux Préparatoires* indicate that this action would be taken without prejudice to the principle of double jeopardy (*ne bis in idem*).<sup>151</sup>

<sup>150</sup> See also section V.C, below.

<sup>151</sup> *Travaux Préparatoires*, p. 163.

(g) *Lack of obligation under the Convention to extradite where there are substantial grounds for believing a fugitive will be discriminated against (article 16(14))*

528. Article 16(14) provides that nothing in the Convention is to 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 those reasons.

529. This provision preserves the ability of the requested State party to deny extradition on such grounds, unless such ground of refusal is not provided for in its extradition treaty in force with the requesting State party, or in its domestic law governing extradition in the absence of a treaty. The *Travaux Préparatoires* state that, when considering a request for extradition pursuant to a sentence issued in absentia, which is possible in some States, the requested State party would take into due consideration whether or not the person whose extradition was sought had been sentenced following a fair trial, for example the same guarantees as he or she would have enjoyed had he or she been present at the trial and had voluntarily escaped from justice or failed to appear at the trial.

(h) *Conclusion of new agreements and arrangements (article 16(17))*

530. Article 16(17) calls upon States parties to seek to conclude bilateral and multilateral agreements or arrangements to carry out or to enhance the effectiveness of extradition.

#### **Additional references and resources**

##### **Organized Crime Convention**

Article 15 (Jurisdiction)  
 Article 17 (Transfer of sentenced persons)  
 Article 18 (Mutual legal assistance)  
 Article 19 (Joint investigations)  
 Article 20 (Special investigative techniques)  
 Article 27 (Law enforcement cooperation)  
 Article 34 (Implementation of the Convention)

##### **Additional United Nations resources**

Conference room paper on the notion of serious crime in the United Nations Convention against Transnational Organized Crime (CTOC/COP/2012/CRP.4), paras. 13-15.

International Guidelines for Crime Prevention and Criminal Justice Responses with Respect to Trafficking in Cultural Property and Other Related Offences (General Assembly 69/196, annex).

UNODC Manual on Mutual Legal Assistance and Extradition (2012).

UNODC Model Law on Extradition (2004).

Model Treaty on Extradition (General Assembly 45/116, annex and General Assembly 52/88, annex).

### **Examples of national legislation**

Albania, Criminal Code, art. 11

Botswana, Extradition Act 1990, Part II, sects. 3-7

Cambodia, Code of Criminal Procedure, Book Nine, chap. 2, arts. 566-594

Canada, Extradition Act, S.C. 1999

China, Extradition Law of the People's Republic of China, chap. I, arts. 1-6; and chap. II, arts. 7-9

Colombia, Penal Code, First Book - Title II, arts. 14-18

Costa Rica, Law of Extradition, arts. 1-13

Ethiopia, The Criminal Code, Part I, Book I, art. 21

Germany, Act on International Cooperation in Criminal Matters

India, The Extradition Act, chaps. I-V, arts. 1-31

Republic of Korea, Extradition Act, chap. II, art. 5-10-2

Sierra Leone, The Extradition Act 1974, Parts I – V

Singapore, Extradition Act, arts. 6-8

South Africa, Extradition Act 67 of 1962, arts.1-4 and 11-12

Trinidad and Tobago, Extradition (Commonwealth and Foreign Territories) Act, Part III, sects. 5-20

Uruguay, Penal Code, First Book, Title I, arts. 13 and 14

Venezuela (Bolivarian Republic of), Penal Code, First Book, Title I, art. 6

Zambia, The Extradition Act, Part II, arts. 3-5; and Part IV, arts. 28-44

## **B. Mutual legal assistance in criminal matters**

### **Article 18 of the Organized Crime Convention**

#### **– Mutual legal assistance**

1. States Parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by this Convention as provided for in article 3 and shall reciprocally extend to one another similar assistance where the requesting State Party has reasonable grounds to suspect that the offence referred to in article 3, paragraph 1 (a) or (b), is transnational in nature, including that victims, witnesses, proceeds, instrumentalities or evidence of such offences are located in the requested State Party and that the offence involves an organized criminal group.
2. Mutual legal assistance shall be afforded to the fullest extent possible under relevant laws, treaties, agreements and arrangements of the requested State Party with respect to investigations, prosecutions and judicial proceedings in relation to the offences for which a legal person may be held liable in accordance with article 10 of this Convention in the requesting State Party.
3. Mutual legal assistance to be afforded in accordance with this article may be requested for any of the following purposes:
  - (a) Taking evidence or statements from persons;
  - (b) Effecting service of judicial documents;
  - (c) Executing searches and seizures, and freezing;
  - (d) Examining objects and sites;
  - (e) Providing information, evidentiary items and expert evaluations;
  - (f) Providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records;
  - (g) Identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes;
  - (h) Facilitating the voluntary appearance of persons in the requesting State Party;
  - (i) Any other type of assistance that is not contrary to the domestic law of the requested State Party.
4. Without prejudice to domestic law, the competent authorities of a State Party may, without prior request, transmit information relating to criminal matters to a competent authority in another State Party where they believe that such information could assist the authority in undertaking or successfully concluding inquiries and criminal proceedings or could result in a request formulated by the latter State Party pursuant to this Convention.
5. The transmission of information pursuant to paragraph 4 of this article shall be without prejudice to inquiries and criminal proceedings in the State of the competent authorities providing the information. The competent authorities receiving the information shall comply with a request that said information remain confidential, even temporarily, or with restrictions on its use. However, this shall not prevent the receiving State Party from disclosing in its proceedings information that is exculpatory to an accused person. In such a case, the receiving State Party shall notify the transmitting State Party prior to the disclosure and, if so requested, consult with the transmitting State Party. If, in an exceptional case, advance notice is not possible, the receiving State Party shall inform the transmitting State Party of the disclosure without delay.

6. The provisions of this article shall not affect the obligations under any other treaty, bilateral or multilateral, that governs or will govern, in whole or in part, mutual legal assistance.

7. Paragraphs 9 to 29 of this article shall apply to requests made pursuant to this article if the States Parties in question are not bound by a treaty of mutual legal assistance. If those States Parties are bound by such a treaty, the corresponding provisions of that treaty shall apply unless the States Parties agree to apply paragraphs 9 to 29 of this article in lieu thereof. States Parties are strongly encouraged to apply these paragraphs if they facilitate cooperation.

8. States Parties shall not decline to render mutual legal assistance pursuant to this article on the ground of bank secrecy.

9. States Parties may decline to render mutual legal assistance pursuant to this article on the ground of absence of dual criminality. However, the requested State Party may, when it deems appropriate, provide assistance, to the extent it decides at its discretion, irrespective of whether the conduct would constitute an offence under the domestic law of the requested State Party.

10. A person who is being detained or is serving a sentence in the territory of one State Party whose presence in another State Party is requested for purposes of identification, testimony or otherwise providing assistance in obtaining evidence for investigations, prosecutions or judicial proceedings in relation to offences covered by this Convention may be transferred if the following conditions are met:

(a) The person freely gives his or her informed consent;

(b) The competent authorities of both States Parties agree, subject to such conditions as those States Parties may deem appropriate.

11. For the purposes of paragraph 10 of this article:

(a) The State Party to which the person is transferred shall have the authority and obligation to keep the person transferred in custody, unless otherwise requested or authorized by the State Party from which the person was transferred;

(b) The State Party to which the person is transferred shall without delay implement its obligation to return the person to the custody of the State Party from which the person was transferred as agreed beforehand, or as otherwise agreed, by the competent authorities of both States Parties;

(c) The State Party to which the person is transferred shall not require the State Party from which the person was transferred to initiate extradition proceedings for the return of the person;

(d) The person transferred shall receive credit for service of the sentence being served in the State from which he or she was transferred for time spent in the custody of the State Party to which he or she was transferred.

12. Unless the State Party from which a person is to be transferred in accordance with paragraphs 10 and 11 of this article so agrees, that person, whatever his or her nationality, shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in the territory of the State to which that person is transferred in respect of acts, omissions or convictions prior to his or her departure from the territory of the State from which he or she was transferred.

13. Each State Party shall designate a central authority that shall have the responsibility and power to receive requests for mutual legal assistance and either to execute them or to transmit them to the competent authorities for execution. Where a State Party has a special region or territory with a separate system of mutual legal assistance, it may designate a distinct central authority that shall have the same function for that region or territory. Central authorities shall ensure the speedy and proper execution or transmission of the requests received. Where the

central authority transmits the request to a competent authority for execution, it shall encourage the speedy and proper execution of the request by the competent authority. The Secretary-General of the United Nations shall be notified of the central authority designated for this purpose at the time each State Party deposits its instrument of ratification, acceptance or approval of or accession to this Convention. Requests for mutual legal assistance and any communication related thereto shall be transmitted to the central authorities designated by the States Parties. This requirement shall be without prejudice to the right of a State Party to require that such requests and communications be addressed to it through diplomatic channels and, in urgent circumstances, where the States Parties agree, through the International Criminal Police Organization, if possible.

14. Requests shall be made in writing or, where possible, by any means capable of producing a written record, in a language acceptable to the requested State Party, under conditions allowing that State Party to establish authenticity. The Secretary-General of the United Nations shall be notified of the language or languages acceptable to each State Party at the time it deposits its instrument of ratification, acceptance or approval of or accession to this Convention. In urgent circumstances and where agreed by the States Parties, requests may be made orally, but shall be confirmed in writing forthwith.

15. A request for mutual legal assistance shall contain:

- (a) The identity of the authority making the request;
- (b) The subject matter and nature of the investigation, prosecution or judicial proceeding to which the request relates and the name and functions of the authority conducting the investigation, prosecution or judicial proceeding
- (c) A summary of the relevant facts, except in relation to requests for the purpose of service of judicial documents;
- (d) A description of the assistance sought and details of any particular procedure that the requesting State Party wishes to be followed;
- (e) Where possible, the identity, location and nationality of any person concerned; and
- (f) The purpose for which the evidence, information or action is sought.

16. The requested State Party may request additional information when it appears necessary for the execution of the request in accordance with its domestic law or when it can facilitate such execution.

17. A request shall be executed in accordance with the domestic law of the requested State Party and, to the extent not contrary to the domestic law of the requested State Party and where possible, in accordance with the procedures specified in the request.

18. Wherever possible and consistent with fundamental principles of domestic law, when an individual is in the territory of a State Party and has to be heard as a witness or expert by the judicial authorities of another State Party, the first State Party may, at the request of the other, permit the hearing to take place by videoconference if it is not possible or desirable for the individual in question to appear in person in the territory of the requesting State Party. States Parties may agree that the hearing shall be conducted by a judicial authority of the requesting State Party and attended by a judicial authority of the requested State Party.

19. The requesting State Party shall not transmit or use information or evidence furnished by the requested State Party for investigations, prosecutions or judicial proceedings other than those stated in the request without the prior consent of the requested State Party. Nothing in this paragraph shall prevent the requesting State Party from disclosing in its proceedings information or evidence that is exculpatory to an accused person. In the latter case, the requesting State Party shall notify the requested State Party prior to the disclosure and, if so requested, consult with the requested State Party. If, in an exceptional case, advance notice is not possible, the requesting

State Party shall inform the requested State Party of the disclosure without delay.

20. The requesting State Party may require that the requested State Party keep confidential the fact and substance of the request, except to the extent necessary to execute the request. If the requested State Party cannot comply with the requirement of confidentiality, it shall promptly inform the requesting State Party.

