



**UNODC**

United Nations Office on Drugs and Crime

# Model Legislative Provisions against Organized Crime



UNITED NATIONS OFFICE ON DRUGS AND CRIME  
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# Model Legislative Provisions against Organized Crime



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# Introduction

The model legislative provisions against organized crime were developed by the United Nations Office on Drugs and Crime (UNODC) in response to a request made by the General Assembly to the Secretary-General to promote and assist the efforts of Member States to become party to and implement the United Nations Convention against Transnational Organized Crime and the Protocols thereto.<sup>1</sup>

The model legislative provisions will facilitate and help systematize the provision of legislative assistance by UNODC and facilitate the review and amendment of existing legislation and the adoption of new legislation by Member States themselves. The model legislative provisions are designed to be adapted to the needs of each State, whatever its legal tradition and social, economic, cultural and geographic conditions.

Model laws already exist for some of the obligations under the United Nations Convention against Transnational Organized Crime, in particular, with respect to extradition, mutual assistance in criminal matters, witness protection and money-laundering. Furthermore, there are model laws that focus on implementation of the Protocols to the Convention. Accordingly, the present model legislative provisions focus on implementation of the articles of the Organized Crime Convention that are not covered by existing model laws (articles 2, 3, 5, 10, 11, 15, 17 and 19-31). A guide to which provisions of the Convention are covered by particular model laws is provided in table 1, on page [...].

The commentary to the present model legislative provisions indicates which provisions are mandatory and which are optional, reflecting the level of obligation specified in the Organized Crime Convention. That distinction is not made with regard to the general provisions (chapter I) and the definitions (article 3), as they are an integral part of the model legislative provisions (although not mandated by the Organized Crime Convention *per se*). Recommended provisions may also stem from other international instruments, including international human rights and humanitarian law and refugee law. Whenever appropriate or necessary, options for the wording of the provision are suggested in order to reflect the differences between legal systems.

The commentary indicates the legal source of each provision and, in some cases, supplies examples of indicative national laws from various countries

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<sup>1</sup>United Nations, *Treaty Series*, vols. 2225, 2237, 2241 and 2326, No. 39574.

(in unofficial translation where necessary).<sup>2</sup> The commentary also draws on interpretative notes for the official records (*travaux préparatoires*) of the United Nations Convention against Transnational Organized Crime,<sup>3</sup> and the *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto*.<sup>4</sup>

Any national legislation on transnational organized crime needs to be developed in line with the State's constitutional principles, the basic concepts of its legal system and its existing legal structure and enforcement arrangements. Furthermore, national laws on transnational organized crime will need to operate consistently with other, existing national laws on related issues. Accordingly, the model legislative provisions are not intended to be incorporated directly into national laws as presented without a careful review of the whole legislative context of a given State.

This set of model legislative provisions against organized crime is the product of the Organized Crime Branch of UNODC, prepared in close coordination with the Justice Section of UNODC.<sup>5</sup> A group of experts in the field of transnational organized crime from a variety of countries and legal backgrounds met over the course of two expert working group meetings to discuss and review the draft.<sup>6</sup>

### *Logic and structure of the model legislative provisions*

The model legislative provisions focus on implementation of the articles of the United Nations Convention against Transnational Organized Crime that are not covered by existing model laws: that is, articles 2, 3, 5, 10, 11, 15, 17 and 19-31 of the Convention. They are divided into chapters, reflecting the following logic.

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<sup>2</sup>In cases where an official English version of the law was not available, the version used is that provided by national experts from the State concerned.

<sup>3</sup>*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).

<sup>4</sup>*Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (United Nations publication, Sales No. E.05.V.2).

<sup>5</sup>The following staff members contributed to the process: Mounia Ben Hammou, Celso Coracini, Estella Deon, Marie Grandjouan, Simonetta Grassi, Karen Kramer, Johan Kruger, Gioacchino Polimeni, Riikka Puttonen, Stephen Thurlow and Olga Zudova. UNODC was assisted in this regard by two consultants: Fiona David, the principal drafter, and Marlene Hirtz, who provided civil law expertise.

<sup>6</sup>Experts from the following countries contributed to the model legislation provisions in an individual capacity: Australia, Brazil, France, Italy, Jamaica, Mexico, New Zealand, Russian Federation, Uganda and United States of America. In addition, representatives from the following offices, organizations and regional processes participated in the meetings: the Department of Peacekeeping Operations of the Secretariat, the International Criminal Police Organization (INTERPOL) and the Organization for Security and Co-operation in Europe (OSCE).

## *Chapter I. General provisions*

Chapter I includes provisions that are intended to apply generally to legislation that implements the Organized Crime Convention, including a statement of the purpose, principles to be applied in the interpretation of the law, key definitions and jurisdiction.

## *Chapter II. Coordination and prevention*

Chapter II includes provisions regarding the establishment of a national coordinating committee to oversee the implementation of these provisions and other policies and programmes directed at preventing organized crime.

## *Chapter III. Substantive offences*

Chapter III defines precisely what conduct is criminal, addresses the issues of penalties for both natural and legal persons, and delineates factors that a court may take into account in sentencing.

## *Chapter IV. Investigations*

Chapter IV provides a basic legal framework to support the use of special investigative techniques that may assist in effectively responding to complex transnational crimes. It also provides a legal basis for measures intended to enhance operational and technical cooperation between law enforcement agencies in the States parties, particularly joint investigations.

## *Chapter V. Prosecution of convention offences*

Chapter V addresses some of the procedural matters that arise in the prosecution of Convention offences, including discretion to prosecute, and the granting of immunity in certain circumstances.

## *Chapter VI. Special procedural and evidentiary rules*

Chapter VI provides a legal basis for the special procedural and evidentiary rules that may facilitate the effective prosecution of transnational organized crime, such as extended time to commence prosecutions and admission of evidence obtained through special investigative techniques.

### *Chapter VII. Protection of witnesses*

Chapter VII provides a legal basis for measures that can be taken both in court and outside court to ensure the safety and dignity of victims and witnesses of Convention offences.

### *Chapter VIII. Restitution for victims of Convention offences*

Chapter VIII provides the legal basis for measures that can be taken to ensure that victims of Convention offences are provided with compensation and/or restitution.

### *Chapter IX. Transfer of sentenced persons*

Chapter IX provides the legal basis for the transfer of persons sentenced for Convention offences to another Convention State.

## **Relationship with existing model laws**

These model legislative provisions focus on implementation of the articles of the Organized Crime Convention not covered by the existing model laws, which are as follows:

- (a) Model Law against the Smuggling of Migrants (2010);
- (b) Model Law against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition (2011);
- (c) Model Legislation on Money-Laundering and Financing of Terrorism, prepared by the United Nations Office on Drugs and Crime and the International Monetary Fund (2005);
- (d) Model Provisions on Money-Laundering, Terrorist Financing, Preventive Measures and Proceeds of Crime (for common law legal systems), prepared by the United Nations Office on Drugs and Crime, the Commonwealth Secretariat and the International Monetary Fund (2009);
- (e) Model Legislative Provisions against Terrorism (available upon request);
- (f) Model Law on Extradition (2004);
- (g) Model Law on Mutual Assistance in Criminal Matters (2007);

(h) Justice in Matters Involving Child Victims and Witnesses of Crime: Model Law and Related Commentary (2009);

(i) UNODC model law on witness protection (available upon request);

(j) Model legislative provisions on drug control (available upon request).

Table 1 provides a guide to each of the articles in the Organized Crime Convention and provides a cross-reference to the relevant model law(s).

**Table 1. Key to the United Nations Convention against Transnational Organized Crime and model laws and legislative provisions**

| <i>Article of the United Nations Convention against Transnational Organized Crime</i> | <i>Subject</i>  | <i>Corresponding model law or legislative provisions</i>  |
|---|---|---|
| Article 1   | Statement of purpose  | United Nations Convention against Transnational Organized Crime model legislative provisions  |
| Article 2   | Use of terms  | United Nations Convention against Transnational Organized Crime model legislative provisions; and the Model Law against the Smuggling of Migrants, the Model Law against Trafficking in Persons and the Model Law against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition |
| Article 3   | Scope of application  | United Nations Convention against Transnational Organized Crime model legislative provisions  |
| Article 4   | Protection of sovereignty                                       |   |
| Article 5   | Criminalization of participation in an organized criminal group | United Nations Convention against Transnational Organized Crime model legislative provisions  |

**Table 1. (continued)**

| <i>Article of the United Nations Convention against Transnational Organized Crime</i> | <i>Subject</i>   | <i>Corresponding model law or legislative provisions</i>   |
|---|--|--|
| Articles 6 and 7  | Criminalization of the laundering of proceeds of crime | Model Legislation on Money-Laundering and Financing of Terrorism, prepared by the United Nations Office on Drugs and Crime and the International Monetary Fund (2005, for civil law systems)<br><br>Model Provisions on Money-Laundering, Terrorist Financing, Preventive Measures and Proceeds of Crime (for common law legal systems), prepared by the United Nations Office on Drugs and Crime, the Commonwealth Secretariat and the International Monetary Fund (2009) |
| Article 8   | Criminalization of corruption                          |  |
| Article 9   | Measures against corruption                            |  |
| Article 10  | Liability of legal persons                             | United Nations Convention against Transnational Organized Crime model legislative provisions   |
| Article 11  | Prosecution, adjudication and sanctions                | United Nations Convention against Transnational Organized Crime model legislative provisions   |

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*Article of the United Nations  
Convention against Transnational  
Organized Crime*

|            | <i>Subject</i>  | <i>Corresponding model law or<br/>legislative provisions</i>  |
|------------|---|---|
| Article 12 | Confiscation and seizure                                  | Model Legislation on<br>Money-Laundering and<br>Financing of Terrorism,<br>prepared by the United<br>Nations Office on Drugs and<br>Crime and the International<br>Monetary Fund (2005, for<br>civil law systems)   |
| Article 13 | International cooperation for<br>purposes of confiscation |   |
| Article 14 | Disposal of confiscated<br>proceeds of crime or property  | Model Provisions on Money-<br>Laundering, Terrorist<br>Financing, Preventive<br>Measures and Proceeds of<br>Crime (for common law legal<br>systems), prepared by the<br>United Nations Office on<br>Drugs and Crime, the<br>Commonwealth Secretariat<br>and the International<br>Monetary Fund (2009) |
|            |   | Model Law against the Illicit<br>Manufacturing of and<br>Trafficking in Firearms, Their<br>Parts and Components and<br>Ammunition   |
| Article 15 | Jurisdiction  | Model legislative provisions<br>against terrorism<br>United Nations Convention<br>against Transnational<br>Organized Crime model<br>legislative provisions  |
| Article 16 | Extradition   | Model Law on Extradition<br>(2004)  |
| Article 17 | Transfer of sentenced persons                             | United Nations Convention<br>against Transnational<br>Organized Crime model<br>legislative provisions   |
| Article 18 | Mutual legal assistance                                   | Model Law on Mutual<br>Assistance in Criminal Matters<br>(2007)   |
| Article 19 | Joint investigations                                      | United Nations Convention<br>against Transnational<br>Organized Crime model<br>legislative provisions   |

**Table 1. (continued)**

| <i>Article of the United Nations Convention against Transnational Organized Crime</i> | <i>Subject</i>  | <i>Corresponding model law or legislative provisions</i>  |
|---|---|---|
| Article 20  | Special investigative techniques  | United Nations Convention against Transnational Organized Crime model legislative provisions  |
| Article 21  | Transfer of criminal proceedings  | United Nations Convention against Transnational Organized Crime model legislative provisions  |
| Article 22  | Establishment of criminal record  | United Nations Convention against Transnational Organized Crime model legislative provisions  |
| Article 23  | Criminalization of obstruction of justice   | United Nations Convention against Transnational Organized Crime model legislative provisions  |
| Article 24  | Protection of witnesses   | United Nations Convention against Transnational Organized Crime model legislative provisions and the United Nations Office on Drugs and Crime model law on witness protection |
| Article 25  | Assistance to and protection of victims   | United Nations Convention against Transnational Organized Crime model legislative provisions and the United Nations Office on Drugs and Crime model law on witness protection |
| Article 26  | Measures to enhance cooperation with law enforcement authorities                  | United Nations Convention against Transnational Organized Crime model legislative provisions  |
| Article 27  | Law enforcement cooperation   | United Nations Convention against Transnational Organized Crime model legislative provisions  |
| Article 28  | Collection, exchange and analysis of information on the nature of organized crime | United Nations Convention against Transnational Organized Crime model legislative provisions  |
| Article 29  | Training and technical assistance   | United Nations Convention against Transnational Organized Crime model legislative provisions  |

| <i>Article of the United Nations Convention against Transnational Organized Crime</i> | <i>Subject</i>   | <i>Corresponding model law or legislative provisions</i>                                     |
|---|--|--|
| Article 30  | Other measures: implementation of the Convention through economic development and technical assistance | United Nations Convention against Transnational Organized Crime model legislative provisions |
| Article 31  | Prevention   | United Nations Convention against Transnational Organized Crime model legislative provisions |
| Article 32  | Conference of the Parties to the Convention  |  |
| Article 33  | Secretariat  |  |
| Article 34  | Implementation of the Convention   |  |
| Article 35  | Settlement of disputes   |  |
| Article 36  | Signature, ratification, acceptance, approval and accession  |  |
| Article 37  | Relation with protocols  |  |
| Article 38  | Entry into force   |  |
| Article 39  | Amendment  |  |
| Article 40  | Denunciation   |  |
| Article 41  | Depositary and languages   |  |



# Chapter I.

## General provisions

### INTRODUCTORY COMMENTARY

The present chapter contains provisions that are intended to apply generally to legislation that implements the Convention. These provisions reflect articles 1 (statement of purpose), 2 (key terms), 3 (scope of application), 15 (jurisdiction) and article 34, paragraph 2 (Convention offences, when enacted in domestic law, do not require the elements of transnationality and involvement of an organized criminal group except where these are essential elements of the offence itself).

Some of these matters may already be covered by existing national laws. For example, there may already be definitions of “public official” or “foreign law enforcement official” in other national laws; there may be national laws on jurisdictional competence of courts to hear offences under national laws that apply generally; and there may already be specific laws implementing the Protocols to the Organized Crime Convention. It is important for drafters to identify all such pre-existing laws and ensure consistency while also ensuring implementation of the requirements of the Convention.

### **Article 1. Objective of the model legislative provisions**

1. These model legislative provisions are intended to [facilitate implementation of] [implement] the United Nations Convention against Transnational Organized Crime.
2. The purposes of these provisions are:
  - (a) To prevent and combat organized crime;
  - (b) To facilitate the investigation and prosecution of organized crime; and
  - (c) To promote and facilitate national and international cooperation in order to meet these objectives

consistent with [fundamental human rights and the rule of law] [international legal obligations, including human rights].

## COMMENTARY

*Source:* Organized Crime Convention, article 1.

A statement of purpose may not be required in some legal systems. However, it may be useful in some legal systems, such as those where the inclusion of a direct reference to the treaty in the corresponding national law allows the courts to refer to the treaty to resolve questions of interpretation.

It is important for drafters to consider how the obligations in the Organized Crime Convention interact with other key international obligations, particularly with regard to human rights and the administration of justice. Accordingly, a statement is included in article 1 (“consistent with [fundamental human rights and the rule of law] [international legal obligations, including human rights]”) to make it clear that the implementation of Convention obligations is not intended to operate to the detriment of other critical international obligations.

## Article 2. Scope of application

These model legislative provisions shall apply to preventing and combating:

- (a) Serious crime where the offence involves an organized criminal group;
- and
- (b) Offences established under chapter 3 of these model legislative provisions.

## COMMENTARY

Mandatory.

*Source:* Organized Crime Convention, article 3 (Scope of application) read together with article 34, paragraph 2.

Article 3 of the Organized Crime Convention provides that the Convention shall apply, except where otherwise stated, to the prevention, investigation and prosecution of offences established in accordance with articles 5, 6, 8 and 23, and to serious crime (as defined in article 2), where the offence is transnational in nature and involves an organized criminal group.

Article 3 has to be read together with article 34, in particular paragraph 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.

As noted in the interpretative note to the Convention:

The purpose of [article 34, paragraph 2] 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>7</sup>

In other words, even though the focus of the Convention is on transnational organized crime, national drafters should ensure that national laws criminalizing the laundering of criminal proceeds (article 6), corruption (article 8) or obstruction of justice (article 23) and the various Protocol offences do not require the conduct to be transnational in nature or to involve an organized criminal group, unless this is required by the offence as defined. National laws criminalizing participation in an organized criminal group (article 5) should not require the conduct to be transnational in nature.

Article 34, paragraph 2, has implications for the operation of many articles found in the Convention. So, the inclusion of a scope of application provision such as the one drafted here is very important. For example, the Convention establishes various mechanisms to facilitate international cooperation (mutual assistance, extradition, confiscation, police-to-police cooperation). These mechanisms must be operational in relation to the full spectrum of “offences covered by this Convention”. As a result of article 34, paragraph 2, it follows that “offences covered by this Convention” includes the offences of, for example, corruption, money-laundering and obstruction of justice, established in national law without reference to the elements of transnationality or involvement of an organized criminal group.

The Protocols to the Convention, on smuggling of migrants, trafficking in persons and firearms, operate, in effect, as extensions to the Convention. The provisions of the Convention apply, *mutatis mutandis*, to the Protocols (as set out in article 37 of the Convention and article 1 of each of the three Protocols). Accordingly, it will be important for drafters to locate all relevant national laws that address these issues and ensure that any national laws intended to implement the Convention apply equally to national laws intended to implement the Protocols.

<sup>7</sup>Interpretative note on article 34 (see A/55/383/Add.1, para. 59) cited in *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, p. 285.

### Article 3. Definitions and use of terms

In these provisions:

(a) “Confiscation”, which includes forfeiture where applicable, shall mean the permanent deprivation of property by order of a [court or other competent authority];

#### COMMENTARY

Source: Organized Crime Convention, article 2, subparagraph (g).

The interpretative notes contained in the *Travaux Préparatoires* to the Convention clarify that:

When the domestic law of a State party requires the order of a court for confiscation, that court will be considered the only competent authority for the purposes of this definition.<sup>8</sup>

As noted in the Model Provisions on Money-Laundering, Terrorist Financing, Preventive Measures and Proceeds of Crime (for common law legal systems), prepared by the United Nations Office on Drugs and Crime, the Commonwealth Secretariat and the International Monetary Fund,<sup>9</sup> the deciding authority for confiscation orders (and equivalent benefit recovery or asset forfeiture orders) may or may not be a court. In some jurisdictions, certain orders, such as a search warrant or production order, might be issued by a judge acting in his or her personal capacity, in which case the power being exercised is executive rather than judicial.<sup>10</sup>

However, the interpretative notes contained in the *Travaux Préparatoires* to the Convention clarify that:

When the domestic law of a State party requires the order of a court for confiscation, that court will be considered the only competent authority for the purposes of this definition.<sup>11</sup>

There may be different types of confiscation orders. A confiscation order might be used when specific property or assets can be identified. A benefit recovery order might be used when no specific property can be identified following conversion or substitution. Furthermore, some legal systems will have a regime for civil forfeiture.

<sup>8</sup>Interpretative notes on article 2 (see A/55/383/Add.1, para. 6) cited in *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, pp. 17-18.

<sup>9</sup>United Nations Office on Drugs and Crime, the Commonwealth Secretariat and the International Monetary Fund, *Model Provisions on Money-Laundering, Terrorist Financing, Preventive Measures and Proceeds of Crime (for common law legal systems)* (2009). Available from [www.unodc.org/documents/money-laundering/Model\\_Provisions\\_2009\\_Final.pdf](http://www.unodc.org/documents/money-laundering/Model_Provisions_2009_Final.pdf) (accessed 18 December 2011).

<sup>10</sup>*Ibid.*, sect. 43, para. 5, p. 68.

<sup>11</sup>Interpretative notes on article 2 (see A/55/383/Add.1, para. 6) cited in *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, pp. 17-18.

### Examples

Article 1.3 of the Model Legislation on Money-Laundering and Financing of Terrorism (for civil law systems) provides a slightly different, more limited definition:

P. “Confiscation” shall mean the permanent deprivation of property based on a decision order of a court.<sup>12</sup>

The Model Law on Mutual Assistance in Criminal Matters (2007)<sup>13</sup> includes the following definition of confiscation:

Confiscation, which includes forfeiture where applicable, means the permanent deprivation of property by order of a court or other competent authority. (art. 22, para. 2)

(b) “Financial or other material benefit” shall include any type of financial or non-financial inducement, payment, bribe, reward, advantage, privilege or service (including sexual or other services);

### COMMENTARY

Source: Organized Crime Convention, article 2, subparagraph (a).

The term “financial or other material benefit” is an integral part of the definition of “organized criminal group” in article 2, subparagraph (a), of the Convention. As noted in the interpretative notes on article 2 (see A/55/383/Add.1, para. 3) contained in the *Travaux Préparatoires* to the Convention:

The words “in order to obtain, directly or indirectly, a financial or other material benefit” should be understood broadly, to include, for example, crimes in which the predominant motivation may be sexual gratification, such as the receipt 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>14</sup>

For consistency, the definition of “financial or material benefit” used here is identical to the definition of this term used in the UNODC Model Law against the Smuggling of Migrants.

### Example

The Model Provisions on Money-Laundering, Terrorist Financing, Preventive Measures and Proceeds of Crime (for common law legal systems), section 45, paragraph 5, provides that:

<sup>12</sup> United Nations Office on Drugs and Crime and International Monetary Fund, *Model Legislation on Money-Laundering and Financing of Terrorism* (2005), p. 12. Available from [www.unodc.org/documents/money-laundering/2005%20UNODC%20and%20IMF%20Model%20Legislation.pdf](http://www.unodc.org/documents/money-laundering/2005%20UNODC%20and%20IMF%20Model%20Legislation.pdf) (accessed 18 December 2011).

<sup>13</sup> United Nations Office on Drugs and Crime, *Model Law on Mutual Assistance in Criminal Matters* (2007), p. 14. Available from [www.unodc.org/pdf/legal\\_advisory/Model%20Law%20on%20MLA%202007.pdf](http://www.unodc.org/pdf/legal_advisory/Model%20Law%20on%20MLA%202007.pdf).

<sup>14</sup> *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, p. 17.

“benefit” means an advantage, gain, profit, or payment of any kind, and the benefits that a person derives or obtains or that accrue to him include those that another person derives, obtains or that otherwise accrue to such other person, if the other person is under the control of, or is directed or requested by, the first person.

(c) “Foreign law enforcement agency” of another State shall mean the competent [agency] with responsibility for [preventing, prosecuting] investigating crime in another State;

### COMMENTARY

*Source:* The need to define this term comes from article 27 of the Organized Crime Convention, which requires cross-border law enforcement cooperation.

As noted in the *Legislative Guides*, under article 27, States parties to the Convention are required to cooperate closely with one another in terms of law enforcement (police-to-police) cooperation. In some legal systems, it may be necessary to specifically authorize national law enforcement agencies to work with foreign law enforcement agencies in this way. Where this is the case, it may also be necessary to include a definition of what is meant by the term “foreign law enforcement agency”.

(d) “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;

### COMMENTARY

*Source:* Organized Crime Convention, article 2, subparagraph (f).

The Convention requires States parties to establish mechanisms for freezing and seizure of proceeds of crime both domestically and as a form of international cooperation (see for example, articles 12 and 13). Furthermore, the freezing or seizure of proceeds of crime may also be a useful tool that can be applied by sentencing judges to ensure that criminals do not retain the profits of their crimes. Accordingly, it may be helpful for drafters to ensure that there is a definition of “freezing” and “seizure” in national law. The definition included here is based on the definition found in article 2, subparagraph (f) of the Convention.

The interpretative notes to the Convention clarify that:

The terms “freezing” or “seizure” as defined in article 2, subparagraph (f), can be found in articles 12 and 13 of the United Nations Convention against Transnational Organized Crime. The term

“search and seizure” appearing in article 18 should not be confused with “seizure” in article 2. “Search and seizure” refers to the use of intrusive compulsory measures by law enforcement authorities to obtain evidence for purposes of a criminal case. The term “freezing” in article 18 is used to cover the concept defined as “freezing” or “seizure” in article 2 and should be understood more broadly to include not only property but also evidence.<sup>15</sup>

### **Example**

Article 1.3 of the Model Legislation on Money-Laundering and Financing of Terrorism (for civil law systems) defines the terms “freezing” and “seizing” separately, as follows:

N. “Freezing” shall mean prohibiting the transfer, conversion, disposition or movement of funds or other property on the basis of, and for the duration of the validity of, a decision of a judicial or other competent authority. The frozen funds or other property shall remain the property of the persons or entities that held an interest in the specified funds or other property at the time of the freezing, and may continue to be administered by the financial institution.

O. “Seizing” shall mean prohibiting the transfer, conversion, disposition or movement of funds or other property on the basis of, and for the duration of the validity of, a decision of a judicial or other competent authority. The seized funds or other property shall remain the property of the persons or entities that held an interest in the specified funds or other property at the time of the seizure, but shall be administered by the judicial or other competent authority.<sup>16</sup>

(e) “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 offences to which these model legislative provisions apply, in order to obtain, directly or indirectly, a financial or other material benefit;

### **COMMENTARY**

*Source:* Organized Crime Convention, article 2, subparagraph (a).

The definition of an “organized criminal group”, found in article 2, subparagraph (a), of the Convention, is central to its operation. Accordingly, it is vital that national drafters consider how best to reflect this definition in national law.

<sup>15</sup>Interpretative notes on article 2 (see A/55/383/Add.1, para. 5) cited in the *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, pp. 17-18.

<sup>16</sup>United Nations Office on Drugs and Crime and International Monetary Fund, *Model Legislation on Money-Laundering and Financing of Terrorism*, p. 12.

As noted in the *Legislative Guides*, the definition of “organized criminal group” does not include groups that do not seek to obtain any “financial or other material benefit”.<sup>17</sup> In other words, terrorist or insurgent groups are not covered by this definition, provided their goals are not related to a financial or material benefit. However, the definition may still cover these groups where, for example, a terrorist organization sells drugs in order to raise money to fund their operations.

The interpretative notes to the Convention also state that:

The words “in order to obtain, directly or indirectly, a financial or other material benefit” should be understood broadly, to include, for example, crimes in which the predominant motivation may be sexual gratification, such as the receipt 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>18</sup>

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”. It may also be useful to delete the reference to “structured” and refer simply to “groups”. As defined under the Organized Crime Convention, a structured group is defined in the negative: as one that does not need a formal hierarchy. These sorts of approaches are permitted, as article 34, paragraph 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.

### **Example**

Article 1.3 of the UNODC Model Legislation on Money-Laundering and Financing of Terrorism defines an “organized criminal group” as follows:

“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 offences, in order to obtain, directly or indirectly, a financial or other material benefit.

### **Example**

New Zealand’s Crimes Act 1961 defines an organized criminal group as follows:

#### **Section 98A: Participation in organised criminal group**

- (1) Every person commits an offence and is liable to imprisonment for a term not exceeding 10 years who participates in an organised criminal group—
  - (a) knowing that 3 or more people share any 1 or more of the objectives (the particular objective or particular objectives) described in paragraphs (a) to (d) of subsection (2)

<sup>17</sup> *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, p. 13.

<sup>18</sup> Interpretative notes on article 2 (see A/55/383/Add.1, para. 3), cited in *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, p. 17.