21. Mutual legal assistance may be refused:

(a) If the request is not made in conformity with the provisions of this article;

(b) If the requested State Party considers that execution of the request is likely to prejudice its sovereignty, security, ordre public or other essential interests;

(c) If the authorities of the requested State Party would be prohibited by its domestic law from carrying out the action requested with regard to any similar offence, had it been subject to investigation, prosecution or judicial proceedings under their own jurisdiction;

(d) If it would be contrary to the legal system of the requested State Party relating to mutual legal assistance for the request to be granted.

22. States Parties may not refuse a request for mutual legal assistance on the sole ground that the offence is also considered to involve fiscal matters.

23. Reasons shall be given for any refusal of mutual legal assistance.

24. The requested State Party shall execute the request for mutual legal assistance as soon as possible and shall take as full account as possible of any deadlines suggested by the requesting State Party and for which reasons are given, preferably in the request. The requested State Party shall respond to reasonable requests by the requesting State Party on progress of its handling of the request. The requesting State Party shall promptly inform the requested State Party when the assistance sought is no longer required.

25. Mutual legal assistance may be postponed by the requested State Party on the ground that it interferes with an ongoing investigation, prosecution or judicial proceeding.

26. Before refusing a request pursuant to paragraph 21 of this article or postponing its execution pursuant to paragraph 25 of this article, the requested State Party shall consult with the requesting State Party to consider whether assistance may be granted subject to such terms and conditions as it deems necessary. If the requesting State Party accepts assistance subject to those conditions, it shall comply with the conditions.

27. Without prejudice to the application of paragraph 12 of this article, a witness, expert or other person who, at the request of the requesting State Party, consents to give evidence in a proceeding or to assist in an investigation, prosecution or judicial proceeding in the territory of the requesting State Party shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in that territory in respect of acts, omissions or convictions prior to his or her departure from the territory of the requested State Party. Such safe conduct shall cease when the witness, expert or other person having had, for a period of fifteen consecutive days or for any period agreed upon by the States Parties from the date on which he or she has been officially informed that his or her presence is no longer required by the judicial authorities, an opportunity of leaving, has nevertheless remained voluntarily in the territory of the requesting State Party or, having left it, has returned of his or her own free will.

28. The ordinary costs of executing a request shall be borne by the requested State Party, unless otherwise agreed by the States Parties concerned. If expenses of a substantial or extraordinary nature are or will be required to fulfil the request, the States Parties shall consult to determine the terms and conditions under which the request will be executed, as well as the manner in which the costs shall be borne.

29. The requested State Party:

(a) Shall provide to the requesting State Party copies of government records, documents or information in its possession that under its domestic law are available to the general public;

(b) May, at its discretion, provide to the requesting State Party in whole, in part or subject to such conditions as it deems appropriate, copies of any government records, documents or information in its possession that under its domestic law are not available to the general public.

30. States Parties shall consider, as may be necessary, the possibility of concluding bilateral or multilateral agreements or arrangements that would serve the purposes of, give practical effect to or enhance the provisions of this article.

## 1. Introduction

531. National authorities increasingly need the assistance of other States for the successful investigation, prosecution and punishment of offenders, particularly those who have committed transnational offences. The ability to assert jurisdiction and secure the presence of an accused offender in its territory accomplishes an important part of the task, but does not complete it. The international mobility of offenders and the use of advanced technology, among other factors, make it more necessary than ever that law enforcement and judicial authorities collaborate and assist the State that has assumed jurisdiction over the matter.
532. In order to achieve that goal, States have enacted laws to permit them to provide such international cooperation and increasingly have resorted to treaties related to mutual legal assistance in criminal matters. Such treaties commonly list the kind of assistance to be provided, the rights of the requesting and requested States relative to the scope and manner of cooperation, the rights of alleged offenders, and the procedures to be followed in making and executing requests.
533. These bilateral instruments enhance law enforcement in several ways. They enable authorities to obtain evidence abroad in a way that it is admissible domestically. For example, witnesses can be summoned, persons located, documents and other evidence produced and warrants issued. They supplement other arrangements on the exchange of information (for example, information obtained through INTERPOL, police-to-police relationships and judicial assistance and letters rogatory). They also resolve certain complications between countries with different legal traditions, some of which restrict assistance to judicial authorities rather than prosecutors.
534. There have been some multilateral efforts through treaties aimed at mutual legal assistance in criminal matters with respect to particular offences, including the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (see article 7), and the Convention against Corruption (see article 46). There have also been some regional instruments, either ad hoc on mutual legal

assistance or containing provisions on mutual legal assistance, to enable and facilitate such assistance.

535. In article 18, the Organized Crime Convention builds on the above initiatives, calls for the widest measure of mutual legal assistance as listed in article 18(3) in investigations, prosecutions and judicial proceedings, and expands the scope of application to all offences covered by the Convention. This includes the offences established under articles 5, 6, 8 and 23, offences established under any of the Protocols States become parties to, and transnational serious crimes involving an organized criminal group (article 2(b)).
536. Legal assistance may be requested for taking evidence or statements, effecting service of judicial documents, executing searches and seizures, examining objects and sites, providing information, evidence and expert evaluations, documents and records, tracing proceeds of crime, facilitating the appearance of witnesses, and any other kind of assistance not barred by domestic law. Article 18 of the Convention applies also to international cooperation in the identification, tracing, and seizure of proceeds of crime, property, and instrumentalities for the purpose of confiscation (see also article 13).
537. The Convention recognizes the diversity of legal systems and allows States to refuse mutual legal assistance under certain conditions (see article 18(21)). However, it makes clear that assistance cannot be refused on the ground of bank secrecy (article 18(8)) or for offences considered to involve fiscal matters (article 18(22)). States are required to provide reasons for any refusal to assist. Otherwise, States must execute requests expeditiously and take into account possible deadlines facing the requesting authorities (for example expiration of a statute of limitation).

## **2. Summary of the main requirements**

538. All States parties must ensure the widest measure of mutual legal assistance as listed in article 18(3) in investigations, prosecutions and judicial proceedings in relation to the following offences:
- (a) Offences established in accordance with articles 5, 6, 8 and 23 that are transnational and involve an organized criminal group;
  - (b) Serious crime (defined in article 2(b)) that is transnational and involves an organized criminal group;
  - (c) Offences established in accordance with the three Protocols, which are considered as offences established in accordance with the Convention under article 1(3) of each Protocol;
  - (d) Offences established in accordance with articles 5, 6, 8 and 23 that involve an organized criminal group, where there are reasonable grounds to suspect that victims, witnesses, proceeds, instrumentalities or evidence of such offences are located in the requested State party;

- (e) Serious crime which involves an organized criminal group, where there are reasonable grounds to suspect that victims, witnesses, proceeds, instrumentalities or evidence of such offences are located in the requested State party (article 18(1) and (3)).
539. All States parties must provide for mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to offences for which a legal person may be held liable under article 10 (article 18(2)).
540. Each State party must ensure that mutual legal assistance is not refused by it on the ground of bank secrecy (article 18(8)). Legislation may be necessary if existing laws or treaties governing mutual legal assistance are in conflict.
541. Each State party must provide for article 18(9)–(29), to govern the modalities of mutual legal assistance in the absence of a mutual legal assistance treaty with another State party (article 18(7) and (9)–(29)). Legislation may be necessary if existing domestic law governing mutual legal assistance is inconsistent with any of the terms of these paragraphs and if domestic law prevails over treaties.
542. Each State party must notify the Secretary-General of the United Nations of its central authority designated for the purpose of article 18, as well as of the language(s) acceptable to each State party in this regard (article 18(13) and (14)).
543. Each State party shall consider entering into bilateral or multilateral agreements or arrangements to give effect to or enhance the provisions of this article (article 18(30)).

### **3. Mandatory requirements**

#### *(a) Scope (article 18(1))*

544. Article 18(1) establishes the scope of the obligation to provide mutual legal assistance. States parties are required to provide the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by the Convention as provided in article 3. Thus, each State party must ensure that its mutual legal assistance treaties and laws provide for assistance with respect to investigations, prosecutions and judicial proceedings. The term “judicial proceedings” is separate from investigations and prosecutions and connotes a different type of proceeding.
545. Since it is not defined in the Convention, States parties have discretion in determining the extent to which they will provide assistance for such proceedings, but assistance should at least be available with respect to portions of the criminal process that in some countries may not be part of the actual trial, such as pre-trial proceedings, sentencing proceedings, and bail proceedings. These investigations, prosecutions or proceedings must relate to offences covered by the Convention as provided in article 3. This means:

- (a) Offences established in accordance with articles 5, 6, 8 and 23 that are transnational (defined in article 3(2)) and involve an organized criminal group (defined in article 2(a));
  - (b) Serious crime (defined in article 2(b)) that is transnational and involves an organized criminal group;
  - (c) Offences established in accordance with the three Protocols, to which States are parties.
546. In addition, States parties are obliged by article 18(1) to reciprocally extend to one another similar assistance where the requesting State has reasonable grounds to suspect that the offence referred to in article 3(1)(a) or (b) is transnational in nature including that victims, witnesses, proceeds, instrumentalities or evidence of such offences are located in the requested State party and that the offences involve an organized criminal group.
547. Under article 3, the Convention applies where the offence in question is transnational in nature and involves an organized criminal group. In contrast, article 18(1) requires the provision of mutual legal assistance where the requesting State party has reasonable grounds to suspect that the offence is transnational in nature and that the offence involves an organized criminal group. It should be noted that the mere fact that victims, witnesses, proceeds, instrumentalities or evidence of such offences are located in the requested State party constitutes in itself a sufficient reasonable ground to suspect that the offence is transnational.
548. This sets a lower evidentiary standard intended to facilitate assistance requests for the purpose of determining whether elements of transnationality and organized crime are present and whether international cooperation may be necessary and may be sought under the Convention for subsequent investigative measures, prosecution or extradition. It is important that this standard be reflected in domestic implementing legislation.
549. If a State party's current mutual legal assistance laws and treaties are not broad enough to cover all of the offences set forth in paragraph 1, amending legislation may be necessary.
550. In drafting legislation creating powers to execute assistance requests, legislators should note that the criterion for the requests and provision of legal assistance is slightly broader than that applying to most other Convention and Protocol obligations.
- (b) *Mutual legal assistance for proceedings involving legal persons (article 18(2))*
551. Article 18(2) provides that mutual legal assistance shall be furnished to the fullest extent possible under relevant laws, treaties, agreements and arrangements with

respect to investigations, prosecutions and judicial proceedings in relation to the offences for which a legal person may be held liable in accordance with article 10.<sup>152</sup>

552. Thus, a State party should have the ability to provide a measure of mutual legal assistance with respect to investigations, prosecutions and judicial proceedings into the conduct of legal persons. Here, some discretion is granted to States parties regarding the extent to which assistance is to be provided. Where a State party presently lacks any legal authority to provide assistance with respect to investigations, prosecutions and judicial proceedings against legal persons, amending legislation should be considered.
553. The *Travaux Préparatoires* indicate that the term “judicial proceedings” in article 18(2) refers to the matter for which mutual legal assistance is requested and is not intended to be perceived as in any way prejudicing the independence of the judiciary.<sup>153</sup>

(c) *Purposes for which mutual legal assistance is to be provided (article 18(3))*

554. Article 18(3) sets forth the following list of specific types of mutual legal assistance that a State party must be able to provide:
- (a) Taking evidence or statements from persons;
  - (b) Effecting service of judicial documents;
  - (c) Executing searches and seizures, and freezing;
  - (d) Examining objects and sites;
  - (e) Providing information, evidentiary items and expert evaluations;
  - (f) Providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records;
  - (g) Identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes;
  - (h) Facilitating the voluntary appearance of persons in the requesting State party;
  - (i) Any other type of assistance that is not contrary to the domestic law of the requested State party.
555. States parties should review their current mutual legal assistance treaties to ensure that these sources of legal authority are broad enough to cover each form of cooperation listed above. Generally, mutual legal assistance treaties provide for such forms of cooperation. In the rare situation in which a form of cooperation listed in article 18(3) is not provided for (in particular in countries in which treaties are considered subordinate to mutual legal assistance laws), the States parties concerned should consider such mutual legal assistance treaties as being automatically supplemented by

<sup>152</sup> See also section IV.B, above.