(whether or not the person himself or herself shares the particular objective or particular objectives); and

(b) to whether his or her conduct may contribute, to the occurrence of any criminal activity; and

(c) either knowing that the criminal activity contributes, or being reckless as to whether the criminal activity may contribute, to achieving the particular objective or particular objectives of the organised criminal group.

(2) For the purposes of this Act, a group is an organised criminal group if it is a group of 3 or more people who have as their objective or one of their objectives—

(a) obtaining material benefits from the commission of offences that are punishable by imprisonment for a term of 4 years or more; or

(b) obtaining material benefits from conduct outside New Zealand that, if it occurred in New Zealand, would constitute the commission of offences that are punishable by imprisonment for a term of 4 years or more; or

(c) the commission of serious violent offences (within the meaning of section 312A(1)); or

(d) conduct outside New Zealand that, if it occurred in New Zealand, would constitute the commission of serious violent offences (within the meaning of section 312A(1)).

(3) A group of people is capable of being an organised criminal group for the purposes of this Act whether or not—

(a) some of them are subordinates or employees of others; or

(b) only some of the people involved in it at a particular time are involved in the planning, arrangement, or execution at that time of any particular action, activity, or transaction; or

(c) its membership changes from time to time.

### **Example**

According to the Criminal Code 1996 of the Russian Federation, a crime is considered to be committed by organized crime if it was committed by a permanent (stable) group of persons who had united beforehand to commit one or more crimes. A crime is considered to be committed by a criminal association if it was committed by a structured organized group or association of organized groups acting under single management (direction) and the members of such groups were united in order to commit jointly one or more grave or very serious crimes (felonies) in order to get directly or indirectly financial or other material benefit. A person who created an organized criminal group or a criminal association or who was managing them is subject to criminal liability for their establishment and management in cases stipulated by articles 208 (organization of a criminal association and participation therein), 209 (banditry), 210 (organization of criminal association), 282.1 (organization of an extremist association) of the Criminal Code of the Russian Federation; the same is true for all crimes committed by an organized group or criminal association with intent.<sup>19</sup>

<sup>19</sup>Unofficial translation.

**Example**

The General Civil Penal Code 1902 of Norway defines an “organized criminal group” in its section 60a as follows:

An organized criminal group is here defined as an organized group of three or more persons whose main purpose is to commit an act that is punishable by imprisonment for a term of not less than three years, or whose activity largely consists of committing such acts ...<sup>20</sup>

**Example**

The Criminal Code 1968 of Bulgaria defines an “organized criminal group” as follows:

**Article 93 §20**

20. (New, SG No. 92/2002, amended, SG No. 27/2009) An “organized criminal group” is the permanent structured association of three or more individuals intended for the agreed perpetration, inside the country or abroad, of crime punishable by deprivation of liberty of more than three years. An association shall also be considered structured in the absence of any formal distribution of functions among its participants, duration of their involvement or any developed internal structure.<sup>21</sup>

**Example**

The Criminal Code 2000 of Lithuania defines various forms of complicity, including (among other things) an “organized group” and also a “criminal association” as follows:

**Article 25. Forms of complicity**

1. Forms of complicity shall be a group of accomplices, an organised group or a criminal association.
2. A group of accomplices shall be one in which two or more persons agree, at any stage of the commission of a criminal act, on the commission, continuation or completion of the criminal act, where at least two of them are perpetrators.
3. An organised group shall be one in which two or more persons agree, at any stage of the commission of a criminal act, on the commission of several crimes or of one serious or grave crime, and in committing the crime each member of the group performs a certain task or is given a different role.
4. A criminal association shall be one in which three or more persons linked by permanent mutual relations and division of roles or tasks join together for the commission of a joint criminal act—one or several serious and grave crimes. An anti-state group or organisation and a terrorist group shall be considered equivalent to a criminal association.<sup>22</sup>

<sup>20</sup> Available from [www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/NOR\\_penal\\_code.pdf](http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/NOR_penal_code.pdf).

<sup>21</sup> Available from [www.imolin.org/doc/amlid/Bulgaria/Bulgaria\\_Criminal\\_Code\\_2009.pdf](http://www.imolin.org/doc/amlid/Bulgaria/Bulgaria_Criminal_Code_2009.pdf).

<sup>22</sup> Available from [www3.lrs.lt/pls/inter3/dokpaieska.showdoc\\_e?p\\_id=366707&p\\_query=&p\\_tr2=#](http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_e?p_id=366707&p_query=&p_tr2=#).

**Example**

The Criminal Law of China 1979<sup>23</sup> includes an offence of forming, leading or taking an active part in “organizations in the nature of criminal syndicates” (article 294). The term “organizations in the nature of a criminal syndicate” is not defined in the law itself but is defined in the interpretation by the Standing Committee of the National People’s Congress regarding the first paragraph of article 294 of the Criminal Law of China:

“Organizations in the nature of criminal syndicate” prescribed in the first paragraph of article 294 of the Criminal Law shall, at the same time, possess the following characteristics:

- (1) the criminal organization is relatively stable, with a relatively large number of members, definite organizers or leaders, and basically fixed backbone members;
- (2) it gains economic interests through organized illegally [sic] acts, criminal acts or other means, with a certain amount of economic strength to support its activities;
- (3) it has committed organized illegal and criminal acts on many occasions through violence, threat or other means, perpetrating outrages, riding roughshod over or cruelly injuring or killing people;
- (4) through committing illegal and criminal acts, or taking advantage of protection and connivance by State functionaries, it plays the bully over an area, exercising illegal control and wielding illegal enormous influence over a certain area or trade, thus seriously disrupting the economic order and people’s daily activities.<sup>24</sup>

**Example**

The Criminal Code 2002 of the Republic of Moldova defines an “organized criminal group” as follows:

**Article 46. Organized Criminal Group**

An organized criminal group shall be a stable union of persons that organized themselves in advance in order to commit one or more crimes.<sup>25</sup>

**Example**

The Criminal Code 1937 of the Swiss Confederation defines a “criminal organization” as follows:

**Art. 260<sup>ter</sup>****Criminal organisation**

1. Any person who participates in an organisation, the structure and personal composition of which is kept secret and which pursues the objective of committing crimes of violence or securing a financial gain by criminal means,

<sup>23</sup>The text of the Criminal Law of the People’s Republic of China is available at: [www.imolin.org/doc/amliid/China/China\\_Criminal\\_Law\\_1997.pdf](http://www.imolin.org/doc/amliid/China/China_Criminal_Law_1997.pdf). The Interpretation by the Standing Committee of the National People’s Congress Regarding the First Paragraph of Article 294 of the Criminal Law of the People’s Republic of China is available at: [www.gov.cn/english/laws/2005-10/09/content\\_75389.htm](http://www.gov.cn/english/laws/2005-10/09/content_75389.htm).

<sup>24</sup>Available from [www.gov.cn/english/laws/2005-10/09/content\\_75389.htm](http://www.gov.cn/english/laws/2005-10/09/content_75389.htm).

<sup>25</sup>Available from <http://legislationline.org/documents/section/criminal-codes/country/14>.

any person who supports such an organisation in its criminal activities,  
shall be liable to a custodial sentence not exceeding five years or to a monetary penalty.<sup>26</sup>

(f) “Proceeds of crime” shall mean any property derived from or obtained, directly or indirectly, through the commission of an offence. [Proceeds of crime can be generated by offences committed both within and outside the territory of [*insert name of State*]].

## COMMENTARY

*Source:* Organized Crime Convention, article 2, subparagraph (e).

The Convention obliges States parties to take a number of steps with regard to the proceeds of crimes committed by organized criminal groups. Accordingly, it is important that this concept be defined.

The definition provided here is based on article 2, subparagraph (e), of the Organized Crime Convention, which states:

“Proceeds of crime” shall mean any property derived from or obtained, directly or indirectly, through the commission of an offence.

If the legislature wants to ensure coverage of proceeds of crime, where these are located outside the State’s territorial jurisdiction, it may be useful to clearly state that proceeds of crime can include proceeds located offshore. Whether or not national bodies can, as a practical matter, recover these proceeds of crime then becomes a question of enforcement.

### *Examples*

Article 1.3 of the Model Legislation on Money-Laundering and Financing of Terrorism provides a range of drafting options for the definition of “proceeds of crime” as follows:

A. “Proceeds of crime” shall mean any funds or property derived from or obtained, directly or indirectly

Variant 1: from any offence.

Variant 2: from an offence punishable by a maximum penalty of imprisonment for more than one year.

Variant 3: from an offence punishable by a minimum penalty of imprisonment for more than six months.

Variant 4: offences defined at articles [in specified legislation, e.g. Criminal Code].

Proceeds of crime shall include assets converted or transformed, in part or in full, into other property, and investment yields.

<sup>26</sup> Available from [www.admin.ch/ch/e/rs/311\\_0/a260ter.html](http://www.admin.ch/ch/e/rs/311_0/a260ter.html).

The Model Provisions on Money-Laundering, Terrorist Financing, Preventive Measures and Proceeds of Crime (for common law legal systems), include the following definition:

For the purposes of this section, “proceeds of crime” includes proceeds of an offence committed outside the national territory if the conduct constitutes an offence in the State or territory where the conduct occurred and would have constituted an offence if committed within the national territory of [insert name of State adopting the law].

The Model Law on Mutual Legal Assistance in Criminal Matters (2007) defines proceeds of crime as follows:

Proceeds of crime mean any property derived from or obtained, directly or indirectly, through the commission of an offence or unlawful activity, whether such property is located, or the offence is committed, within or outside (name of State) (sect. 22, para. 5).

(g) “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;

## COMMENTARY

*Source:* Organized Crime Convention, article 2, subparagraph (d).

The definition included here is based on the definition of “property” found in article 2, subparagraph (d), of the Organized Crime Convention, which states:

(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.

In many legal systems, an equivalent definition may already exist.

From a drafting perspective, it is important for drafters to consider whether the legislature intends to ensure coverage of property (for example, for asset confiscation purposes) that is located outside the State’s territorial jurisdiction. If so, it may be useful to clearly state that property can include property located offshore. Whether or not national bodies can, as a practical matter, recover this property then becomes a question of enforcement.

### Examples

Article 1.3 of the Model Legislation on Money-Laundering and Financing of Terrorism has a more detailed definition of “funds” and “property”:

B. “Funds” or “property” shall mean assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments in any

form, including electronic or digital, evidencing title to or interest in such assets, including but not limited to bank credits, traveller's cheques, bank cheques, money orders, shares, securities, bonds, drafts and letters of credit, and any interest, dividends or other income on or value accruing from or generated by such assets.

The Model Provisions on Money-Laundering, Terrorist Financing, Preventive Measures and Proceeds of Crime (for common law legal systems) include a definition of property:

"Property" means assets of every kind, whether tangible or intangible, corporeal or incorporeal, moveable or immovable, however acquired, and legal documents or instruments in any form, including electronic or digital, evidencing title to, or interest in, such assets, including but not limited to currency, bank credits, deposits and other financial resources, travellers cheques, bank cheques, money orders, shares, securities, bonds, drafts and letters of credit, whether situated in [*insert name of State*] or elsewhere, and includes a legal or equitable interest, whether full or partial, in any such property.

### **Example**

The Model Law on Mutual Legal Assistance in Criminal Matters (2007) defines property as follows:

Property means 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. (sect. 22, para. 6)

(h) "Serious crime" shall mean an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty;

## **COMMENTARY**

*Source:* Organized Crime Convention, article 2, subparagraph (b).

As noted in the *Legislative Guides*, many of the provisions of the Organized Crime Convention can be invoked with respect to serious crimes involving an organized criminal group.<sup>27</sup> The concept of a "serious crime" is defined in article 2, subparagraph (b). While there is no requirement for national legislatures to introduce a definition of "serious crime", it may be useful where the intention is to extend coverage of certain provisions drafted to implement the Convention (for example, legislation on mutual assistance) to forms of crime not specifically mentioned in the Convention. The definition of "serious crime" provided here is without prejudice to any national definition of serious crime.

<sup>27</sup> *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, p. 14.

On this point, it is noted in the *Legislative Guides* to the Convention:

If States parties wish to have other offences with an organized criminal group nexus covered by the Convention, that is, in addition to those established under articles 5, 6, 8 and 23, they may wish to ensure that the provided penalties fulfil the conditions of the above definition (see art. 3, subpara. 1(b)).

(i) “Witness” shall include any person in possession of information relevant to the investigation, prosecution or adjudication of an offence to which these model legislative provisions apply.

## COMMENTARY

The Convention requires States parties to take certain measures with regard to the protection of witnesses who give testimony concerning offences covered by the Convention. Accordingly, it may be necessary for national drafters to consider whether there is already a suitable, functional definition of “witness” under national laws that can be referred to in provisions on witness protection and assistance.

The drafting option included here is based on the functional description of a witness found on page 19 of the UNODC *Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime*.<sup>28</sup> As noted in this document, it is the function of the witness—as a person in possession of information important to the judicial or criminal proceedings—that is relevant, rather than his or her status or the form of testimony. Witnesses fall into three main categories: justice collaborators (informants, others who participated in the criminality), victim-witnesses and other types of witnesses (innocent bystanders, expert witnesses, etc.).

Given the important role that witness intimidation can play in undermining the administration of justice, it is suggested that the definition of “witness” used should be broadly drafted in order to include people who assist not only by giving evidence in court but also by, for example, giving information that assists an investigation.

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<sup>28</sup>United Nations Office on Drugs and Crime, *Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime* (2008), p. 19.



## Chapter II.

# Coordination and prevention of organized crime

### INTRODUCTORY COMMENTARY

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 vital that criminal justice responses to crime are underpinned by an equally strong focus on preventing these crimes from happening in the first place.

The objective of preventing transnational organized crime from ever 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.

The concept of crime prevention can potentially have many different meanings. However, through the mechanism of the Economic and Social Council, States Members of the United Nations have developed the Guidelines for the Prevention of Crime.<sup>29</sup> According to the Guidelines:

“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.

The present model legislative provisions adopt this definition of crime prevention.

Countries should endeavour to include a substantial proactive crime prevention component in their legislation, policies and programmes relating to the Organized Crime Convention, and not just reactive or security-related measures. As noted in the UNODC *Handbook on the Crime Prevention Guidelines: Making Them Work*,<sup>30</sup> various approaches to preventing crime have been developed over the past two decades on the basis of a considerable amount of research and evaluation. The major fields of crime prevention include a range of responses developed over many years, including developmental, envi-

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<sup>29</sup>Economic and Social Council resolution 2002/13, annex.

<sup>30</sup>*Handbook on the Crime Prevention Guidelines: Making Them Work*, Criminal Justice Handbook Series (United Nations publication, Sales No. E.10.IV.9).

ronmental/situational, social and community-based crime prevention, the prevention of recidivism and interventions may be classified into a number of groups.<sup>31</sup>

In the context of preventing organized crime, while there may be differences in the commodities (drugs, human beings, firearms etc.), the techniques of organized crime (corruption, money-laundering, intimidation) are the common factor; so, a cooperative approach is important. The origins of organized crime, the populations involved in trafficking and the victims of trafficking or smuggled migrants, are often within national boundaries. Thus, proactive national and local solutions are needed. Similarly, considerable demand for trafficked goods and services may come from within the country, and not just from beyond the borders.

The Economic and Social Council Guidelines for the Prevention of Crime establish the importance of seven principles, fundamental to effective crime prevention:

- *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;
- *Socioeconomic development and inclusion.* Crime prevention considerations should be integrated into all relevant social and economic policies and programmes, including those addressing unemployment, education, health, housing and urban planning, poverty, social marginalization and exclusion;
- *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;
- *Sustainability and accountability.* Crime prevention requires adequate resources, including funding for structures and activities, in order to be sustained;
- *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;
- *Human rights, rule of law and a culture of lawfulness.* The human rights recognized in international legal instruments to which States are parties must be recognized and respected in all aspects of crime prevention;
- *Interdependency.* National crime prevention diagnoses and strategies should take account of the links between local criminal problems and transnational organized crime.

#### **Article 4. National coordinating committee**

1. For the purposes of this article, “crime prevention” shall mean strategies and measures that seek to reduce the risk of organized crime occurring, and their

<sup>31</sup>Ibid., p. 13.

potential harmful effects on individuals and society, by intervening to influence their multiple causes.

2. The [relevant Minister] shall establish a national coordinating [committee/body] tasked with developing, coordinating, monitoring and evaluating the national response to preventing all forms of organized crime, including through data collection, analysis and exchange, the development of prevention programmes, training and other matters such as technical cooperation with other States.
3. The [committee/body] shall comprise officials from [insert relevant agencies], officials from other relevant State agencies and representatives from local government and non-government service providers.
4. According to the applicable/internal proceeding, a [person/organization] shall be appointed as the [Secretary/Secretariat] of the Committee. The Committee shall have the capacity to establish [subcommittees/working groups] as required.
5. The Committee will report annually to [the relevant Minister/Parliament] on its activities.

## COMMENTARY

Optional.

*Source:* Organized Crime Convention, articles 1 and 31.

The principal objective of the Convention is to prevent and combat organized crime more effectively. Crime prevention can have many different meanings. As noted in the introduction to this chapter, the present model legislative provisions adopt the definition of “crime prevention” found in the Economic and Social Council Guidelines for the Prevention of Crime. As noted in the *Handbook on the Crime Prevention Guidelines*, one of the first recommendations of the Guidelines for the Prevention of Crime is the establishment of 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.<sup>32</sup>

It is recommended in these model legislative provisions that a similar approach of establishing a central coordinating body be considered in the context of implementing the Organized Crime Convention and its Protocols. In addition to the Convention's broad focus on prevention, as a result of article 31, States parties to the Convention are also under an obligation to take certain concrete steps directed at preventing organized crime. These include:

(a) To endeavour to develop and evaluate national projects and to establish best practices and policies aimed at the prevention of organized crime;

(b) To endeavour, in accordance with the 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. Those measures should focus on:

- (i) Strengthening cooperation between law enforcement agencies or prosecutors and relevant private entities, including industry;
- (ii) Promoting 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;
- (iii) Preventing 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;
- (iv) Preventing the misuse of legal persons by organized criminal groups.

Measures to prevent such misuse of legal persons could include:

(a) Establishing public records on legal and natural persons involved in the establishment, management and funding of legal persons;

(b) Introducing the possibility of disqualifying by court order or any appropriate means for a reasonable period of time persons convicted of offences covered by the Convention from acting as directors of legal persons incorporated within their jurisdiction;

(c) Establishing national records of persons disqualified from acting as directors of legal persons;

(d) Exchanging information contained in the records referred to in subparagraphs (a) and (c) of this paragraph with the competent authorities of other States parties.<sup>33</sup>

Implementing these obligations will require action across government and civil society, as well as a considerable degree of coordination and cooperation. It is envisaged that these specific measures

<sup>32</sup>Ibid., p. 30.

<sup>33</sup>Organized Crime Convention, art. 31, paras. 1 and 2.

would fall within the broader remit of a coordinating committee or body. That committee or body would have the main responsibility for coordinating the actions of the various stakeholders, ensuring that relevant information is shared appropriately, avoiding duplication of effort and monitoring impact and effectiveness of crime prevention activities. It may also be necessary for the central coordinating committee or body to work towards coordinating with other established bodies, for example, tasked with implementing the three Protocols to the Organized Crime Convention. A number of countries have established national coordinating committees to coordinate responses to trafficking in persons.

### **Examples**

There are many examples of practical approaches to crime prevention in the document *Practical Approaches to Urban Crime Prevention*.<sup>34</sup>

## **Article 5. Data collection and analysis**

1. The national [committee/body] shall establish a programme of research, including collection and publication of statistics and other data and information, on issues related to the achievement of its crime prevention mandate, including:

- (a) Diagnostic studies of the root causes of crime;
- (b) Local safety audits and victimization surveys;
- (c) Trends and threats in organized crime;
- (d) The circumstances in which organized crime operates;
- (e) The professional groups and technologies involved in criminality, including State and non-State parties;
- (f) The effectiveness and efficiency of existing national and international laws, policies and measures to prevent and respond to organized crime;
- (g) Compliance with international obligations, including human rights standards.

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<sup>34</sup>Margaret Shaw and Vivien Carli, eds., *Practical Approaches to Urban Crime Prevention: Proceedings of the Workshop held at the 12th UN Congress on Crime Prevention and Criminal Justice, Salvador, Brazil, April 12-19, 2010* (Montreal, International Centre for the Prevention of Crime and United Nations Office on Drugs and Crime, 2011). Available from [www.unodc.org](http://www.unodc.org).

## COMMENTARY

*Source:* Organized Crime Convention, article 28.

As recognized in article 28, information collection and exchange is recognized as being essential to developing sound, evidence-based policy on preventing and responding to transnational organized crime. The Guidelines for the Prevention of Crime provide examples of the practical steps that Governments should take to build that knowledge base:

### Knowledge base

21. 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, policy-makers, 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 those data in order to reduce repeat victimization, persistent offending and areas with a high level of crime.

A number of States have well-established research institutes that are both a focal point for national-level research not only on the causes of crime but on preventing crime (see examples below from the United Nations crime prevention and criminal justice programme network). While establishing a research institute may be beyond the resources of some States, it may be possible to achieve a similar outcome (that is, the availability of key data to inform crime prevention efforts) through, for example, partnerships between the State and existing research institutions such as universities. The provision of funding by developed States for initiatives such as this to developing States would also be within the scope of article 30, paragraph 2, of the Convention, which requires States parties, among other things, to make concrete efforts, to the extent possible:

To enhance financial and material assistance to support the efforts of developing countries, with a view to strengthening the capacity of the latter to prevent and combat transnational organized crime.

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 determining priorities and allocating appropriate resources to meet those threats. UNODC has developed a methodology on how to conduct such assessments: *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.<sup>35</sup>

### **Example**

The United Nations crime prevention and criminal justice programme network consists of the United Nations Office on Drugs and Crime and a number of interregional and regional institutes around the world, as well as specialized centres. The network has been developed to assist the international community in strengthening cooperation in the crucial area of crime prevention and criminal justice. Its components provide a variety of services, including exchange of information, research, training and public education.<sup>36</sup>

### **Example**

The Australian Institute of Criminology<sup>37</sup> is a government research institute established by legislation. The Institute seeks to promote justice and reduce crime by undertaking and communicating evidence-based research to inform policy and practice. The details of its establishment and functions are stated as follows in the Criminology Research Act 1971:

#### **5. Establishment of Institute**

1. There is hereby established an institute to be known as the Australian Institute of Criminology.
2. The Institute consists of:
  - (a) the Director; and
  - (b) the staff of the Institute.

#### **6. Functions of Institute**

The Institute has the following functions:

- (a) to promote justice and reduce crime by:
  - (i) conducting criminological research; and
  - (ii) communicating the results of that research to the Commonwealth, the States, the Australian Capital Territory, the Northern Territory and the community;
- (b) to assist the Director in performing the Director's functions;
- (c) to administer programs for awarding grants, and engaging specialists, for:

<sup>35</sup> Available from [www.unodc.org/documents/organized-crime/SOCTA\\_Handbook.pdf](http://www.unodc.org/documents/organized-crime/SOCTA_Handbook.pdf).

<sup>36</sup> See further [www.unodc.org/unodc/en/commissions/CCPCJ/institutes.html](http://www.unodc.org/unodc/en/commissions/CCPCJ/institutes.html).

<sup>37</sup> See [www.aic.gov.au](http://www.aic.gov.au).

- (i) criminological research that is relevant to the public policy of the States, the Australian Capital Territory and the Northern Territory; and
- (ii) activities related to that research (including the publication of that research, for example).

**Example**

The National Institute of Justice is the research, development, and evaluation agency of the United States Department of Justice. The Institute's mission is to advance scientific research, development and evaluation to enhance the administration of justice and public safety. The National Institute of Justice sponsors basic/applied research, evaluations, and pilot programme demonstrations. The Institute develops new tools and disseminates criminal justice information.<sup>38</sup>

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<sup>38</sup>Further information about the National Institute of Justice of the United States Department of Justice is available from [www.nij.gov](http://www.nij.gov). Further examples of countries that have implemented research programmes to inform crime prevention can be found in the *Handbook on the Crime Prevention Guidelines: Making Them Work*, particularly on page 54.

## Chapter III.

# Offences

### INTRODUCTORY COMMENTARY

This chapter includes a provision on jurisdiction as well as provisions that are intended to implement two of the offence provisions in the Convention, article 5 (participation in an organized criminal group) and article 23 (obstruction of justice). As these offences require separate legislative treatment, this chapter is divided into two parts, with the first part addressing implementation of article 5, and the second part addressing implementation of article 23.

### A NOTE ON PENALTIES

Reflecting the approach to this issue taken in the Organized Crime Convention, no penalties are specified in these model legislative provisions. Under article 11, paragraph 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. With this proviso, the issue of penalties is left to the discretion of States. In setting penalties, it is important to ensure that the offences established to give effect to the Convention meet common criteria for mutual legal assistance and extradition. In many contexts, international cooperation, such as mutual legal assistance and extradition, will be provided only if the offence attracts a penalty of at least one year's imprisonment.

### Article 6. Jurisdiction

1. [National courts] shall have jurisdiction to determine proceedings for offences to which these model legislative provisions apply when:

(a) Committed [wholly or partly] within the territory of [*insert name of State*]; or

(b) Committed [wholly or partly] on board a vessel that is flying the flag of [insert name of State] or an aircraft that is registered under the laws of [insert name of State] at the time that the offence was committed; or

## COMMENTARY

Mandatory.

Source: Organized Crime Convention, article 15, paragraphs 1 (a) and (b).

Article 15 of the Convention sets out the mandatory and optional requirements for establishing jurisdiction over Convention offences.

Article 15, paragraph 1, requires States parties to assert jurisdiction over the offences established in accordance with articles 5, 6, 8 and 23, on the basis of the territorial principle. That is, States parties must ensure they have jurisdiction over these offences when committed within its territory, on board a ship flying its flag or on board an aircraft registered under its laws.

As noted in the *Legislative Guides*, the obligation to establish jurisdiction over Convention offences is not conditional on the existence of a transnational element or the involvement of an organized criminal group. On the contrary, as a result of article 34, paragraph 2, these factors are not to be taken into account for the purposes of establishing penal offences (except to the extent required by the terms of article 5 which, as it deals with an offence focused on participation in an organized criminal group, necessarily requires the involvement of an organized criminal group).<sup>39</sup>

For consistency, this draft provision reflects an identical provision in the Model Law against the Smuggling of Migrants.<sup>40</sup>

(c) Committed by a [insert name of State] national present in [insert name of State] territory whose extradition is refused on the grounds of nationality; or

## COMMENTARY

Mandatory.

Source: Organized Crime Convention, articles 15, paragraph 3, and 16, paragraph 10.

Article 15, paragraph 3, of the Convention requires States parties, for the purposes of article 16, paragraph 10, to establish jurisdiction over “the offences covered by this Convention”—irrespective of where the offence occurred—in situations where the suspect is present in their territory and extradition is refused solely on the grounds that the suspect is a national. This reflects the obligation to

<sup>39</sup> *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, p. 107.

<sup>40</sup> United Nations Office on Drugs and Crime, *Model Law against the Smuggling of Migrants* (2010), p. 20 (art. 4).

“extradite or prosecute”, which is further elaborated in article 16, paragraph 10.