<sup>153</sup> *Travaux Préparatoires*, p. 198.

those forms of cooperation. Alternatively, under some legal systems, amending legislation or other action may be required.

556. In most cases, domestic law already provides powers to take the measures necessary to deliver the above types of assistance. If not, such powers must be created. If they exist, amendments may be necessary to ensure that they can be used in legal assistance cases. For example, search and seizure powers limited to cases where judicial authorities are satisfied that a domestic crime has been committed and that the search for evidence is warranted, would have to be amended to allow search warrants for alleged foreign offences evidence of which is believed to be in the requested State.
557. In order to obtain from and provide mutual legal assistance to States parties in the absence of a mutual legal assistance treaty, a mechanism is provided pursuant to the provisions of article 18(7) and (9)–(29). The implementation requirements pertaining to this situation are described below.

*(d) Procedure to be followed in the absence of a treaty (article 18(7))*

558. Article 18(7) provides that where there is no mutual legal assistance treaty in force between a State party seeking cooperation and the State party from whom cooperation is sought, the rules of mutual legal assistance set forth in article 18(9)–(29) apply in providing the forms of cooperation listed in article 18(3). If a treaty is in force between the States parties concerned, the rules of the treaty will apply instead, unless they agree to apply article 18(9)–(29).
559. For many States parties whose legal systems permit direct application of treaties, no implementing legislation will be needed. If the legal system of a State party does not permit direct application of these paragraphs, legislation will be required to ensure that in the absence of a mutual legal assistance treaty, the terms of article 18(9)–(29) apply to requests made under the Convention, rather than rules that may otherwise apply. Such an enabling statute may be general in nature, consisting of a reference to the effect that in cases falling within the scope of article 18, and in the absence of a treaty with the State party concerned, the rules of article 18(9)–(29) apply.
560. States parties are also strongly encouraged, but not obliged, to apply any of article 18(9)–(29) if they facilitate their cooperation efforts (by, for example, going beyond existing mutual legal assistance treaties).

*(e) Prohibition on denial of mutual legal assistance on the ground of bank secrecy (article 18(8))*

561. Article 18(8) provides that States parties shall not decline to render mutual legal assistance pursuant to article 18 on the ground of bank secrecy. It is significant that this paragraph is not included among the paragraphs that only apply in the absence of a mutual legal assistance treaty. Instead, States parties are obliged to ensure that no such ground for refusal may be invoked under their mutual legal assistance laws or treaties. Cooperation among States parties in the exchange of financial information is crucial in

order to effectively prosecute financial crimes and to confiscate proceeds of crime. Therefore, financial investigators need to be able to identify and trace the financial assets of members of criminal groups across bank accounts and through other forms of fiduciary holdings.

562. Thus, where a State party's laws currently permit refusal on the ground of banking secrecy, amending legislation should be enacted to remedy this. Where such a ground for refusal is included in any State party's mutual legal assistance treaties, the act of that country's becoming party to the Organized Crime Convention should as a matter of treaty law automatically invalidate the contrary provisions of an earlier treaty. Should a State party's legal system provide that treaties are not applied directly, domestic legislation may be required.
563. The *Travaux Préparatoires* indicate that article 18(8) is not inconsistent with article 18(17) and (21).<sup>154</sup>

(f) *Measures to be applied in the absence of a treaty (article 18(9)–(29))*

564. The actions required in order to implement article 18(9)–(29), which provide certain procedures and mechanisms that must be applied in the absence of a mutual legal assistance treaty between the States parties concerned, are discussed above in general terms in relation to article 18(7) above. Some States parties will usually apply these paragraphs directly where they are relevant to a particular request for assistance, because under their legal system the Convention's terms can be directly applied. Otherwise, it may be easiest for a general legislative grant of authority to be enacted to permit direct application of article 18(9)–(29) for countries in which treaties are not directly applied.
565. With respect to the transfer of detained or convicted persons to another State party (see article 18(10)(b)), among the conditions to be determined by States parties for the transfer of a person, States parties may agree that the requested State party may be present at witness testimony conducted in the territory of the requesting State party.<sup>155</sup>
566. The costs associated with such transfers of persons (article 18(1) and (11)) would generally be considered extraordinary in nature. The *Travaux Préparatoires* also indicate the understanding that developing countries may encounter difficulties in meeting even some ordinary costs and should be provided with appropriate assistance to enable them to meet the requirements of this article.<sup>156</sup> Article 18(28) also deals with the issue of costs.
567. The Convention requires the designation of a central authority with the power to receive and execute or transmit mutual legal assistance requests to the competent authorities to handle it in each State party. This central authority may be different at different stages of the proceedings for which mutual legal assistance is requested.

<sup>154</sup> Ibid.

<sup>155</sup> Ibid.

<sup>156</sup> Ibid., p. 199.

Further, the *Travaux Préparatoires* indicate that this paragraph is not intended to create an impediment to countries having a central authority as regards receiving requests or to a different central authority as regards making requests.<sup>157</sup>

568. The Secretary-General of the United Nations should be notified of the designated central authority and the acceptable language(s) to be used for requests at the time of signature or deposit (article 18(13) and (14)). The notification should be provided to the directory of competent national authorities under the 1988 Convention and the Organized Crime Convention by the United Nations Office on Drugs and Crime.

#### 4. Optional measures, including optional issues

##### (a) *Spontaneous transmission of information*

569. Article 18(4) and (5) provide a legal basis for a State party to forward to another State party information or evidence it believes is important for combating the offences covered by the Convention, where the other country has not made a request for assistance and may be completely unaware of the existence of the information or evidence. There is, however, no obligation to do so in a particular case. Article 18(4) and (5) are complemented by article 27 of the Convention which enables law enforcement cooperation between States parties.<sup>158</sup>
570. For those States parties whose legal system permits direct application of treaties, article 18(4) and (5) requires them to transmit information spontaneously where such transmissions are not otherwise possible under domestic law and no new legislation is needed.
571. If a State party does not already have a domestic legal basis for such spontaneous transmissions and under its legal system the terms of these paragraphs cannot be directly applied, it is strongly encouraged, but not obliged, to take such steps as may be necessary to establish such a legal basis.
572. The *Travaux Préparatoires* indicate:
- (a) That when a State party is considering whether to spontaneously provide information of a particularly sensitive nature or is considering placing strict restrictions on the use of information thus provided, it is considered advisable for the State party concerned to consult with the potential receiving State beforehand;
  - (b) That when a State party that receives information under this provision already has similar information in its possession, it is not obliged to comply with any restrictions imposed by the transmitting State.<sup>159</sup>

<sup>157</sup> Ibid.

<sup>158</sup> See also section V.C, below.

<sup>159</sup> *Travaux Préparatoires*, p. 198.

(b) *Savings clause for mutual legal assistance treaties (no specific obligations, article 18(6))*

573. Article 18(6) simply provides that the article does not preclude or affect the independent obligations that may arise under other treaties that govern mutual legal assistance. At the same time, becoming a party to the Organized Crime Convention gives rise to separate obligations that States parties must comply with among themselves.

(c) *Testimony by videoconferencing*

574. Provision of testimony via videoconferencing is not mandatory. Note should also be taken of article 18(28), which provides for consultations regarding the allocation of the costs of mutual legal assistance of a substantial or extraordinary nature.

575. Article 18(18) requires States parties to make provision, wherever possible and consistent with the fundamental principles of domestic law, for the use of videoconferencing as a means of providing viva voce evidence in cases where it is impossible or undesirable for a witness to travel. In this context, it needs to be stressed that the costs of providing testimony by videoconferencing have been substantially reduced since the Convention was negotiated, so that in many countries they may not be considered substantial or extraordinary. Testimony by videoconferencing may require the following legislative changes:

- (a) Legislative powers allowing authorities to compel the attendance of a witness, administer oaths and subject witnesses to criminal liability for non-compliance (for example, using contempt-of-court or similar offences);
- (b) Amendments to evidentiary rules to allow for the basic admissibility of evidence provided by videoconferencing and setting technical standards for reliability and verification (for example, identification of the witness);
- (c) Expansion of perjury offences, putting in place legislation to ensure that:
  - (i) A witness physically in the country who gives false evidence in foreign legal proceedings is criminally liable;
  - (ii) A witness in a foreign country who gives false evidence in a domestic court or proceeding via videoconferencing is criminally liable;
  - (iii) Persons alleged to have committed perjury via videoconferencing can be extradited into and out of the jurisdiction, as applicable;
  - (iv) A person can be extradited for having committed perjury in the jurisdiction of the foreign tribunal.

576. The *Travaux Préparatoires* provide the following guidelines:

- (a) The judicial authority of the requested State party shall be responsible for the identification of the person to be heard and shall, on conclusion of the hearing,

draw up minutes indicating the date and place of the hearing and any oath taken. The hearing shall be conducted without any physical or mental pressure on the person questioned;

- (b) If the judicial authority of the requested State considers that during the hearing the fundamental principles of the law of that State are infringed, he or she has the authority to interrupt or, if possible, to take the necessary measures to continue the hearing in accordance with those principles;
- (c) The person to be heard and the judicial authority of the requested State shall be assisted by an interpreter as necessary;
- (d) The person to be heard may claim the right not to testify as provided for by the domestic law of the requested State or of the requesting State; the domestic law of the requested State applies to perjury;
- (e) All the costs of the videoconference shall be borne by the requesting State party, which may also provide as necessary for technical equipment.<sup>160</sup>

577. With respect to the last point, concerning costs, the *Travaux Préparatoires* indicate that costs in connection with article 18(10), (11) and (18) would generally be considered extraordinary in nature and point out that developing countries might encounter difficulties in meeting even some ordinary costs and should be provided with appropriate assistance to enable them to meet the requirements of the article.<sup>161</sup>

(d) *Conclusion of new agreements and arrangements (article 18(30))*

578. Article 18(30) calls upon States parties to consider, as may be necessary, the possibility of concluding bilateral or multilateral agreements or arrangements that would serve the purposes of, give practical effect to, or enhance the provisions of the article. The Model Treaty on Mutual Assistance in Criminal Matters (adopted by the General Assembly in its resolution 45/117, subsequently amended in General Assembly resolution 53/112) contains provisions that may be instructive.