As noted in the *Legislative Guides*, the reference to “offences covered by this Convention” is broader than simply a reference to the offences established in articles 5, 6, 8 and 23. Article 16, which regulates extradition under the Convention, applies to the offences established under the Convention and offences referred to in article 3, paragraph 1 (a) and (b) where these involve an organized criminal group and the suspect is located in the territory of the requested State party (see also article 16, paragraph 1, read together with article 3). The practical result is that a State Party that does not extradite its nationals must establish jurisdiction over:

(a) The offences established by articles 5, 6, 8 and 23, where these involve an organized criminal group and are committed abroad by its nationals;

(b) Serious crime under its laws involving an organized criminal group committed abroad by its nationals;

(c) Crimes established by the Protocols.<sup>41</sup>

(d) Committed by a person present in [insert name of State] whose extradition is refused on any ground.

## COMMENTARY

Optional.

*Source:* Organized Crime Convention, article 15, paragraph 4.

Subparagraph (d) is optional, as it gives effect to article 15, paragraph 4, of the Convention, which provides that each State party may establish jurisdiction over offences when the alleged offender is present in its territory and it does not extradite him or her for any reason. Note that if subparagraph (d) is used, there is no need to include subparagraph (c), as subparagraph (d) covers situations where extradition is refused for any reason, including nationality.

For consistency, this draft provision is based on an identical provision found in the Model Law against the Smuggling of Migrants.

### *Example*

The Model Law against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition provides as follows:

Article 42. Application of this Law

[...]

(c) The offence is committed [wholly or partly] by a [name of State] national whose extradition is refused on the grounds of nationality.

<sup>41</sup> *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, p. 108.

2. [National courts] shall also have jurisdiction to determine proceedings for offences to which this law applies when:

(a) The [victim/object of the crime] is a national [or permanent resident] [or habitual resident] of [*insert name of State*];

(b) The offence is committed by a [*insert name of State*] national [or permanent resident] [or habitual resident]; or

## COMMENTARY

Optional.

*Source:* Organized Crime Convention, article 15, paragraph 2 (a) and (b).

The Convention encourages but does not require States parties to consider establishing jurisdiction over offences in a range of other situations where their national interests may be harmed.

### *Example*

The following excerpt is taken from the Model Law against Trafficking in Persons:

1. This Law shall apply to any offence established under chapters V and VI of this Law committed outside the territory of [name of State] when:

(a) The offence is committed by a [name of State] national;

(b) The offence is committed by a stateless person who has his or her habitual residence in [name of State] at the time of the commission of the offence; or

(c) The offence is committed against a victim who is a [name of State] national;

2. This Law shall also apply to acts with a view to the commission of an offence under this Law within [name of State].<sup>42</sup>

### *Example*

The following excerpt taken from the Model Law against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition:

This Law shall also apply to any offence established under this Law when:

(a) The person is a national [or permanent resident] [or habitual resident] of [name of State];

(b) The offence is committed by a [name of State] national [or habitual resident] [or permanent resident];

(c) The offence is committed by a stateless person who has his or her habitual

<sup>42</sup>Model Law against Trafficking in Persons (United Nations publication, Sales No. E.09.V.11), p. 23.

residence in [name of State] at the time of the commission of the offence;

(d) The offence is committed in the territory of [name of State] with a view to the commission of a serious crime within the territory of [name of State]; or

(e) The offence is committed outside the territory of [name of State] but the consequences of the offence are directed towards or intended to commit a serious crime within the territory of [name of State].<sup>43</sup>

(c) The offence is committed outside the territory of [*insert name of State*] with a view to the commission of a serious crime within the territory of [*insert name of State*].

## COMMENTARY

Optional.

*Source:* Organized Crime Convention, article 15, paragraph 2(c)(i) and (ii).

Article 15, paragraph (2)(c)(i) and (ii) applies only to offences established under article 5, paragraph 1 (participation in an organized criminal group) and article 6, paragraph 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) offences.

## Section A. Offences related to participation in an organized criminal group

### INTRODUCTION

Article 5 of the Organized Crime Convention focuses on criminalization of participation in an organized criminal group. States are required to criminalize either or both of the sets of conduct specified in subparagraphs 1(a)(i) and (ii) of article 5 as crimes in their national laws, along with the related offences of aiding, abetting, organizing or directing such offences.

These model legislative provisions include options for a conspiracy-type offence (that is, agreeing to commit a serious crime) and/or a participation-type offence (that is, actual participate in the activities of an organized criminal group). Broadly speaking, these two options reflect different common and civil law traditions. The offence of “conspiracy” was developed in common law countries. In many civil law

<sup>43</sup> *Model Law against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition* (United Nations publication, Sales No. E.11.V.9), pp. 65-66.

countries, the concept of conspiracy is not recognized as the general position is that mere planning of an offence, without an overt act to put the plan into operation, is not criminal. Nonetheless, as the various examples of national laws noted below show, this distinction between the common law and civil law traditions is not absolute as some countries have laws that mix elements of conspiracy (agreement to commit) and association (taking part in activities).

### Article 7 (option 1). Conspiracy

1. A person who agrees with one or more other persons to commit a serious crime [involving an organized criminal group] in order to obtain directly or indirectly, a financial or other material benefit, commits an offence punishable by [*insert penalty sufficient to take into account the gravity of the offence*].
2. [*Only include if required by domestic law*] [For a person to be convicted under this section, an act other than the making of the agreement must be undertaken by one of the participants in furtherance of the agreement.]

#### COMMENTARY

**Optional.** The Convention provides for either subparagraph 1(a)(i) or (ii) of article 5, or both, to be implemented.

*Source:* Organized Crime Convention, article 5, paragraph 5(a)(i).

The elements of the offence specified in article 5, paragraph 1(a)(i) are based on a conspiracy offence. As noted in the *Legislative Guides*:

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.<sup>44</sup>

The physical elements (sometimes called the “*actus reus*”) and the mental elements (sometimes called the “*mens rea*” or “*fault element*”) of the offence are set out in table 2.

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 (the relevant concept is *dolus malus*). This is an issue that must be resolved by reference to local legal traditions.

<sup>44</sup>*Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, para. 55, p. 23.

**Table 2. Elements of the offence specified in article 5, paragraph 1(a)(i), of the United Nations Convention against Transnational Organized Crime**

| <i>Article of the United Nations Convention against Transnational Organized Crime</i> | <i>Physical element</i>  | <i>Corresponding mental elements</i>   |
|---|--|--|
| Art. 5, para. 1(a)(i)   | Agreeing with one or more other persons to commit a serious crime (action)   | The agreement was entered into intentionally.<br><br>The agreement was made for a purpose related directly or indirectly to obtaining a financial or other material benefit. |
| Art. 5, para. 1(a)(i)   | [Where required by the domestic law, an act (other than making the agreement itself) was committed in furtherance of that agreement] (act or omission) |  |
| Art. 5, para. 3   | [Where required by the domestic law, involvement of an organized criminal group]   |  |

In some States, an additional element must be present before an offence of conspiracy can be proven (specifically, an act undertaken by one of the participants in furtherance of the agreement; or involving an organized criminal group). These elements will not be required for all States. The language in square brackets may be useful in these States.

Article 5, paragraph 3, of the Convention provides that where elements such as conduct in furtherance of the criminal agreement, or involvement of an organized criminal group is required by domestic law, these States are required to ensure that offences established to give effect to article 5, paragraph 1, cover all serious crimes involving organized criminal groups. Further, article 5, paragraph 3, provides that State parties that do require these elements are required to have informed the Secretary-General of that fact at the time of signature or deposit of instrument of ratification.

Article 5 has to be read together with article 11, paragraph 1, which provides that Convention offences must be liable to sanctions that take into account the gravity of the offence. Furthermore, article 5 should be read together with article 26, paragraphs 2 and 3, which provide that States may want to consider mitigating sentences or granting immunity from prosecution or leniency to those who cooperate with the authorities. This is optional and dependent on tradition.<sup>45</sup>

<sup>45</sup>Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto, pp. 93-94.

**Example**

The Criminal Law Act 1977 of the United Kingdom includes the following conspiracy offence:

1 The offence of conspiracy.

(1) Subject to the following provisions of this Part of this Act, if a person agrees with any other person or persons that a course of conduct shall be pursued which, if the agreement is carried out in accordance with their intentions, either—

(a) will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement, or

(b) would do so but for the existence of facts which render the commission of the offence or any of the offences impossible,

he is guilty of conspiracy to commit the offence or offences in question.

(2) Where liability for any offence may be incurred without knowledge on the part of the person committing it of any particular fact or circumstance necessary for the commission of the offence, a person shall nevertheless not be guilty of conspiracy to commit that offence by virtue of subsection (1) above unless he and at least one other party to the agreement intend or know that that fact or circumstance shall or will exist at the time when the conduct constituting the offence is to take place.

**Example**

The Criminal Code of Canada includes the following conspiracy offence, covering indictable offences, alongside an offence more in the nature of participation in an organized criminal group (included in the commentary on this issue).

Conspiracy

465. (1) Except where otherwise expressly provided by law, the following provisions apply in respect of conspiracy:

(a) every one who conspires with any one to commit murder or to cause another person to be murdered, whether in Canada or not, is guilty of an indictable offence and liable to a maximum term of imprisonment for life;

(b) every one who conspires with any one to prosecute a person for an alleged offence, knowing that he did not commit that offence, is guilty of an indictable offence and liable

(i) to imprisonment for a term not exceeding ten years, if the alleged offence is one for which, on conviction, that person would be liable to be sentenced to imprisonment for life or for a term not exceeding fourteen years, or

(ii) to imprisonment for a term not exceeding five years, if the alleged offence is one for which, on conviction, that person would be liable to imprisonment for less than fourteen years;

(c) every one who conspires with any one to commit an indictable offence not provided for in paragraph (a) or (b) is guilty of an indictable offence and liable to the same punishment as that to which an accused who is guilty of that offence would, on conviction, be liable; and

(d) every one who conspires with any one to commit an offence punishable on summary conviction is guilty of an offence punishable on summary conviction.

## Article 7 (option 2). Criminal association

1. A person who intentionally takes an active part in criminal activities of an organized criminal group, knowing either the aim and general activity of the organized criminal group, or its intention to commit the crimes in question, commits an offence punishable by [*insert penalty sufficient to take into account the gravity of the offence*].

2. A person who intentionally takes an active part in [any other] activities of an organized criminal group:

(a) with knowledge of either the aim and general activity of the organized criminal group, or its intention to commit the crimes in question; and

(b) knowing that their acts or omissions will contribute to the achievement of the criminal aim described above;

commits an offence punishable by [*insert penalty sufficient to take into account the gravity of the offence*].

3. The acts or omissions engaged in for the purpose of [paragraph 2] need not otherwise be illegal.

### COMMENTARY

**Optional.** The Organized Crime Convention provides for either paragraph 1(a)(i) or (ii) of article 5, or both, to be implemented.

*Source:* Organized Crime Convention, article 5, paragraph 1(a)(ii).

The type of offence specified in article 5, paragraph 1(a)(ii) may be more consistent or suitable for countries with laws that do not recognize conspiracy or do not allow criminalization of a mere

agreement to commit an offence.<sup>46</sup> The mental element for the subcategories of offences specified by article 5, paragraph 1(a)(ii)a and b are different. As noted in the *Legislative Guides*:

For the second type of offence, that is criminal association, the required mental element is general knowledge of the criminal nature of the group or of at least one of its criminal activities or objectives. In the case of participating in criminal activities, the mental element of the activity in question would also apply. For instance, active participation in kidnapping or obstruction of justice would require the mental element for those offences.

In the case of taking part in non-criminal but supportive activities, an additional requirement is that of knowledge that such involvement will contribute to the achievement of a criminal aim of the group.<sup>47</sup>

The physical (sometimes called the “actus reus” or the “external elements”) and the mental elements (sometimes called the “mens rea” or the “fault element”) of the offences designated in article 5, paragraph 1(a)(ii) are set out in more detail in table 3.

**Table 3. Elements of the offence specified in article 5, paragraph 1(a)(ii), of the United Nations Convention against Transnational Organized Crime**

| <i>Article of the United Nations Convention against Transnational Organized Crime</i> | <i>Physical element</i>  | <i>Corresponding mental elements</i>   |
|---|--|--|
| Art. 5, para. 1(a)(ii)a   | Through an act or omission, take an active part in criminal activities of the organized criminal group             | The act or omission is intentional and undertaken with knowledge of the criminal nature of the group, or of its criminal activities or objectives. |
| Art. 5, para. 1(a)(ii)b   | Through an act or omission, take an active part in other (non-criminal) activities of the organized criminal group | The act or omission is intentional and undertaken with knowledge that participation will contribute to the achievement of the criminal aim.        |

Paragraph 1 of this draft article is intended to implement article 5, paragraph 1(a)(ii)a, of the Convention. A provision of this nature is intended to cover, for example, the members of an organized criminal group who are preparing to engage in a form of serious crime.

Paragraphs 2 and 3 of this draft article are intended to implement article 5, paragraph 1(a)(ii)b of the Convention. An offence of this nature would include, for example, the conduct of someone who rents a

<sup>46</sup>Ibid., p. 24.

<sup>47</sup>Ibid.

property or a hotel room to criminals or who provides a bookkeeping service to an organized criminal group, provided that he or she knows that that conduct is supporting the activities of the organized criminal group.

Article 5 has to be read together with article 11, paragraph 1, which provides that offences established in accordance with article 5 must be liable to sanctions that take into account the gravity of the offence.

Furthermore, article 5 should be read together with article 26, paragraphs 2 and 3. States may want to consider mitigating sentences or granting immunity from prosecution or leniency to those who cooperate with the authorities. This is optional and dependent on the State's legal tradition.<sup>48</sup>

### **Example**

Title V of the French Penal Code includes an offence of participation in a criminal association that refers to "conspiracy" but also requires some "material action".

#### Title V. Participation in a Criminal Association

##### Article 450-1

A criminal association consists of any group formed or any conspiracy established with a view to the preparation, marked by one or more material actions, of one or more felonies, or of one or more misdemeanours punished by at least five years' imprisonment.

Where the offences contemplated are felonies or misdemeanours punished by ten years' imprisonment, participation in a criminal association is punished by ten years' imprisonment and a fine of €150,000.

Where the offences contemplated are misdemeanours punished by at least five years' imprisonment, the participation in a criminal association is punished by five years' imprisonment and a fine of €75,000.<sup>49</sup>

### **Example**

The Criminal Code (R.S.C., 1985) of Canada includes an offence of participation in activities of a criminal organization:

#### Participation in activities of criminal organization

467.11(1) Every person who, for the purpose of enhancing the ability of a criminal organization to facilitate or commit an indictable offence under this or any other Act of Parliament, knowingly, by act or omission, participates in or contributes to any activity of the criminal organization is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

<sup>48</sup>Ibid., pp. 93-94.

<sup>49</sup>Available from [www.legifrance.gouv.fr/content/download/1957/13715/version/4/file/Code\\_33.pdf](http://www.legifrance.gouv.fr/content/download/1957/13715/version/4/file/Code_33.pdf).

### Prosecution

(2) In a prosecution for an offence under subsection (1), it is not necessary for the prosecutor to prove that

- (a) the criminal organization actually facilitated or committed an indictable offence;
- (b) the participation or contribution of the accused actually enhanced the ability of the criminal organization to facilitate or commit an indictable offence;
- (c) the accused knew the specific nature of any indictable offence that may have been facilitated or committed by the criminal organization; or
- (d) the accused knew the identity of any of the persons who constitute the criminal organization.

### Factors

(3) In determining whether an accused participates in or contributes to any activity of a criminal organization, the Court may consider, among other factors, whether the accused

- (a) uses a name, word, symbol or other representation that identifies, or is associated with, the criminal organization;
- (b) frequently associates with any of the persons who constitute the criminal organization;
- (c) receives any benefit from the criminal organization; or
- (d) repeatedly engages in activities at the instruction of any of the persons who constitute the criminal organization.

### **Example**

The Italian Criminal Code includes the following offence of participating in a mafia-style organization:

#### Article 416 bis. Mafia-type association

Any person participating in a Mafia-type association, which includes three or more persons, shall be punished by a term of imprisonment of three to six years.

Those promoting, directing or organizing the association shall be punished, for that alone, by a term of imprisonment of 4 to 9 years.

An association is said to be a Mafia-type association when the participants take advantage of the intimidating power of the association ties, and of the resulting conditions of submission and silence (*omertà*), to commit criminal offences, to directly and indirectly acquire management or in whatever way control of economic activities, licenses, authorizations, public contracts and services, or to obtain unlawful profits or advantages for themselves or any other person, or with a view to preventing or limiting the freedom to vote, or getting votes for themselves or other persons, on the occasion of an election.

Should the association be of the armed type, the punishment shall be imprisonment of four to ten years under the circumstances mentioned in paragraph 1, and imprisonment of 5 to 15 years under the circumstances mentioned in paragraph 2.

An association is said to be of the armed type when the participants have firearms or explosives at their disposal, even if hidden or deposited elsewhere, to achieve the objectives of the association.

If the economic activities, whose control the participants in the association aim at achieving or maintaining, are funded, totally or partially, by the price, products or proceeds of criminal offences, the punishment referred to in the above paragraphs shall be increased by one third up to one half.

The sentenced person shall always be liable to confiscation of the things that were used or meant to be used to commit the offence and all things that represent the price, the product or the proceeds of such offence, or the use thereof.

The provisions shall also apply to the Camorra and any other association, whatever their local names are, seeking to achieve objectives which correspond to those of the Mafia-type association, by taking advantage of the intimidating power of the association ties.

### **Example**

The Italian Criminal Code contains a description of association to commit crimes:

Article 416. Association to commit crimes

When three or more persons associate for the purpose of committing more than one crime, those who promote or constitute or organize the association shall be punished, for that alone, by a term of imprisonment of three to seven years.

For the act of participating in the association alone, the punishment shall be a term of imprisonment of one to five years.

The leaders shall be subject to the same punishment as for the promoters.

If the participants in the association carry out armed raids in the countryside or public roads, the terms of imprisonment shall be of five to fifteen years.

The punishment shall be increased if the participants in the association are ten or more.<sup>50</sup>

### **Example**

The Criminal Code 1997 of the Republic of Poland contains provisions on “criminal groups” as follows:

Article 258

§1. Whoever participates in an organized group or association having for its purpose the commission of offences shall be subject to the penalty of deprivation of liberty for up to 3 years.

<sup>50</sup> Available from [www.legislationline.org/documents/section/criminal-codes](http://www.legislationline.org/documents/section/criminal-codes).

§2. If the group or association specified in §1 has the characteristics of an armed organization, the perpetrator shall be subject to the penalty of deprivation of liberty for a term of between 3 months and 5 years.

§3. Whoever sets up the group or association specified in §1 or 2 or leads such a group or association shall be subject to the penalty of deprivation of liberty for a term of between 6 months and 8 years.<sup>51</sup>

### **Example**

The Criminal Justice Act 2006 of Ireland, as amended in 2009 includes an offence of participating in or contributing to the activity of a criminal organization:

Section 72:

Offence to participate in, or contribute to, certain activities.

(1) A person is guilty of an offence if, with knowledge of the existence of the organization referred to in this subsection, the person participates in or contributes to any activity (whether constituting an offence or not)—

(a) intending either to—

- (i) enhance the ability of a criminal organisation or any of its members to commit, or
- (ii) facilitate the commission by a criminal organisation or any of its members of, a serious offence, or

(b) being reckless as to whether such participation or contribution could either—

- (i) enhance the ability of a criminal organisation or any of its members to commit, or
- (ii) facilitate the commission by a criminal organisation or any of its members of, a serious offence.

(2) A person guilty of an offence under this section shall be liable on conviction on indictment to a fine or imprisonment for a term not exceeding 15 years or both.

(3) The reference in subsection (1) to the commission of a serious offence includes a reference to the doing of an act in a place outside the State that constitutes a serious offence under the law of that place and which act would, if done in the State, constitute a serious offence.

(4) In proceedings for an offence under this section it shall not be necessary for the prosecution to prove—

(a) that the criminal organisation concerned or any of its members actually committed, as the case may be—

- (i) a serious offence in the State, or

<sup>51</sup> Available from [www.legislationline.org/documents/section/criminal-codes/country/10](http://www.legislationline.org/documents/section/criminal-codes/country/10).

- (ii) a serious offence under the law of a place outside the State where the act constituting the offence would, if done in the State, constitute a serious offence,
- (b) that the participation or contribution of the defendant actually—
  - (i) enhanced the ability of the criminal organisation concerned or any of its members to commit, or
  - (ii) facilitated the commission by it or any of its members of, a serious offence, or
- (c) knowledge on the part of the defendant of the specific nature of any offence referred to in subsection (1)(a) or (b).<sup>52</sup>

### **Article 8. Aiding, abetting, organizing or directing a serious crime**

1. A person who intentionally organizes, directs, aids, abets, facilitates, counsels or procures the commission of a serious crime involving an organized criminal group commits an offence.
2. The penalty for organizing or directing shall be [*insert penalty appropriate for taking a leading role in an offence*].
3. The penalty for aiding, abetting, facilitating, counselling or procuring shall be [*insert penalty appropriate for taking a support role in an offence*].

#### **COMMENTARY**

Mandatory.

*Source:* Organized Crime Convention, article 5, paragraph 1 (b).

An offence of this nature is intended to ensure, for example, the liability of leaders of criminal organizations who give the orders but do not engage in the commission of the actual crimes themselves.<sup>53</sup> It is important to note that article 5, paragraph 1 (b), extends to any serious crime involving an organized criminal group. This offence could apply, for example, to a person who organizes a homicide or other serious crime involving an organized criminal group.

<sup>52</sup>For further information, please see [www.irishstatutebook.ie/pdf/2009/en.act.2009.0032.pdf](http://www.irishstatutebook.ie/pdf/2009/en.act.2009.0032.pdf).

<sup>53</sup>*Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, p. 25.

Article 5 has to be read together with article 11, paragraph 1, which provides that offences established in accordance with article 5, among other articles, must be liable to sanctions that take into account the gravity of the offence.

Furthermore, article 5 should be read together with article 26, paragraphs 2 and 3. States may want to consider mitigating sentences or granting immunity from prosecution or leniency to those who cooperate with the authorities. This is optional and dependent on the State's legal tradition.<sup>54</sup>

Drafters may want to make a separate provision for "organizing and directing" as distinct from "aiding and abetting", as these may have different levels of culpability. It is also important for drafters to consider if a provision already exists in general laws for covering those who organize, direct, aid, abet, facilitate or counsel the commission of a crime.

### **Example**

Criminal Code (R.S.C., 1985) — Canada

#### Instructing commission of offence for criminal organization

467.13 (1) Every person who is one of the persons who constitute a criminal organization and who knowingly instructs, directly or indirectly, any person to commit an offence under this or any other Act of Parliament for the benefit of, at the direction of, or in association with, the criminal organization is guilty of an indictable offence and liable to imprisonment for life.

#### Prosecution

(2) In a prosecution for an offence under subsection (1), it is not necessary for the prosecutor to prove that

- (a) an offence other than the offence under subsection (1) was actually committed;
- (b) the accused instructed a particular person to commit an offence; or
- (c) the accused knew the identity of all of the persons who constitute the criminal organization.<sup>55</sup>

### **Example**

The Australian Criminal Code Act (Commonwealth) includes offences relating to "supporting" a criminal organization. This may be relevant to the requirement to cover "facilitation" of the commission of a serious crime, as per article 5, paragraph 1 (b), of the Organized Crime Convention:

#### 390.4 Supporting a criminal organisation

- (1) A person commits an offence if:

<sup>54</sup>Ibid., pp. 93-94.

<sup>55</sup>See <http://laws-lois.justice.gc.ca/eng/acts/C-46/page-221.html#docCont>.

(a) the person provides material support or resources to an organisation or a member of an organisation; and

(b) either:

(i) the provision of the support or resources aids; or

(ii) there is a risk that the provision of the support or resources will aid;

the organisation to engage in conduct constituting an offence against any law; and

(c) the organisation consists of 2 or more persons; and

(d) the organisation's aims or activities include facilitating the engagement in conduct, or engaging in conduct, constituting an offence against any law that is, or would if committed be, for the benefit of the organisation; and

(e) the offence against any law mentioned in paragraph (d) is an offence against any law punishable by imprisonment for at least 3 years; and

(f) the offence against any law mentioned in paragraph (b) is a constitutionally covered offence punishable by imprisonment for at least 12 months.

Penalty: Imprisonment for 5 years.

(2) Absolute liability applies to paragraphs (1)(e) and (f).

Note: For absolute liability, see section 6.2.

(3) To avoid doubt, a person may be convicted of an offence against subsection (1) because of a risk that the provision of the support or resources will aid the organisation as described in paragraph (1)(b) even if the provision of the support or resources does not actually aid the organisation in that way.

## Article 9. Proof of intention through circumstantial evidence

For offences under this chapter, the knowledge, intention, aim, purpose or agreement referred to in each offence may be inferred from objective factual circumstances.

### COMMENTARY

Optional.

Source: Organized Crime Convention, article 5, paragraph 2.

In some legal systems, it may already be clear from existing national laws on evidence (or criminal procedure) that circumstantial evidence can be drawn upon to prove mental elements such as intention.

However, if this is not already well established in the legal system, then States parties are required to ensure that this principle applies.

### **Examples**

Criminal Justice Act 1967 (United Kingdom), Section 8 — Proof of criminal intent

A court or jury, in determining whether a person has committed an offence,

- (a) shall not be bound in law to infer that he intended or foresaw a result of his actions by reason only of its being a natural and probable consequence of those actions; but
- (b) shall decide whether he did intend or foresee that result by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances.

## **Section B. Offences related to obstruction of justice**

### **Article 10. Obstruction of justice**

A person who, in a proceeding in relation to any offence covered by these model legislative provisions, uses force, threats or intimidation or promises, offers or gives any undue gift, concession or other advantage to:

- (a) Induce false testimony;
- (b) Interfere in the giving testimony or production of evidence;
- (c) Or otherwise interfere with duties of law enforcement, prosecution or judicial authorities in the course of justice;

commits an offence punishable by [*insert the penalty sufficient to take into account the gravity of the offence*].

### **COMMENTARY**

Mandatory.

Source: Organized Crime Convention, article 23.

Article 23 requires States parties to criminalize conduct involving the obstruction of justice. As noted in the *Legislative Guides*, the reference to a “proceeding” in article 23, subparagraph (a), is intended to

cover all official governmental proceedings, which may include the pretrial stage of a case.<sup>56</sup> In other words, States parties are under an obligation to criminalize conduct that involves obstructing justice in the trial phase, but also in the pretrial phase, which could include obstructing an investigation.

As noted in the *Legislative Guides*, States parties to the Organized Crime Convention are required to ensure that national laws giving effect to article 23 apply to obstructing the course of justice in all proceedings related to offences covered by the Convention. As such, national laws implementing subparagraphs (a) and (b) of article 23 must apply to obstructing justice in relation to:

- (a) The offences established in accordance with articles 5, 6, 8 and 23 of the Convention;
- (b) Other serious crimes established by the States parties concerned;
- (c) Offences established in accordance with any of the three Protocols to which the States parties concerned are also parties.<sup>57</sup>

Article 23 has to be read together with article 11, paragraph 1, which provides that offences established in accordance with article 23, among other articles, must be liable to sanctions that take into account the gravity of the offence.