### Additional references and resources

#### Organized Crime Convention

Article 2 (Use of terms)

Article 3 (Scope of application)

Article 10 (Liability of legal persons)

Article 13 (International cooperation for purposes of confiscation)

Article 20 (Special investigative techniques)

<sup>160</sup> *Travaux Préparatoires*, p. 199.

<sup>161</sup> *Ibid.*

### **Additional United Nations resources**

Background paper prepared by the Secretariat on best practices and experiences in using the United Nations Convention against Transnational Organized Crime for international cooperation and the role of regional networks (CTOC/COP/WG.3/2012/2), paras. 8-12.

Conference room paper prepared by the Secretariat on the technical and legal obstacles to the use of videoconferencing (CTOC/COP/2010/CRP.2).

Manual on Mutual Legal Assistance and Extradition (2012).

Model Law on Mutual Legal Assistance (2007)

Model Treaty on Mutual Assistance in Criminal Matters (General Assembly resolution 45/117, annex and General Assembly resolution 53/112, annex).

Mutual Legal Assistance Request Writer Tool. Available at [www.unodc.org/mla/en/index.html](http://www.unodc.org/mla/en/index.html).

### **Examples of national legislation**

Argentina, Ley de Cooperacion Internacional en Materia Penal - Law No. 24.767, Part III, arts. 67 - 81

Botswana, Mutual Assistance in Criminal Matters Act 1990, Part I, sects. 1-8

Brazil, Decree No. 6.061/2007 and Law No. 13.105/2015

Canada, Mutual Legal Assistance in Criminal Matters Act, R.S.C., 1985

Germany, Act on International Cooperation in Criminal Matters

Indonesia, Law No. 1 (2006) on mutual legal assistance in criminal matters, chap. I, arts. 3-7; and chap. II, arts.11-23

Malaysia, Mutual Assistance in Criminal Matters Act 2002, Part I, sects. 1-5; and Part II, sects. 16-21

Myanmar, Mutual Assistance in Criminal Matters Law, chap. I, sects. 1- 3; and chap. IV, sects. 10-24

Namibia, International Co-operation in Criminal Matters Act 2000

Peru, Code of Criminal Procedure , Book 7: International Judicial Cooperation

Republic of Korea, Act on International Judicial Mutual Assistance in Criminal Matters, chap. I, arts. 1-4; and chap. II, arts. 5-10

Thailand, Act on Mutual Assistance in Criminal Matters

Vanuatu, Mutual Assistance in Criminal Matters Act, Parts 1, 2 and 4

## **C. Other forms of international cooperation**

### **Article 19 of the Organized Crime Convention**

#### **– Joint investigations**

States Parties shall consider concluding bilateral or multilateral agreements or arrangements whereby, in relation to matters that are the subject of investigations, prosecutions or judicial proceedings in one or more States, the competent authorities concerned may establish joint investigative bodies. In the absence of such agreements or arrangements, joint investigations may be undertaken by agreement on a case-by-case basis. The States Parties involved shall ensure that the sovereignty of the State Party in whose territory such investigation is to take place is fully respected.

### **Article 27 of the Organized Crime Convention**

#### **– Law enforcement cooperation**

1. States Parties shall cooperate closely with one another, consistent with their respective domestic legal and administrative systems, to enhance the effectiveness of law enforcement action to combat the offences covered by this Convention. Each State Party shall, in particular, adopt effective measures:

(a) To enhance and, where necessary, to establish channels of communication between their competent authorities, agencies and services in order to facilitate the secure and rapid exchange of information concerning all aspects of the offences covered by this Convention, including, if the States Parties concerned deem it appropriate, links with other criminal activities;

(b) To cooperate with other States Parties in conducting inquiries with respect to offences covered by this Convention concerning:

(i) The identity, whereabouts and activities of persons suspected of involvement in such offences or the location of other persons concerned;

(ii) The movement of proceeds of crime or property derived from the commission of such offences;

(iii) The movement of property, equipment or other instrumentalities used or intended for use in the commission of such offences;

(c) To provide, when appropriate, necessary items or quantities of substances for analytical or investigative purposes;

(d) To facilitate effective coordination between their competent authorities, agencies and services and to promote the exchange of personnel and other experts, including, subject to bilateral agreements or arrangements between the States Parties concerned, the posting of liaison officers;

(e) To exchange information with other States Parties on specific means and methods used by organized criminal groups, including, where applicable, routes and conveyances and the use of false identities, altered or false documents or other means of concealing their activities;

(f) To exchange information and coordinate administrative and other measures taken as appropriate or the purpose of early identification of the offences covered by this Convention.

2. With a view to giving effect to this Convention, States Parties shall consider entering into bilateral or multilateral agreements or arrangements on direct cooperation between their law

enforcement agencies and, where such agreements or arrangements already exist, amending them. In the absence of such agreements or arrangements between the States Parties concerned, the Parties may consider this Convention as the basis for mutual law enforcement cooperation in respect of the offences covered by this Convention. Whenever appropriate, States Parties shall make full use of agreements or arrangements, including international or regional organizations, to enhance the cooperation between their law enforcement agencies.

3. States Parties shall endeavour to cooperate within their means to respond to transnational organized crime committed through the use of modern technology.

### **Article 17 of the Organized Crime Convention**

#### **– Transfer of sentenced persons**

States Parties may consider entering into bilateral or multilateral agreements or arrangements on the transfer to their territory of persons sentenced to imprisonment or other forms of deprivation of liberty for offences covered by this Convention, in order that they may complete their sentences there.

### **Article 21 of the Organized Crime Convention**

#### **– Transfer of criminal proceedings**

States Parties shall consider the possibility of transferring to one another proceedings for the prosecution of an offence covered by this Convention in cases where such transfer is considered to be in the interests of the proper administration of justice, in particular in cases where several jurisdictions are involved, with a view to concentrating the prosecution.

## **1. Introduction**

579. The Convention provides for a number of other mandatory and non-mandatory mechanisms to facilitate international cooperation. Discussed in this section are law enforcement cooperation (article 27), joint investigations (article 19), the transfer of sentenced persons (article 17) and the transfer of criminal proceedings (article 21).

## **2. Summary of the main requirements**

### *(a) Law enforcement cooperation (article 27)*

580. Under article 27, a State party shall:

(a) Consistent with their respective domestic legal and administrative systems, adopt effective measures for purposes of effective investigation with respect to the offences established by the Convention, including:

(i) Enhancing and, where necessary, establishing channels of communication between their respective law enforcement agencies;

- (ii) Cooperating with other States parties in their inquiries concerning:
  - a. The identity, whereabouts and activities of particular persons;
  - b. The movement of proceeds or property derived from the commission of offences and of property, equipment and other instrumentalities used or intended for use in the commission of offences;
- (iii) Providing, when appropriate, items and substances for analytical or investigative purposes;
- (b) Consider entering into bilateral or multilateral agreements or arrangements to give effect to or enhance the provisions of this article;
- (c) Endeavour to cooperate in order to respond to transnational organized crime committed by use of modern technology.

*(b) Joint investigations (article 19)*

581. Although mutual legal assistance<sup>162</sup> can facilitate the investigation and prosecution of transnational organized crime significantly, closer cooperation in the form of joint investigations, with personnel from two or more States, may prove more effective, especially in complex cases. Article 19 requires States parties to consider concluding agreements or arrangements on the establishment of joint investigative bodies.
582. Under article 19, a State party shall consider bilateral or multilateral agreements or arrangements regarding an establishment of joint investigative bodies, while ensuring that the sovereignty of the State party in whose territory such investigation is to take place is fully respected.

*(c) Transfer of sentenced persons (article 17)*

583. Under article 17, a State party may consider entering into bilateral or multilateral agreements or arrangements on the transfer to their territory of persons sentenced to imprisonment or other forms of deprivation of liberty for offences covered by the Organized Crime Convention in order that they may complete their sentences there.

*(d) Transfer of criminal proceedings (article 21)*

584. Under article 21, a State party shall consider transferring the criminal proceedings for the prosecution of an offence covered by the Organized Crime Convention in cases where such a transfer is in the interests of the proper administration of justice, especially those in which several States are involved.

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<sup>162</sup> See also section V.B, above.

### 3. Mandatory requirements

#### *Scope of law enforcement cooperation (article 27(1))*

585. Article 27(1) establishes the scope of the obligation to cooperate. States parties are required to cooperate closely with one another in terms of law enforcement (police-to-police) cooperation in a number of enumerated areas described in subparagraphs (a)-(f) of article 27(1).
586. This general obligation to cooperate is not absolute; rather, it is to be conducted consistent with their respective domestic legal and administrative systems. The *Travaux Préparatoires* indicate that this clause provides States parties with flexibility regarding the extent and manner of cooperation. For example, it enables States parties to deny cooperation where it would be contrary to their domestic laws or policies to provide the assistance requested.<sup>163</sup> States parties shall also have the ability to condition or refuse cooperation in specific instances in accordance with their respective requirements.
587. Subject to this general limitation, States parties are to strengthen the channels of communication among their respective law enforcement authorities (article 27(1)(a)); undertake specific forms of cooperation in order to obtain information about persons, the movements of proceeds and instrumentalities of crime (article 27(1)(b)); provide to each other items or quantities of substances for purposes of analysis or other investigative purposes (article 27(1)(c)); promote exchanges of personnel including the posting of liaison officers (article 27(1)(d)); exchange information on a variety of means and methods used by organized criminal groups (article 27(1)(e)); and conduct other cooperation for purposes of facilitating early identification of offences (article 27(1)(f)).
588. The *Travaux Préparatoires* furthermore indicate that States parties will make their own determination as to how best to ensure the secure and rapid exchange of information. Many delegations endorsed the use of direct communication between their different domestic law enforcement agencies and foreign counterparts. However, States parties that feel it more advisable to establish a central point of contact to ensure efficiency would not be precluded from doing so.<sup>164</sup>

### 4. Other measures, including optional issues

#### (a) *Establishment of bilateral or multilateral agreements or arrangements on law enforcement cooperation (article 27(2))*

589. Article 27(2) calls upon States parties to consider entering into bilateral or multilateral agreements or arrangements on direct cooperation between their law enforcement agencies, with a view to giving effect to the Convention.

<sup>163</sup> *Travaux Préparatoires*, p. 244.

<sup>164</sup> *Ibid.*

590. Article 27(2) also grants legal authority for such cooperation in the absence of a specific agreement or arrangement. The domestic laws of most countries already permit such cooperation. Indeed, virtually all countries are members of Interpol, a multilateral arrangement by which such cooperation can generally be carried out. For any States parties whose laws do not so permit, this provision can be a source of legal authority for this type of cooperation on a case-by-case basis.

(b) *Cooperation through use of modern technology (article 27(3))*

591. Criminals and terrorists exploit information technology to commit crimes including network attacks, extortion, online child sexual exploitation and cybertechnology-enabled fraud. They communicate with one another, often covertly using the darknet, and regularly maintain their criminal organizations using technology enablers. Globally, cybercrime encompasses financially and sexually motivated criminality, online terrorism planning and acts directly against the confidentiality, integrity and accessibility of computer systems.

592. Article 27(3) calls upon States to endeavour to conduct law enforcement cooperation in order to respond to transnational organized crime committed through the use of modern technology. The *Travaux Préparatoires* indicate that the forms of modern technology referred to in this article include computers and telecommunications networks.<sup>165</sup>

593. The measures relating to law enforcement cooperation under article 27 are complemented by article 18(4) and (5) of the Convention, which provide a legal basis for a State party to forward to another State party information or evidence it believes is important for combating the offences covered by the Convention, where the other country has not made a request for assistance and may be completely unaware of the existence of the information or evidence.<sup>166</sup>

(c) *Joint investigations (article 19)*

594. Article 19 encourages, but does not require, States to enter into agreements or arrangements to conduct joint investigations, prosecutions, and proceedings in more than one State, where a number of States parties may have jurisdiction over the offences involved.

595. Article 19 further grants legal authority to conduct joint investigations on a case-by-case basis, even absent a specific agreement or arrangement. The domestic laws of most States already permit such joint activities and for those few States whose laws do not so permit, this provision will be a sufficient source of legal authority for case-by-case cooperation of this sort.

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<sup>165</sup> Ibid.

<sup>166</sup> See also section V.B, above.

596. Two models of joint investigations are commonly used in practice. Either model can be used as a basis for implementation of article 19 of the Organized Crime Convention, and it is for States to decide which model is most appropriate:
- (a) The first model identified consists of parallel, coordinated investigations with a common goal, assisted by a liaison officer network or through personal contacts and supplemented by formal mutual legal assistance requests in order to obtain evidence. The officials involved may be non-co-located and be able to work jointly on the basis of long-standing cooperative practices and/or existing mutual legal assistance legislation depending on the nature of the legal system(s) involved;
  - (b) The second model consists of integrated joint investigation teams with officers from at least two jurisdictions. These teams can be further divided and characterized as either passive or active. An example of a passively integrated team would be the situation where a foreign law enforcement officer is integrated with officers from the host State in an advisory or consultancy role or in a supportive role based on the provision of technical assistance to the host state. An actively integrated team would include officers from at least two jurisdictions with the ability to exercise operational powers (equivalent or at least some powers) under host State control in the territory or jurisdiction where the team is operating.
597. As a practical matter, States who want to engage in joint investigations may need to consider a way of ensuring that foreign law enforcement officials can lawfully participate in local operations. Conferring certain powers for a certain period of time may be required. Further issues of relevance will be ensuring clarity with respect to supervision, roles and responsibilities of seconded officers, limits on their activities and the question of criminal or civil liability. The *Model Legislative Provisions against Organized Crime* provide further guidance on joint investigations.<sup>167</sup>

(d) *Transfer of sentenced persons (article 17)*

598. In accordance with article 17, States parties may wish to consider entering into bilateral or multilateral agreements or arrangements on the transfer to their territory of persons sentenced to imprisonment or other forms of deprivation of liberty for offences established in accordance with the Organized Crime Convention, in order that they may complete their sentences there.
599. Sentenced persons who serve their sentences in their home countries can be integrated back into the community better than if they had served their sentence elsewhere. This is a positive reason for transferring sentenced persons to a State with which they have social links to serve their sentences. The transfer of sentenced persons can also serve a number of other diplomatic and practical purposes. Transfer is also a mechanism that States can use to secure the return of their nationals who may be imprisoned in harsh

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<sup>167</sup> *Model Legislative Provisions against Organized Crime*, pp. 87-93.

or inhumane conditions. Also, transfer eases the practical burdens attendant in incarcerating foreign nationals, arising from, for example, language barriers and the need to accommodate the religious, cultural and dietary needs of foreign inmates.

600. Transfer of sentenced persons also has a strong basis in international human rights law. For example, article 10(3) of the International Covenant on Civil and Political Rights specifies that the “essential aim” of a penitentiary system is the “reformation and social rehabilitation” of prisoners. Furthermore, the rehabilitation of persons sentenced for Convention offences is also a stated objective of the Organized Crime Convention, which provides in its article 31(3) that “States parties shall endeavour to promote the reintegration into society of persons convicted of offences covered by this Convention”.
601. Transfer of sentenced persons is a complex issue likely requiring both the conclusion of bilateral or other agreements and supporting domestic legislation. When implementing article 17, States parties will have to take into account already existing (bilateral or multilateral) treaties or arrangements governing the transfer of sentenced persons to and from another State or consider entering into such treaties or arrangements. Further questions to consider are possible restrictions that national legislations may impose on such transfers, the handling of requests for transfers of sentenced persons and difficulties justice officials have encountered in negotiating treaties with other States for the transfer of prisoners.
602. To ensure the efficiency of the transfer of sentenced persons, national laws should address the following issues at a minimum: definitions of all critical terms; identifying and designating a central authority to receive and respond to requests; enumerating the requirements for transfer; ensuring clarity of application and other procedures; and the steps and procedures that a country is to follow in administering the programme, processing applications and making transfer decisions. Such laws should not make any specific requirements that are unique to that State’s national context. The *Model Legislative Provisions against Organized Crime* provide further guidance on transfer of sentenced persons.<sup>168</sup>

(e) *Transfer of criminal proceedings (article 21)*

603. The very nature of transnational organized crime is that criminal activities span more than one State’s jurisdiction. It is not unusual to have criminal acts committed and victims located in several States, with proceeds of the criminal acts laundered through the financial systems of multiple States and members of the criminal organization operating or living in yet other States. In such instances, it is more practical, efficient and fairer to all parties concerned — including offenders and victims — to consolidate the case in one place. The transfer of criminal proceedings is an important tool to facilitate the administration of justice and, in some instance, may be the only way to pursue a prosecution.

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<sup>168</sup> Ibid., pp. 119-131.

604. Thus, under article 21, States parties are required to “consider the possibility of transferring to one another proceedings for the prosecution of an offence covered by the Convention in cases where such transfer is considered to be in the interests of the proper administration of justice, in particular in cases where several jurisdictions are involved, with a view to concentrating the prosecution.”
605. In order to transfer criminal proceedings, the two States involved first need to evaluate whether the recipient State in which the proceedings are to be held has jurisdiction over the principal issues of the case. Next, from a practical point of view, in order to effectively transfer the prosecution to another State, two further steps may be required. First, the two States would need to share and transfer information and evidence. Article 15(5) of the Convention provides that, where two States are involved in the investigation, prosecution or judicial proceedings with respect to the same conduct, they shall, as appropriate, consult one another with a view to coordinating actions. Secondly, if the matter had already reached the courts in one State, it would be necessary to “stay” or suspend the prosecution, pending resolution in the other State.
606. The United Nations has developed the Model Treaty on the Transfer of Proceedings in Criminal Matters,<sup>169</sup> which may be instructive to States parties interested in negotiating and concluding bilateral or multilateral treaties aimed at improving cooperation in matters of crime prevention and criminal justice.

### **Additional references and resources**

#### **Organized Crime Convention**

Article 13 (International cooperation for purposes of confiscation)  
 Article 18 (Mutual legal assistance)  
 Article 20 (Special investigative techniques)

#### **Protocols supplementing the Organized Crime Convention**

Trafficking in Persons Protocol, article 1, paragraph 3  
 Smuggling of Migrants Protocol, article 1, paragraph 3  
 Firearms Protocol, article 1, paragraph 3

#### ***Model Legislative Provisions against Organized Crime***

Article 17 (International law enforcement cooperation)

<sup>169</sup> General Assembly resolution 45/118, annex.

Article 18 (Joint investigations)

Article 19 (Conferral of powers on foreign law enforcement officials in joint investigations)

*Chapter IX – Transfer of sentenced persons*

Article 29 (Objectives)

Article 30 (Definitions and use of terms)

Article 30 (Requirements for transfer)

Article 32 (Notice of the right to apply for transfer)

Article 33 (Application for transfer)

Article 34 (Protection of prisoners in the transfer process)

Article 35 (Enforcement or administration of the transferred sentence)

**Additional United Nations resources**

*Joint investigations*

Conference room paper entitled “Informal expert working group on joint investigations: conclusions and recommendations” (CTOC/COP/2008/CRP.5)

*Law enforcement cooperation*

UNODC, *Comprehensive Study on Cybercrime* (Vienna, 2013)

*Transfer of sentenced persons*

Background paper prepared by the Secretariat on best practices and experiences in using the United Nations Convention against Transnational Organized Crime for international cooperation and the role of regional networks (CTOC/COP/WG.3/2012/2), paras. 17-21.

UNODC, *Handbook on the International Transfer of Sentenced Persons*, Criminal Justice Handbook Series (Vienna, 2012)

*Transfer of criminal proceedings*

Model Treaty on the Transfer of Proceedings in Criminal Matters (General Assembly resolution 45/118, annex.)

**Examples of national legislation**

*Law enforcement cooperation:*

Bosnia and Herzegovina, Law on Mutual Legal Assistance in Criminal Matters, chap. II, art. 24

Estonia, Code of Criminal Procedure, chap. 19, §471  
 Germany, Act on International Cooperation in Criminal Matters, Part V, sect. 61b  
 Germany, Act on International Cooperation in Criminal Matters, Part X, sect.93  
 Latvia, Criminal Procedure Law, chap. 84, sects.888 - 896  
 Republic of Moldova, Criminal Procedure Code, chap. IX, arts. 531-540  
 Republic of Moldova, Law No. 241-XVI of 20.10.2005 on Preventing and Combating  
 Trafficking in Human Beings, chap. VI, arts. 33 and 34  
 Serbia, Law on Mutual Assistance in Criminal Matters, sect. V (Other forms of mutual  
 assistance), art. 96

*Joint investigations:*

Ireland, The Criminal Justice (Joint Investigation Teams) Act 2004  
 Romania, Law No. 39/2003 regarding the preventing and combating of organized crime  
 Sweden, Act on Joint Investigation Teams for Criminal Investigations promulgated on 18  
 December 2003  
 France, Criminal Code of Procedure, art. 695

*Transfer of sentenced persons*

Bahamas, Criminal Justice (International Co-operation) Act, Part II, arts. 3-11  
 Bosnia and Herzegovina, Law on Mutual Legal Assistance in Criminal Matters, chaps. VII  
 and VIII, arts. 77-82  
 Bulgaria, Penal Procedure Code, chap. 36, arts. 453-462  
 Canada, Mutual Legal Assistance in Criminal Matters Act, Part I, sects. 24-29  
 Hungary, Act XXXVIII of 1996 on International Legal Assistance in Criminal Matters, chap.  
 IV, sects. 46-60  
 Latvia, Criminal Procedure Law, chap. 78, sect. 821  
 Micronesia (Federated States of), Code of the Federated States of Micronesia, Title 12.  
 Criminal Procedure, chap. 15, § 1501-§ 1516  
 Montenegro, The Law on Mutual Legal Assistance in Criminal Matters, I. General provisions,  
 arts. 1-9  
 Poland, The Code of Criminal Procedure, chap. 66, arts.608-611f  
 Republic of Korea, Act on the International Transfer of Sentenced Person, Chapter I, Article  
 1-4  
 Samoa, International Transfer of Prisoners Act 2009, Part 2, sects. 8-12; Part 3, sects. 13-20;  
 Part 4, sects. 21-29  
 Serbia, Law on Mutual Assistance in Criminal Matters, chap. IV (Execution of criminal  
 judgment), arts. 56-82  
 Ukraine, Criminal Code, General Part - chap. II, art. 10  
 Viet Nam, Law on Legal Assistance, chap. V, arts. 49-60  
 Zimbabwe, Transfer of Offenders Act, arts. 1-16

*Transfer of criminal proceedings*

Bahamas, Criminal Justice (International Co-operation) Act, Part II, arts. 3-11

Bulgaria, Penal Procedure Code, chap. 36, arts. 478-480

Estonia, Code of Criminal Procedure, chap. 19, § 474-§ 475

Latvia, Criminal Procedure Law, chap. 68, sects. 741-748

Montenegro, The Law on Mutual Legal Assistance in Criminal Matters, III. Transfer and Assuming of Criminal Prosecution, arts. 34-37

Netherlands, Code of Criminal Procedure 1921, Title X, sects. 552t-552hh

Poland, The Code of Criminal Procedure, chap. 63, arts. 590-592

### **Related international instruments**

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

United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (United Nations, *Treaty Series*, vol. 1582, No. 27627).