Furthermore, article 11, paragraph 1, should be read together with article 26, paragraphs 2 and 3. States may want to consider mitigating sentences or granting immunity from prosecution or leniency to those who cooperate with the authorities. This is optional and dependent on the State's legal tradition.<sup>58</sup>

The drafting option provided here is intended to provide coverage of situations involving intimidation of jurors, court reporters, translators and others who may be associated with the administration of justice, such as reporters who uncover a story.

It is important to realize that the drafting option provided here, to respond to the obligation to criminalize obstruction of justice, will likely need to be supplemented by other related offences, such as perjury (which may already exist in many legal systems), or giving false testimony or taking other steps to manipulate or influence the course of justice.

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 United Nations 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".

The *Legislative Guide* further notes that:

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, concession or other

<sup>56</sup>*Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, p. 92.

<sup>57</sup>*Ibid.*, pp. 92-93.

<sup>58</sup>*Ibid.*, pp. 93-94.

advantage may be given to some other person, such as a relative or political organization. Some national legislation might cover the promise and offer under provisions regarding the attempt to commit bribery. When this is not the case, it will be necessary 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.<sup>59</sup>

**Table 4. Elements of the offence specified in article 23 of the United Nations Convention against Transnational Organized Crime**

| <i>Article of the United Nations Convention against Transnational Organized Crime</i> | <i>Physical element</i>   | <i>Corresponding fault elements</i>   |
|---|---|---|
| Art. 23, subpara. (a)   | Use force, threat, intimidation or promise, offer or give an undue advantage to a person. | The conduct is intentional and undertaken to induce false testimony, or to interfere in giving of testimony, or the production of evidence, in relation to a proceeding for a Convention offence. |
| Art. 23, subpara. (b)   | Use of force, threats or intimidation.  | The conduct is intentional and undertaken in order to interfere with conduct of duties of law enforcement, prosecution or judicial authorities in relation to a Convention offence.               |

### **Example**

The following offences are found in the Criminal Code of Brazil, Title Xi—Crimes against the Public Administration, chapter lii—Crimes against the Administration of Justice:<sup>60</sup>

Article 343. To give, to offer or promise money or any other advantage to a witness, expert, accountant, translator or interpreter, for them to give false testimony, to deny the truth or not to tell the truth in a hearing, expert report, calculations, translation or interpretation:

Penalty — imprisonment for a term of three up to four years, and a fine.

The penalties will be increased from one sixth up to one third if the crime is committed with the intent to obtain evidence to be used in a criminal procedure or in a civil procedure in which one litigant is the public administration.

<sup>59</sup> *Legislative Guide for the Implementation of the United Nations Convention against Corruption* (United Nations publication, Sales No. E.06.IV.16), para. 197.

<sup>60</sup> Unofficial translation.

### Constraint in the course of a proceeding

Article 344. To use violence or to threaten severely, with the intent to satisfy self or someone else's interest, against authority, part (litigant) or any other person who serves or is called to serve in a judicial proceeding, police investigation, administrative proceeding or arbitration.

Penalty — imprisonment, for a term of one up to four years, and a fine, plus the penalty that corresponds to the violence.

### Procedural fraud

Article 347. To change artificially, during a civil or administrative proceeding, the state of a place, a thing or a person, in order to mislead the judge or the expert.

Penalty — imprisonment, from a term of three months up to two years, and a fine.

If the alteration is intended to take effect in a criminal proceeding, even if it is still not initiated, the penalties shall be doubled.

### **Example**

The following offences are found in the Criminal Code, R.S.C. 1985, c C-46, of Canada:

#### Article 423. Intimidation

##### 423.1

(1) No person shall, without lawful authority, engage in conduct referred to in subsection (2) with the intent to provoke a state of fear in:

- (a) a group of persons or the general public in order to impede the administration of criminal justice;
- (b) a justice system participant in order to impede him or her in the performance of his or her duties; or
- (c) a journalist in order to impede him or her in the transmission to the public of information in relation to a criminal organization.

(2) The conduct referred to in subsection (1) consists of:

- (a) using violence against a justice system participant or a journalist or anyone known to either of them or destroying or causing damage to the property of any of those persons;
- (b) threatening to engage in conduct described in paragraph (a) in Canada or elsewhere;
- (c) persistently or repeatedly following a justice system participant or a journalist or anyone known to either of them, including following that person in a disorderly manner on a highway;
- (d) repeatedly communicating with, either directly or indirectly, a justice system participant or a journalist or anyone known to either of them; and

(e) besetting or watching the place where a justice system participant or a journalist or anyone known to either of them resides, works, attends school, carries on business or happens to be.

(3) Every person who contravenes this section is guilty of an indictable offence and is liable to imprisonment for a term of not more than fourteen years.<sup>61</sup>

### **Example**

The following offences are found in the French Penal Code:

Penal Code article 434-8 (Ordinance no. 2000-916 of 19 September 2000, article 3, Official Journal of 22 September 2000, entry into force 1 January 2002)

Any threat or any intimidation directed against a judge or prosecutor, a juror or any other member of a court, an arbitrator, an interpreter, an expert or the advocate of a party, with a view to influencing his behaviour in the discharge of his office, is punished by three years' imprisonment and a fine of €45,000.

Article 433-3. The threat to commit an offence against persons or property made to a magistrate, a juror, a lawyer, a member of Gendarmerie Nationale, an officer belonging to the National Police, to the Customs Offices, or the Penitentiary Administration or to any person vested of public authority, while on duty or because of his duty, if his position is known by the author, is punished by 2 years imprisonment and a fine of €30,000.

The same penalties are applicable when threats are made to the spouse, ascendants, descendants in direct line of persons mentioned in the two first paragraphs, or to any persons living usually in their home, when those threats are motivated by the duties of these persons.

The penalty is brought to five years imprisonment and €75,000 fine when it is a death threat or a threat of attack against property which is dangerous for the persons.

Threats, violence or any other act of intimidation used to obtain from a person mentioned in the first or the second paragraph, in order that he accomplish, refrain from accomplishing any part of his duty, mission, mandate or facilitated by his duty, mission, mandate or that he abuse his actual or alleged authority in order to obtain from a public authority or a public administration some honour, employment, public contract or any other favourable decision, is punished by 10 years imprisonment and a fine of €150,000.

Article 434-15 (Ordinance no. 2000-916 of 19 September 2000, article 3, Official Journal of 22 September 2000 in force 1 January 2002). The use of promises, offers, gifts, pressures, threats, acts of violence, manoeuvres or tricks in the course of proceedings or in respect of a claim or defence in court to persuade others to make or deliver a statement, declaration or false affidavit, or to abstain from making a statement, declaration or affidavit, is punished by three years' imprisonment and a fine of €45,000, even where the subornation of perjury was ineffective.

<sup>61</sup> See <http://laws-lois.justice.gc.ca/eng/acts/C-46/page-192.html#docCont>.

Article 434-5 (Ordinance no. 2000-916 of 19 September 2000, article 3, Official Journal of 22 September 2000 in force 1 January 2002) Any threat or any other intimidation made against any person with a view to persuading the victim of a felony or a misdemeanour not to file a complaint or to retract is punished by three years' imprisonment and a fine of €45,000.<sup>62</sup>

### **Example**

The Philippines' Witness Protection, Security and Benefit Act (Republic Act No. 6981), section 17, Penalty for Harassment of Witness, provides as follows:

Any person who harasses a Witness and thereby hinders, delays, prevents or dissuades a Witness from:

- (a) attending or testifying before any judicial or quasi-judicial body or investigating authority;
- (b) reporting to a law enforcement officer or judge the commission or possible commission of an offense, or a violation of conditions or probation, parole, or release pending judicial proceedings;
- (c) seeking the arrest of another person in connection with the offense;
- (d) causing a criminal prosecution, or a proceeding for the revocation of a parole or probation; or
- (e) performing and enjoying the rights and benefits under this Act or attempts to do so, shall be fined not more than three thousand pesos (P3,000.00) or suffer imprisonment of not less than six (6) months but not more than one (1) year, or both, and he shall also suffer the penalty of perpetual disqualification from holding public office in case of a public officer.

## **Section C. Penalties and sentencing considerations**

### **Article 11. Penalties and sentencing considerations**

1. In sentencing a person convicted of an offence to which these model legislative provisions apply, a court may take into account the following:

- (a) Any previous convictions for [an offence covered under these model legislative provisions] [or serious crime] in another [State];

<sup>62</sup> Available from [www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations](http://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations).

(b) Whether the person has voluntarily cooperated by providing information or otherwise assisted law enforcement authorities to investigate and prosecute other offences to which this law applies.

2. Upon conviction for an offence that these model legislative provisions apply to, in addition to any other penalty provided in this or any other law or enactment, the judge can make an order in relation to any of the measures listed below:

(a) Prohibiting the exercise, directly or indirectly, of one or more social or professional activities [permanently] [for a maximum period of [...] years], including with regard to occupying a public office;

(b) Exclusion from public bidding [and/or] from entitlement to public benefits or aid;

(c) [Temporary] [permanent] disqualification from participation in public procurement;

(d) [Temporary] [permanent] disqualification from acting as a director of legal persons incorporated in [insert name of State];

(e) [Temporary] [permanent] disqualification from practice of other commercial activities;

(f) [Temporary] [permanent] disqualification from practice as a lawyer, notary public, tax consultant or accountant;

(g) Publicizing the decision;

(h) [Any other non-custodial measures as appropriate].

3. The provisions of this article shall be without prejudice to the criminal liability of legal persons who have violated the criminal provisions of these model legislative provisions.

## COMMENTARY

Optional.

Source: Organized Crime Convention, articles 11, paragraph 1; 22; 26, paragraphs 1 and 2; and 31, paragraph 2.

As noted in the *Legislative Guides*, offences should be subject to penalties that take into account the grave nature of the offence (Organized Crime Convention, art. 11, para. 1). States may want to consider

mitigating sentences or granting immunity from prosecution or leniency to those who cooperate with the authorities (Organized Crime Convention, art. 26, paras. 2 and 3). This is optional and dependent on the State's legal tradition.<sup>63</sup>

Article 31 requires States parties to endeavour, in accordance with fundamental principles of their domestic law, to reduce the opportunity for organized criminal groups to participate in lawful markets. Article 31, paragraph 2, provides that these measures should focus on, among other things: preventing the misuse of public tender proceedings; the prevention and misuse of legal persons; and the disqualification of persons convicted of Convention offences from acting as directors of legal persons incorporated in their jurisdiction.

The obligation in article 22 is permissive. The obligation in article 26, paragraph 1, is mandatory, but the manner in which it can be achieved is discretionary. The obligation in article 26, paragraph 2, is to "consider" providing for the possibility of sentence mitigation, in appropriate cases.

### **Example**

The Criminal Justice Act 2003 (United Kingdom), section 143 provides as follows:

(2) In considering the seriousness of an offence ("the current offence") committed by an offender who has one or more previous convictions, the court must treat each previous conviction as an aggravating factor if (in the case of that conviction) the court considers that it can reasonably be so treated having regard, in particular, to—

(a) the nature of the offence to which the conviction relates and its relevance to the current offence, and

(b) the time that has elapsed since the conviction.

[...]

(4) Any reference in subsection (2) to a previous conviction is to be read as a reference to—

(a) a previous conviction by a court in the United Kingdom;

(aa) a previous conviction by a court in another member State of a relevant offence under the law of that State

### **Example**

The French Penal Code provides as follows:

#### **Article 450-5**

(Inserted by Act no. 2004-204 of 9 March 2004, article 6 XV, Official Journal of 10 March 2004)

<sup>63</sup>Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto, pp. 93-94.

Natural and legal persons convicted of the offences set out under the second paragraph of article 450-1 and article 450-2-1 also incur the additional penalty of confiscation of all or part of their assets, whatever their nature, movable or immovable, severally or jointly owned.<sup>64</sup>

## Article 12. Liability of legal persons

1. Any legal person, other than the State, on whose behalf or for whose benefit an offence under these model legislative provisions has been committed by any natural person, acting either individually or as part of an organ of the legal person, who has a leading position within it, based on a power of representation of the legal person, an authority to take decisions on behalf of the legal person, or an authority to exercise control within the legal person, acting in such capacity, shall be punished by a fine of an amount equal to [indicate multiplier] times the fines specified for natural persons, irrespective of the conviction of those individuals as perpetrators of or accomplices to the offence.

2. The following measures may be imposed on a legal person if there is criminal liability of directors, servants or agents acting within their authority:

(a) If the activity of the legal person was entirely or predominantly used for the carrying out of criminal offences or if the legal person was created to commit an offence under these model legislative provisions, order that the legal person be dissolved;

(b) Prohibit the exercise, whether directly or indirectly, of one or more social or professional activities [permanently] [for a maximum period of ... years];

(c) Order the [temporary] [permanent] closure of the establishment, or one or more of the establishments, of the legal person that was used to commit the offences in question;

(d) Make an order that the legal person be excluded from public bidding [and/or] from entitlement to public benefits or aid;

(e) Order the disqualification of the legal person from participation in public procurement whether on a temporary or permanent basis;

<sup>64</sup>For further information, please see <http://195.83.177.9/code/liste.phtml?lang=uk&c=33&r=3849#art16761>.

- (f) Disqualify the legal person from the practice of other commercial activities [and/or] from the creation of another legal person;
- (g) Order the legal person to publish the judgement by the court;
- (h) [Make such further orders as it considers just].
3. The liability of any legal person does not preclude that of the natural person.

## COMMENTARY

Liability of legal persons is a mandatory provision but may be covered through civil or administrative liability. In other words, criminal liability of legal persons is not a mandatory requirement.

*Source:* Organized Crime Convention, article 10.