## VI. Prevention and national coordination

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607. The establishment of specific criminal offences and a focus on effective law enforcement, prosecution and adjudication are vital to combating organized crime. However, it is also essential that criminal justice responses are complemented by an equally strong focus on preventing these crimes from happening in the first place. The objective of preventing transnational organized crime from occurring is at the very heart of the Organized Crime Convention. As stated in article 1, the purpose of the Convention is to promote cooperation to prevent and combat transnational organized crime more effectively. States parties must endeavour to include a substantial proactive crime prevention component in their legislation, policies and programmes relating to the Convention and not just reactive or security-related measures.
608. The following section sets out the Convention requirements in relation to prevention (article 31), data collection, analysis and information exchange (article 28). Although not explicitly mentioned in the Convention, the significance of national cooperation to combat organized crime is also outlined in this Chapter.

### A. Prevention

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#### Article 31 of the Organized Crime Convention – Prevention

1. 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.
2. States Parties shall 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. These measures should focus on:
  - (a) The strengthening of cooperation between law enforcement agencies or prosecutors and relevant private entities, including industry;
  - (b) The promotion of the development of standards and procedures designed to safeguard the integrity of public and relevant private entities, as well as codes of conduct for relevant professions, in particular lawyers, notaries public, tax consultants and accountants;
  - (c) The prevention of the misuse by organized criminal groups of tender procedures conducted by public authorities and of subsidies and licences granted by public authorities for commercial activity;
  - (d) The prevention of the misuse of legal persons by organized criminal groups; such measures could include:

- (i) The establishment of public records on legal and natural persons involved in the establishment, management and funding of legal persons;
  - (ii) The introduction of the possibility of disqualifying by court order or any appropriate means for a reasonable period of time persons convicted of offences covered by this Convention from acting as directors of legal persons incorporated within their jurisdiction;
  - (iii) The establishment of national records of persons disqualified from acting as directors of legal persons; and
  - (iv) The exchange of information contained in the records referred to in subparagraphs (d) (i) and (iii) of this paragraph with the competent authorities of other States Parties.
3. States Parties shall endeavour to promote the reintegration into society of persons convicted of offences covered by this Convention.
  4. States Parties shall endeavour to evaluate periodically existing relevant legal instruments and administrative practices with a view to detecting their vulnerability to misuse by organized criminal groups.
  5. States Parties shall endeavour to promote public awareness regarding the existence, causes and gravity of and the threat posed by transnational organized crime. Information may be disseminated where appropriate through the mass media and shall include measures to promote public participation in preventing and combating such crime.
  6. Each State Party shall inform the Secretary-General of the United Nations of the name and address of the authority or authorities that can assist other States Parties in developing measures to prevent transnational organized crime.
  7. States Parties shall, as appropriate, collaborate with each other and relevant international and regional organizations in promoting and developing the measures referred to in this article. This includes participation in international projects aimed at the prevention of transnational organized crime, for example by alleviating the circumstances that render socially marginalized groups vulnerable to the action of transnational organized crime.

## 1. Introduction

609. The concept of crime prevention can potentially have many different meanings. According to the Guidelines for the Prevention of Crime of the United Nations, “crime prevention” comprises strategies and measures that seek to reduce the risk of crimes occurring, and their potential harmful effects on individuals and society, including fear of crime, by intervening to influence their multiple causes.<sup>170</sup> The Guidelines stress the importance of seven principles that are fundamental to effective crime prevention:
- (a) *Government leadership.* All levels of government should play a leadership role in developing effective and humane crime prevention strategies, and in creating and maintaining institutional frameworks for their implementation and review;
  - (b) *Socioeconomic development and inclusion.* Crime prevention considerations should be integrated into all relevant social and economic policies and

<sup>170</sup> Economic and Social Council resolution 2002/13, annex, para. 3.

programmes, including those addressing unemployment, education, health, housing and urban planning, poverty, social marginalization and exclusion;

- (c) *Cooperation and partnership.* These should be an integral part of crime prevention, given the wide-ranging causes of crime and the skills and responsibilities needed to address them;
  - (d) *Sustainability and accountability.* Crime prevention requires adequate resources, including funding for structures and activities, in order to be sustained;
  - (e) *Knowledge base.* Crime prevention strategies and policies should be based on a broad, multidisciplinary foundation of knowledge about crime problems, their multiple causes and promising and proven practices;
  - (f) *Human rights, rule of law and a culture of lawfulness.* The human rights recognized in international legal instruments to which the State is a party must be recognized and respected in all aspects of crime prevention;
  - (g) *Interdependency.* National crime prevention diagnoses and strategies should take account of the links between local criminal problems and transnational organized crime.
610. Various approaches to preventing crime have been developed over the past two decades on the basis of a considerable amount of research and evaluation.<sup>171</sup> Prevention strategies as well as practical prevention measures may involve long-term programmes, as well as small, ad hoc initiatives aimed at modifying behaviour and closing avenues for crime to occur. The major fields of crime prevention include a range of responses developed over many years, including developmental, environmental/situational, social and community-based crime prevention and the prevention of recidivism.

## 2. Summary of the main requirements

611. Article 31(1) encourages States parties to develop national projects, as well as establishing and promoting best practices, to prevent transnational organized crime.
612. Under article 31(2), States parties must endeavour to reduce, in accordance with fundamental principles of domestic law, existing or future opportunities for organized criminal groups to participate in lawful markets using the proceeds of crimes. The preventative measures under article 31(2) should focus on the specific measures listed in subparagraphs (a)–(d).
613. Article 31(3) encourages States parties to promote the reintegration of people convicted of offences under the *Organized Crime Convention* into society.

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<sup>171</sup> *Handbook on the Crime Prevention Guidelines: Making Them Work*, Criminal Justice Handbook Series (United Nations publication, Sales No. E.10.IV.9).

614. Article 31(4) encourages States parties to periodically evaluate their relevant legal instruments and administrative practices in order to detect their vulnerabilities to misuse by organized criminal groups (article 31(4)).
615. Article 31(5) encourages States parties to promote public awareness regarding the existence, causes, gravity of and the threat posed by transnational organized crime.
616. Article 31(6) requires States parties to provide the Secretary-General of the United Nations with the details of national authorities that can assist other States in developing preventative measures against transnational organized crime.
617. Article 31(7) requires States parties to engage in collaboration with each other and relevant regional and international organizations, as they deem appropriate, in order to promote and develop the preventative measures outlined above.

### **3. Mandatory requirements**

618. Apart from the notification requirement in article 31(6),<sup>172</sup> there are no mandatory requirements in article 31.

### **4. Other measures, including optional issues**

619. In addition to the Convention's broad focus on prevention, as a result of article 31, States parties shall endeavour to take certain concrete steps directed at preventing transnational organized crime.
620. The first of these measures involves an obligation for States parties to endeavour to prevent transnational organized crime through the development and evaluation of national projects, as well as by establishing and promoting best practices and policies (article 31(1)).
621. States parties are also required to endeavour to prevent organized criminal groups from participating in lawful markets with the proceeds of their crimes. These preventative measures are to be undertaken in accordance with the fundamental principles of the State's domestic laws and may include legislative, administrative or other measures (article 31(2)).
622. The operations of legitimate markets can be undermined by organized criminal groups and the associated risks of money-laundering and corruption. These crimes interfere with economic and other policies, distort market conditions, and ultimately produce severe systemic risks. Article 31(2) sets out four areas of particular focus for measures designed to prevent organized criminals gaining access to legal markets:

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<sup>172</sup> See annex I, below.

- (a) States should strengthen cooperation between law enforcement agencies and relevant private entities that may be in a unique position to observe and report organized criminal activities (article 31(2)(a));
  - (b) States are to promote the development of professional standards and codes of conduct that aim to ensure the integrity of public and relevant private entities and professions, such as lawyers, notaries public, tax consultants and accountants, which have been traditionally vulnerable to misuse by organized criminal groups (article 31(2)(b)). These measures should go hand in hand with the measures to combat money-laundering as required by article 7;<sup>173</sup>
  - (c) States are to attempt to ensure that organized criminal groups cannot exploit public administrative processes, including tender procedures and the granting of subsidies or licenses for commercial activity (article 31(2)(c));
  - (d) States are to take various measures — legislative, regulatory, or other — in order to prevent the misuse of legal persons by organized criminal groups, including by creating public records regarding the establishment, funding or management of legal persons as well as establishing the possibility of disqualifying persons convicted of organized criminal activity from serving as directors of legal persons (article 31(2)(d)).<sup>174</sup>
623. Article 31(3) seeks to prevent transnational organized crime by requiring States to endeavour to reintegrate offenders into society. The *Travaux Préparatoires* indicate that, in line with constitutional principles of equality, there is no distinction intended between persons convicted of offences covered by the Convention and persons convicted of other offences.<sup>175</sup>
624. Crime prevention through reintegration refers to all programmes that work with children, young people or adults already involved in the criminal justice system, including those in custody and returning to the community. Those convicted of offences run the greatest risk of re-offending, given that they have already broken the law, have few opportunities and skills to pursue legitimate non-criminal lifestyles, and may have strong links with other offenders and offending lifestyles. Providing them with life and job skills, training, education, alternative lifestyles, role models, good support and housing in the community are all ways to assist with their reintegration. Programmes in prison may help to prepare them for release by providing them with new work skills, for example, or increasing their educational levels and social skills, including the ability to mediate conflict situations, and through the use of other restorative approaches. Programmes may also take place in the community, or in “halfway houses” or sheltered homes that provide safe accommodation and in-house support and advice, and may include apprenticeship programmes, job-creation schemes, life-skills training, microcredit facilities and long-term support. Programmes

<sup>173</sup> See also section III.C, above.

<sup>174</sup> See also section IV.C, above, in relation to sanctions.

<sup>175</sup> *Travaux Préparatoires*, p. 267.

that teach conflict resolution skills or use restorative justice approaches, such as victim-offender mediation or family or community group conferencing, are other examples of ways in which offenders can be assisted in returning to civil society. These are all examples of crime prevention focusing on re-integration, with the overall aim of preventing re-offending.

625. Under article 31(4), States parties are required to periodically evaluate their legislative instruments and administrative practices in order to assess their vulnerability to misuse by transnational organized criminal groups. Owing to the constantly evolving nature of transnational organized crime and the innovative methods employed by organized criminals, legislation and practices that were previously well insulated against organized crime may become less appropriate over time. Therefore, it is essential that States regularly conduct reviews into their legislation and administrative practices in order to identify and address their weaknesses and vulnerabilities.
626. Article 31(5) requires that States parties endeavour to promote public awareness regarding transnational organized crime. There are some major reasons why governments must engage with the public and the media on crime prevention issues and their strategy. Public policy can be driven by public anxiety and demands for tougher action, in the absence of a clear understanding of the alternatives. In almost all countries the media tends to focus on the most violent offences and events, and are a powerful influence in shaping public attitudes towards crime. It is evident, nevertheless, that when people are given more balanced information, they are willing to support crime prevention. When developing strategies, it is important for all levels of government to engage with the public on their experiences and the problems and priorities that they see as important. Keeping the public informed about the positive outcomes of programmes, or the challenges being faced, and working with the media to generate more in-depth and balanced reporting on prevention, are important ways to help ensure that programmes are better understood.
627. In order for States to more effectively share information and cooperate regarding measures to prevent transnational organized crime, States parties are required to provide the Secretary-General of the United Nations with the name and address of their relevant national authority or authorities (article 31(6)). This information can then be utilized by other States to access assistance in developing their own measures to prevent transnational organized crime.
628. States parties are required to collaborate with each other, as well as with regional and international organizations in preventing transnational organized crime (article 31(7)). This paragraph explicitly uses the example of projects which utilize social development as a means of preventing transnational organized crime at a systemic level. Crime prevention through social development includes a range of social, educational, health and training programmes. There are likely to be specific factors affecting individual middle- or low-income countries, such as levels of corruption, levels of trust in the police or rates of poverty and social and economic problems that

attract transnational crime. Risk factors such as high unemployment levels among young people, access to schools and education or access to guns vary considerably.

#### **Additional references and resources**

##### **Organized Crime Convention**

Article 1 ( Statement of purpose)

#### **Additional United Nations resources**

Guidelines for the Prevention of Crime (Economic and Social Council resolution 2002/13, annex).

*Handbook on the Crime Prevention Guidelines: Making Them Work*, Criminal Justice Handbook Series (United Nations publication, Sales No. E.10.IV.9).

#### **Examples of national legislation**

Kenya, *Prevention of Organized Crime Act*

Mexico, *General Law on Social Prevention of Violence and Crime (Ley General para la Prevención Social de la Violencia y la Delincuencia)*

## **B. Data collection, analysis and exchange**

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**Article 28 of the Organized Crime Convention**  
**– Collection, exchange and analysis of information on the nature of organized crime**

1. Each State Party shall consider analysing, in consultation with the scientific and academic communities, trends in organized crime in its territory, the circumstances in which organized crime operates, as well as the professional groups and technologies involved.
2. States Parties shall consider developing and sharing analytical expertise concerning organized criminal activities with each other and through international and regional organizations. For that purpose, common definitions, standards and methodologies should be developed and applied as appropriate.
3. Each State Party shall consider monitoring its policies and actual measures to combat organized crime and making assessments of their effectiveness and efficiency.

### **1. Introduction**

629. Information collection and exchange are essential to developing sound, evidence-based policy in preventing and responding to transnational organized crime. Consolidated information on emerging trends in organized crime is indispensable for setting goals, allocating resources, and evaluating results.
630. Article 28 of the Organized Crime Convention encourages States parties to collect data and examine the characteristics and trends in organized crime. It also advocates cooperation between government agencies, academic communities, and international and regional organizations in the collection, exchange and analysis of information and data relating to organized crime.
631. The Guidelines for the Prevention of Crime provide examples of the practical steps that Governments should take to build that knowledge base: “As appropriate, Governments and/or civil society should facilitate knowledge-based crime prevention by, inter alia:
- (a) Providing the information necessary for communities to address crime problems;
  - (b) Supporting the generation of useful and practically applicable knowledge that is scientifically reliable and valid;
  - (c) Supporting the organization and synthesis of knowledge and identifying and addressing gaps in the knowledge base;
  - (d) Sharing that knowledge, as appropriate, among, inter alia, researchers, policymakers, educators, practitioners from other relevant sectors and the wider community;
  - (e) Applying this knowledge in replicating successful interventions, developing

new initiatives and anticipating new crime problems and prevention opportunities;

- (f) Establishing data systems to help manage crime prevention more cost-effectively, including by conducting regular surveys of victimization and offending;
- (g) Promoting the application of this data in order to reduce repeat victimization, persistent offending and manage areas with a high level of crime.”<sup>176</sup>

## **2. Summary of the main requirements**

632. In accordance with article 28, States parties shall consider:

- (a) Analysing trends in organized crime in its territory in consultation with the scientific and academic communities (article 28, paragraph 1).
- (b) Developing and sharing analytical expertise concerning organized criminal activities with each other and through international and regional organizations (article 28(2)).
- (c) Monitoring its policies and measures to combat transnational organized crime, as well as making assessments of the effectiveness and efficiency of these measures (article 28(3)).

## **3. Mandatory requirements**

633. Article 28 contains no mandatory requirements.

## **4. Other measures, including optional issues**

634. Article 28 requires States parties to consider implementing various strategies relating to the collection, analysis, and exchange of information on transnational organized crime. These strategies form part of a broader evidence-based approach to crime prevention.

### *(a) Analysing trends in organized crime (article 28(1))*

635. An essential element of this evidence-based approach is recognized in article 28(1), which calls on States to consider analysing trends in domestic organized crime. Studying the prevalence, modus operandi and technological functions of organized criminal groups provides law enforcement agencies important insights and enhances their effectiveness. The expertise of the academic and scientific communities can be

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<sup>176</sup> Guidelines for the Prevention of Crime ((Economic and Social Council resolution 2002/13, annex), para. 21.

beneficial in analysing these trends. Consultation and cooperation with these groups can allow States to more meaningfully analyse information collected regarding organized crime. In turn, States can use this analysis to develop effective policies to prevent and combat organized crime.

636. One important aspect of data collection and exchange is the ability to conduct national organized crime threat assessments. Such assessments help law enforcement identify the risk factors, crime types, perpetrators and their collaborators, and to generate the information and analysis needed for intelligence-led policing and evidence-based policy. The information generated by such assessments in turn allows for the determination of priorities and appropriate allocation of resources to meet those threats. UNODC has developed a methodology on how to conduct such assessments, the *Guidance on the Use and Preparation of Serious and Organized Crime Threat Assessments: The SOCTA Handbook*, which is aimed at policymakers, law enforcement leaders and practitioners.

(b) *Developing and sharing analytical expertise (article 28(2))*

637. Article 28(2) requires States parties to strongly consider the possibility of developing and sharing their acquired analytical expertise with other States parties and via regional and international organizations. The need for collaboration and cooperation between States in this regard cannot be overstated. When information and expertise is shared effectively, States are in a position to gain a more complete understanding of the global phenomenon of transnational organized crime.
638. In order to effectively share information regarding transnational organized crime, States may need to apply common definitions, standards and methodologies in their research. In the absence of this level of uniformity, the potential for States to share information concerning organized crime is diminished.

(c) *Monitoring and assessment (article 28(3))*

639. Article 28(3) requests that States parties consider monitoring the effectiveness of their policies and measures designed to prevent and combat transnational organized crime, in order to develop appropriate mechanisms for achieving their objectives. This is an integral aspect of effective prevention, in which governments need to invest time and resources. Many programmes can fail because of a lack of the necessary skills or understanding among those implementing the programmes or because the objectives were unclear or unrealistic. Being able to demonstrate which aspects of a programme helped reduce crime, and which aspects seemed less effective, or had unexpected results, forms a major part of evidence-based prevention. Similarly, being able to demonstrate that a policy has helped to reduce problems by raising awareness, and by providing services and advice, is important for guiding future policy development.

**Additional references and resources***Model Legislative Provisions against Organized Crime*

Article 5 (Data collection and analysis)

**Additional United Nations resources**

Guidelines for the Prevention of Crime (Economic and Social Council resolution 2002/13, annex).

*International Classification of Crime for Statistical Purposes*, version 1.0 (March 2015).

UNODC, *Guidance on the Use and Preparation of Serious and Organized Crime Threat Assessments: The SOCTA Handbook* (Vienna, 2010).

*Handbook on the Crime Prevention Guidelines: Making Them Work*, Criminal Justice Handbook Series (United Nations publication, Sales No. E.10.IV.9).

## C. National coordination

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### 1. Introduction

640. The purpose of the Organized Crime Convention is to prevent and combat organized crime more effectively. National coordination is essential to achieve this purpose. Although not specifically mentioned in the Convention, there is general consensus and widespread practice to nominate or create a national entity to oversee and coordinate a country's anti-organized crime efforts.
641. The desirability of effectively coordinating a State's organized crime prevention efforts is clear. An effective multi-sectorial response to organized crime requires a strong level of inter-agency communication and cooperation. In the absence of effective national coordination, it is possible for gaps to appear in a State's organized crime prevention strategies. A lack of coordination can also result in the duplication of policies and measures in certain areas. This duplication wastes a State's often scarce resources for the prevention of organized crime.
642. The Guidelines for the Prevention of Crime also call upon States to establish a permanent central authority responsible for the implementation of crime prevention policy. At the national level, countries may choose to place responsibility for crime prevention within a ministry such as one responsible for justice or public security, or a group of ministries, or to establish a separate body at a high level. The role of the permanent central authority is to provide leadership, working with other government sectors, other levels of government and civil society to develop a national plan, and to implement and monitor it. The central authority facilitates action at lower levels of government. In some cases, countries have chosen to enact legislation to support a national plan and require other sectors to work together with the central authority. In all cases, resources will be needed for the implementation of plans.
643. A national coordination body may be an appropriate measure for States parties seeking to undertake the obligations established under article 28 (relating to collection, exchange, and analysis of information) and article 31 (relating to prevention) of the *Organized Crime Convention*.<sup>177</sup>

### 2. Optional measures

644. There is no one-size-fits-all formula for an effective coordination mechanism. In fact, in many States, several coordination mechanisms are concurrently in place at the local, national, regional and international levels. Article 4 of the *Model Legislative Provisions against Organized Crime* provide an example for how national coordination could be achieved. It suggests that a national coordination organization:

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<sup>177</sup> See also sections VI.A and VI.B, above.

- (a) Be tasked with developing, coordinating, monitoring and evaluating the national response to preventing all forms of organized crime;
  - (b) Undertake data collection, analysis and exchange, the development of prevention programmes, training and technical cooperation with other States and other matters;
  - (c) Be comprised of representatives of relevant national government agencies, local government and non-governmental service providers;
  - (d) Have the capacity to establish subcommittees as required;
  - (e) Report annually on its activities.
645. The functions of national coordination mechanisms, whether performed through a coordinator or an inter-agency coordination body, may also include the following:
- (a) Help shape policy by participating in the design of policies and programmes, national action plans and other strategies, guidelines and government resolutions;
  - (b) Encourage and facilitate inter-agency and multidisciplinary cooperation among all relevant stakeholders through, for example, setting up a regular round table and established channels of communication;
  - (c) In cases where the coordinator or the inter-agency coordination body also acts as the national rapporteur, coordinate research, identify new trends and patterns;
  - (d) Help establish or strengthen legislation;
  - (e) Monitor and evaluate progress and ensure that anti-organized crime measures comply with international law, standards and norms;
  - (f) Assess and ensure that anti-organized crime measures adapt with and respond to the evolution of trends and patterns.

#### **Additional references and resources**

##### *Model Legislative Provisions against Organized Crime*

Article 4 (National coordinating committee)

#### **Additional United Nations resources**

Guidelines for the Prevention of Crime (Economic and Social Council resolution 2002/13, annex).

Note by the Secretariat on national coordination mechanisms against trafficking in persons (CTOC/COP/WG.4/2015/3).

*Handbook on the Crime Prevention Guidelines: Making Them Work*, Criminal Justice Handbook Series (United Nations publication, Sales No. E.10.IV.9).

**Examples of national legislation**

Australia, Australian Crime Commission Act 2002 (Cth)

United Kingdom, Crime and Courts Act 2013 (National Crime Agency)

## **Annex I**

### **Notification requirements under the Convention against Transnational Organized Crime**

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1. The following is a list of the notifications that States parties are required to make to the Secretary-General of the United Nations. It should be noted that notification can be done at any stage and is limited to “the time of ratification, acceptance or approval”. Notifications should be addressed directly to the United Nations Office on Drugs and Crime using the following email address: [legal@unodc.org](mailto:legal@unodc.org).
2. Notifications with regard to articles 16(5), 18(13), and 31(6) of the United Nations Convention against Transnational Organized Crime are also included in the directory of competent national authorities (“CNA Directory”), available at [sherloc.unodc.org](http://sherloc.unodc.org).

**Article 5 of the Organized Crime Convention**  
**– Criminalization of participation in an organized criminal group**

3. States Parties whose domestic law requires involvement of an organized criminal group for purposes of the offences established in accordance with paragraph 1 (a) (i) of this article shall ensure that their domestic law covers all serious crimes involving organized criminal groups. Such States Parties, as well as States Parties whose domestic law requires an act in furtherance of the agreement for purposes of the offences established in accordance with paragraph 1 (a) (i) of this article, shall so inform the Secretary-General of the United Nations at the time of their signature or of deposit of their instrument of ratification, acceptance or approval of or accession to this Convention.

**Article 6 of the Organized Crime Convention**  
**– Criminalization of the laundering of proceeds of crime**

2.(d) Each State Party shall furnish copies of its laws that give effect to this article and of any subsequent changes to such laws or a description thereof to the Secretary-General of the United Nations.

**Article 13 of the Organized Crime Convention**  
**– International cooperation for purposes of confiscation**

5. Each State Party shall furnish copies of its laws and regulations that give effect to this article and of any subsequent changes to such laws and regulations or a description thereof to

the Secretary-General of the United Nations.

**Article 16 of the Organized Crime Convention**  
– Extradition

5. States Parties that make extradition conditional on the existence of a treaty shall:  
(a) At the time of deposit of their instrument of ratification, acceptance, approval of or accession to this Convention, inform the Secretary-General of the United Nations whether they will take this Convention as the legal basis for cooperation on extradition with other States Parties to this Convention;

**Article 18 of the Organized Crime Convention**  
– Mutual legal assistance

13. Each State Party shall designate a central authority that shall have the responsibility and power to receive requests for mutual legal assistance and either to execute them or to transmit them to the competent authorities for execution. Where a State Party has a special region or territory with a separate system of mutual legal assistance, it may designate a distinct central authority that shall have the same function for that region or territory. [...]. The Secretary-General of the United Nations shall be notified of the central authority designated for this purpose at the time each State Party deposits its instrument of ratification, acceptance or approval of or accession to this Convention. [...]

14. [...] The Secretary-General of the United Nations shall be notified of the language or languages acceptable to each State Party at the time it deposits its instrument of ratification, acceptance or approval of or accession to this Convention. [...]

**Article 31 of the Organized Crime Convention**  
– Prevention

6. Each State Party shall inform the Secretary-General of the United Nations of the name and address of the authority or authorities that can assist other States Parties in developing measures to prevent transnational organized crime.

**Article 35 of the Organized Crime Convention**  
– Settlement of disputes

4. Any State Party that has made a reservation in accordance with paragraph 3 of this article may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

**Article 36 of the Organized Crime Convention**  
**– Signature, ratification, approval, and acceptance**

3. This Convention is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations. A regional economic integration organization may deposit its instrument of ratification, acceptance or approval if at least one of its member States has done likewise. In that instrument of ratification, acceptance or approval, such organization shall declare the extent of its competence with respect to the matters governed by this Convention. Such organization shall also inform the depositary of any relevant modification in the extent of its competence.

4. This Convention is open for accession by any State or any regional economic integration organization of which at least one member State is a Party to this Convention. Instruments of accession shall be deposited with the Secretary-General of the United Nations. At the time of its accession, a regional economic integration organization shall declare the extent of its competence with respect to matters governed by this Convention. Such organization shall also inform the depositary of any relevant modification in the extent of its competence.

**Article 39 of the Organized Crime Convention**  
**– Amendment**

1. After the expiry of five years from the entry into force of this Convention, a State Party may propose an amendment and file it with the Secretary-General of the United Nations, who shall thereupon communicate the proposed amendment to the States Parties and to the Conference of the Parties to the Convention for the purpose of considering and deciding on the proposal. [...]

[...]

4. An amendment adopted in accordance with paragraph 1 of this article shall enter into force in respect of a State Party ninety days after the date of the deposit with the Secretary-General of the United Nations of an instrument of ratification, acceptance or approval of such amendment.

**Article 40 of the Organized Crime Convention**  
**– Denunciation**

1. A State Party may denounce this Convention by written notification to the Secretary-General of the United Nations. Such denunciation shall become effective one year after the date of receipt of the notification by the Secretary-General.

## **Annex II**

### **Additional resources**

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#### **General Assembly**

- Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power  
(General Assembly resolution 40/34, annex).
- International Guidelines for Crime Prevention and Criminal Justice Responses with Respect to Trafficking in Cultural Property and Other Related Offences  
(General Assembly 69/196, annex).
- Interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto (A/55/383/Add.1).
- Model Treaty on Extradition  
(General Assembly resolution 45/116, annex and resolution 52/88, annex).
- Model Treaty on Mutual Assistance in Criminal Matters  
(General Assembly resolution 45/117, annex and resolution 53/112, annex).
- Model Treaty on the Transfer of Proceedings in Criminal Matters  
(General Assembly resolution 45/118, annex).
- Strengthening crime prevention and criminal justice responses to protect cultural property, especially with regard to its trafficking  
(General Assembly resolution 66/180).
- United Nations Convention against Corruption  
(United Nations, *Treaty Series*, vol. 2349, No. 42146).
- United Nations Convention against Transnational Organized Crime  
(United Nations, *Treaty Series*, vol. 2225, No. 39574).
- 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).
- United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules)  
(General Assembly resolution 45/110, annex).

#### **Economic and Social Council**

- Guidelines for the Prevention of Crime  
(Economic and Social Council resolution 2002/13, annex).
- Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime (Economic

and Social Council resolution 2005/20, annex).

Model Bilateral Agreement on the Sharing of Confiscated Proceeds of Crime or Property  
(Economic and Social Council resolution 2005/14, annex).

Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and  
Summary Executions  
(Economic and Social Council resolution 1989/65, annex).

Safeguards guaranteeing protection of the rights of those facing the death penalty (Economic  
and Social Council resolution 1984/50, annex).

### **Security Council**

Security Council resolution 1373 (2001).

### **United Nations Congress on the Prevention of Crime and the Treatment of Offenders**

Basic Principles on the Independence of the Judiciary (*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.2, annex).

Basic Principles on the Role of Lawyers (*Eighth United Nations Congress on the Prevention  
of Crime and the Treatment of Offenders, Havana, 27 August–7 September 1990: report  
prepared by the Secretariat* (United Nations publication, Sales No. E.91.IV.2), chap. I,  
sect. B.3, annex).

Guidelines on the Role of Prosecutors (*Eighth United Nations Congress on the Prevention of  
Crime and the Treatment of Offenders, Havana, 27 August–7 September 1990: report  
prepared by the Secretariat* (United Nations publication, Sales No. E.91.IV.2), chap. I,  
sect. C.26, annex).

### **Conference of the Parties to the United Nations Convention against Transnational Organized Crime**

Note by the Secretariat on money-laundering within the scope of the United Nations  
Convention against Transnational Organized Crime (CTOC/COP/2008/15).

Report of the Conference of the Parties to the United Nations Convention against  
Transnational Organized Crime on its fifth session, held in Vienna from 18 to 22 October  
2010 (CTOC/COP/2010/17).

Conference room paper prepared by the Secretariat on the technical and legal obstacles to the

use of videoconferencing (CTOC/COP/2010/CRP.2).

Conference room paper on the notion of serious crime in the United Nations Convention against Transnational Organized Crime (CTOC/COP/2012/CRP.4).

### **Working Groups established by the Conference of Parties**

#### *Working Group of Government Experts on Technical Assistance*

Discussion paper by the Secretariat on assistance, good practices and comparison of national legislation in the area of identifying and protecting victims of and witnesses to organized crime (CTOC/COP/WG.2/2013/2).

Background paper by the Secretariat on criminalization of participation in an organized criminal group (CTOC/COP/WG.2/2014/2).

Background paper by the Secretariat on liability of legal persons (CTOC/COP/WG.2/2014/3).

#### *Working Group on International Cooperation*

Background paper prepared by the Secretariat on best practices and experiences in using the Organized Crime Convention for international cooperation and the role of regional networks (CTOC/COP/WG.3/2012/2).

#### *Working Group on Trafficking in Persons*

Note by the Secretariat on national coordination mechanisms against trafficking in persons (CTOC/COP/WG.4/2015/3)

### **Conference of the States Parties to the Convention against Corruption**

Conference room paper entitled, "State of implementation of the Convention: criminalization, law enforcement and international cooperation" (CAC/COSP/2013/CRP.7).

### **Publications by the United Nations Office on Drugs and Crime**

*Comprehensive Study on Cybercrime* (2013)

*Current Practices in Electronic Surveillance in the Investigation of Serious and Organized Crime* (United Nations publication, Sales No. E.09.XI.19)

*Digest of Organized Crime Cases: A Compilation of Cases with Commentaries and Lessons Learned* (2012)

- Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime* (2008)
- Guidance on the Use and Preparation of Serious and Organized Crime Threat Assessments: The SOCTA Handbook* (2010)
- Handbook on the Crime Prevention Guidelines: Making Them Work*  
(United Nations publication, Sales No. E.10.IV.9)
- International Classification of Crime for Statistical Purposes*, version 1.0 (2015)
- Legislative Guide for the Implementation of the United Nations Convention against Corruption*, 2nd ed. (2012)
- Legislative Guide to the Universal Anti-Terrorism Conventions and Protocols*  
(United Nations publication, Sales No. E.04.V.7)
- Manual on International Cooperation for the Purposes of Confiscation of Proceeds of Crime* (2012)
- Manual on Mutual Legal Assistance and Extradition* (2012)
- Model Law on Extradition* (2004)
- Model Law on Mutual Legal Assistance in Criminal Matters* (2007)
- Model Legislative Provisions against Organized Crime* (2012)
- Resource Guide on Good Practices in the Protection of Reporting Persons* (2015)
- 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)
- United Nations Guide for Anti-Corruption Policies* (2003)
- Model Legislation on Money Laundering and Financing of Terrorism* (2005)  
(prepared jointly with the International Monetary Fund)
- Model Provisions on Money Laundering, Terrorist Financing, Preventive Measures and Proceeds of Crime* (for common law systems) (2009)  
(prepared jointly with the Commonwealth Secretariat and the International Monetary Fund)
- Handbook on the International Transfer of Sentenced Persons*,  
Criminal Justice Handbook Series (2012)

## Indexes

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