Those involved in transnational organized crime may seek to hide behind the cover of legal persons, such as companies, charities or other associations. As noted in the *Legislative Guides*, this can present serious challenges to criminal justice efforts to counter transnational crime:

Complex corporate structures can effectively hide the true ownership, clients or particular transactions related to crimes ranging from smuggling to money-laundering and corrupt practices. Individual executives may reside outside the country where the offence was committed and responsibility for specific individuals may be difficult to prove. Thus, the view has been gaining ground that the only way to remove this instrument and shield of transnational organized crime is to introduce liability for legal entities. Criminal liability of a legal entity may also have a deterrent effect, partly because reputational damage can be very costly and partly because it may act as a catalyst for more effective management and supervisory structures to ensure compliance.<sup>65</sup>

While there is widespread recognition of the need to ensure that criminals cannot avoid justice by hiding behind legal structures such as companies, States have developed different modalities for ensuring the accountability and the sort of penalties that can be imposed on legal persons.

The Organized Crime Convention recognizes that States have different approaches to the issue of liability of legal persons. The Convention provides that States shall adopt such measures as may be necessary, consistent with its legal principles, to ensure the liability of legal persons for participation in serious crimes involving an organized criminal group and for the commission of the offences established by articles 5, 6, 8 and 23.

As provided for in article 10, paragraph 2, of the Organized Crime Convention, the obligation of States parties to ensure liability does not have to involve criminal liability. The obligation can be met through

<sup>65</sup> *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, p. 116.

domestic laws imposing criminal, civil or administrative liability. The obligation to ensure liability of legal persons extends to (a) participation in serious crimes involving an organized criminal group; and (b) offences established by States implementing articles 5, 6, 8 and 23; and (c) offences established by States implementing the Protocols to the Convention.<sup>66</sup>

Article 10, paragraph 3, provides that States parties are obliged to ensure that the liability of legal persons is without prejudice to the criminal liability of the natural persons who have committed the offences. As noted in the *Legislative Guides*:

The liability of natural persons who perpetrated the acts, therefore, is in addition to any corporate liability and must not be affected at all by the latter. When an individual commits crimes on behalf of a legal entity, it must be possible to prosecute and sanction them both.<sup>67</sup>

This is reflected in paragraph 3 of the above draft provision.

Article 10, paragraph 4, of the Organized Crime Convention provides that States parties shall, in particular, 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”. This is reflected in the draft article above, which provides that legal persons shall be subject to a fine and a range of other measures that target the operations of legal persons (such as the dissolution of a company).

This obligation is in addition to the obligation in article 11, paragraph 1, which applies to both legal and natural persons, to ensure that offences established in accordance with articles 5, 6, 8 and 23 of the Convention are liable to “sanctions that take into account the gravity of that offence”.

### **Example**

The Model Legislation on Money-Laundering and Financing of Terrorism of 2005 contains the following provision on the liability of legal persons:

#### Article 5.2.5 Penalties applicable to legal persons

(1) Any legal person other than the State on whose behalf or for whose benefit money-laundering and financing of terrorism has been committed by any natural person, acting either individually or as part of an organ of the legal person, who has a leading position within it, based on a power of representation of the legal person, an authority to take decisions on behalf of the legal person, or an authority to exercise control within the legal person, acting in such capacity, shall be punished by a fine of an amount equal to [*indicate multiplier*] times the fines specified for natural persons, irrespective of the conviction of those individuals as perpetrators of or accomplices to the offence.

The liability of the legal person does not preclude that of the natural person.

<sup>66</sup>Ibid., p. 119.

<sup>67</sup>Ibid., p. 120.

(2) In addition to the cases already provided for in paragraph (1) of this article, a legal person may also be held liable where the lack of supervision or control over a natural person referred to in paragraph (1) has made possible the commission of money-laundering or financing of terrorism for the benefit of that legal person by a natural person acting under its authority.

Legal persons may additionally be:

- (a) Barred permanently or for a maximum period of [*indicate number*] years from directly or indirectly carrying on certain business activities;
- (b) Placed under court supervision;
- (c) Ordered to close permanently or for a period of [*indicate number*] years their premises which were used for the commission of the offence;
- (d) Wound up;
- (e) Ordered to publicize the judgment.

### **Example**

Under the French Penal Code, individuals are only criminally liable for their own conduct. However, there are also provisions on corporate liability:

#### **Article 121-1**

No one is criminally liable except for his own conduct.

#### **Article 121-2**

Legal persons, with the exception of the State, are criminally liable for the offences committed on their account by their organs or representatives, according to the distinctions set out in articles 121-4 and 121-7.

However, local public authorities and their associations incur criminal liability only for offences committed in the course of their activities which may be exercised through public service delegation conventions.

The criminal liability of legal persons does not exclude that of any natural persons who are perpetrators or accomplices to the same act, subject to the provisions of the fourth paragraph of article 121-3.

#### **Article 435-6**

(Act no. 200-595 of 30 June 2000, article 2, Official Journal 1 July 2000)

Legal persons may incur criminal liability pursuant to the conditions set out under article 121-2 for the offences set out under articles 435-2, 435-3 and 435-4.

The penalties incurred by legal persons are:

1° a fine, in the manner prescribed to under article 131-38;

2° for a maximum period of five years:

- prohibition to undertake directly or indirectly the professional or social activity in which or on the occasion of which the offence was committed;
- placement under judicial supervision;
- closure of the establishment or one of the establishments of the enterprise which was used to commit the offence;
- disqualification from public tenders;
- prohibition to draw cheques, except those allowing the withdrawal of funds by the drawer from the drawee or certified cheques, or to use payment cards;

3° confiscation, in accordance with the conditions laid down under article 131-21, of the thing which was used or intended for the commission of the offence, or of the thing which is the product of it, except for articles liable to restitution;

4° the public display or dissemination of the decision, in accordance with the conditions set out under article 131-35.<sup>68</sup>

### **Example**

The Swiss Criminal Code includes provisions on liability of corporations under criminal law:

#### **Art. 102**

##### Liability under the criminal law

1 If a felony or misdemeanour is committed in an undertaking in the exercise of commercial activities in accordance with the objects of the undertaking and if it is not possible to attribute this act to any specific natural person due to the inadequate organisation of the undertaking, then the felony or misdemeanour shall be attributed to the undertaking. In such cases, the undertaking shall be liable to a fine not exceeding 5 million francs.

2 If the offence committed falls under articles 260ter, 260quinquies, 305bis, 322ter, 322quinquies or 322septies paragraph 1 or is an offence under article 4a paragraph 1 letter a of the Federal Act of 19 Dec. 1986 on Unfair Competition, the undertaking shall be penalised irrespective of the criminal liability of any natural persons, provided the undertaking is responsible for failing to take all the reasonable organisational measures that were required in order to prevent such an offence.

3 The court shall assess the fine in particular in accordance with the seriousness of the offence, the seriousness of the organisational inadequacies and of the loss or damage caused, and based on the economic ability of the undertaking to pay the fine.

4 Undertakings within the meaning of this title are:

<sup>68</sup>For further information, please see <http://195.83.177.9/code/liste.phtml?lang=uk&c=33&r=3627>.

- a. any legal entity under private law;
- b. any legal entity under public law with exception of local authorities;
- c. companies;
- d. sole proprietorships.<sup>69</sup>

### **Example**

German law imposes fines on legal entities and associations, in the following law:

The *Administrative Offences Act* (OwiG) of the Federal Republic of Germany<sup>70</sup>

#### **Section 30: Fine imposed on legal entities and associations**

(1) If a person

1. acting in the capacity of an agency authorised to represent a legal entity, or as a member of such an agency,
2. as the board of an association not having legal capacity, or as a member of such a board,
3. as a partner of a commercial partnership authorised to representation, or
4. as the fully authorised representative or in a leading position as a procura holder, or as general agent of a legal entity or of an association as specified in Nos. 2 or 3 has committed a criminal or administrative offence by means of which duties incumbent upon the legal entity or the association have been violated, or the legal entity or the association has gained or was supposed to gain a profit, a fine may be imposed on the latter.

(2) The fine shall be

1. up to one million Deutsche Mark in cases of a wilfully committed offence;
2. up to five hundred thousand Deutsche Mark in cases of a negligently committed offence.

In cases of an administrative offence the maximum amount of the fine shall be assessed in accordance with the maximum fine provided for the administrative offence in question. The second sentence shall also apply in cases of an offence which at the same time is both a criminal and an administrative offence if the maximum fine imposable for the administrative offence is in excess of the maximum fine in accordance with the first sentence.

(3) Section 17 subsection 4 and section 18 shall apply, *mutatis mutandis*.

If criminal proceedings or administrative fine proceedings in respect of the criminal or administrative offence are not initiated, or if they are discontinued, or if no punishment is

<sup>69</sup>See [www.admin.ch/ch/e/rs/311\\_0/a102.html](http://www.admin.ch/ch/e/rs/311_0/a102.html).

<sup>70</sup>Unofficial translation. Further information available from [www.oecd.org/dataoecd/62/54/2377479.pdf](http://www.oecd.org/dataoecd/62/54/2377479.pdf).

deemed appropriate, the fine may be assessed separately. It may be specified by means of a statute that the fine may also be assessed separately in further cases. Separate assessment of a fine on the legal entity or association shall however be ruled out if the criminal or administrative offence cannot be prosecuted for legal reasons; section 33 subsection 1 second sentence shall remain unaffected.

(5) The assessment of a fine against the legal entity or association shall preclude forfeiture pursuant to sections 73 and 73a of the Criminal Code or Section 29a being ordered against it for the same act.

### **Section 130: Violation of obligatory supervision in firms and enterprises**

(1) Whoever, as the owner of a firm or an enterprise, wilfully or negligently fails to take the supervisory measures required to prevent contravention of duties in the firm or the enterprise which concern the owner in this capacity, and the violation of which is punishable by a penalty or a fine, shall be deemed to have committed an administrative offence if such a contravention is committed which could have been prevented or made much more difficult by proper supervision. The required supervisory measures shall also comprise appointment, careful selection and surveillance of supervisory personnel.

(2) A firm or an enterprise in accordance with subsections 1 and 2 shall include a public enterprise.

(3) If the administrative offence is subject to punishment, it may be punished by a fine not exceeding one million Deutsche Mark. If the violation of duty is punishable by a fine, the maximum amount of the fine for a violation of obligatory supervision shall be dependent on the maximum amount of the fine provided for the violation of duty. The second sentence shall also apply in the event of a breach of duty which at the same time is punishable by a penalty and a fine if the maximum amount of the fine is in excess of the maximum amount in accordance with the first sentence.<sup>71</sup>

### **Example**

The Italian Law on liability of legal persons (Legislative Decree 231/2001 of 8 June 2001)<sup>72</sup> provides as follows:

#### **Art. 5 Liability of the agency**

1. The agency is liable for crimes committed in its interest or to its advantage:

<sup>71</sup>Unofficial translation of § 30 Geldbuße gegen juristische Personen und Personenvereinigungen.

<sup>72</sup>Italy imposed a system of administrative liability of corporations through the Decree-Law No. 300 of 29 September 2000 and the Decree-Law No. 231 of 8 May 2001, entitled "Discipline of the administrative liability of legal persons, of companies and of associations even without a legal status, pursuant to Article 11 of Law no. 300 of 29 September 2000" published in the Gazzetta Ufficiale no. 140 of 19 June 2000. Further information available from [www.oecd.org/dataoecd/61/31/45508054.pdf](http://www.oecd.org/dataoecd/61/31/45508054.pdf).

- a) by persons having functions of representation, administration or management of the agency or of an organizational unit thereof possessing financial and functional autonomy, and by persons who exercise, also de facto, the management and control thereof
  - b) by persons subject to the management or supervision of one of the subjects as per letter a).
2. The agency is not answerable if the persons indicated in subsection 1 have acted in their own sole interest or that of third parties.

### **Example**

The Israeli Penal Law 5737 - 1977 (6th Edition) provides as follows:

Article Four: Criminal Liability of Body Corporate

Extent of Criminal Liability of a Body Corporate

23.(a) A body corporate shall bear criminal liability

(1) under section 22, if the offence was committed by a person in the course of the performance of his function in the body corporate;

(2) for an offence that requires proof of criminal intent or negligence, if – under the circumstances of the case and in the light of the position, authority and responsibility of the person in the management of the affairs of the body corporate – the act by which he committed the offence, his criminal intent or his negligence are to be deemed the act, the criminal intent or the negligence of the body corporate.

(b) If the offence was committed by way of omission, when the obligation to perform is directly imposed on the body corporate, then it is immaterial whether the offence can or cannot be related also to a certain officer of the body corporate.<sup>73</sup>

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<sup>73</sup>Further information available from [www.oecd.org/dataoecd/15/58/43289694.pdf](http://www.oecd.org/dataoecd/15/58/43289694.pdf).



## Chapter IV.

# Investigations

### INTRODUCTORY COMMENTARY

This chapter is intended to facilitate the investigation of organized crime offences required to be established under the Convention. It addresses two separate but overlapping issues:

- Special investigative techniques. That is, 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.
- Informal (police-to-police or agency-to-agency) cooperation between law enforcement agencies.

These issues are covered in articles 19, 20 and 27 of the Convention.

These provisions are not intended to operate in isolation. It will be vital for national drafters to consider the operation of these provisions alongside other national laws, including laws on police powers generally, criminal procedure law, privacy laws and laws on more formal means of cooperation, in particular for mutual legal assistance and extradition.

This chapter is intended to provide the legislative basis of special investigative techniques both domestically and as part of international cooperation. These provisions are intended to operate in addition to the regular rules that regulate investigative powers of law enforcement and other agencies.

There are various discrete special investigative techniques and each of these has different levels of risk and potentially raises different human rights issues. For example, it may be appropriate that a controlled delivery be authorized by senior law enforcement officials, whereas electronic surveillance usually requires judicial authorization and supervision. Accordingly, each major type of special investigative technique is addressed separately so that an appropriate regime can be established for each.

As noted in the *Legislative Guides*, special investigative techniques will typically require a legislative basis, as otherwise they may be illegal, and they also raise specific concerns about privacy and human rights:

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, however, as the delivery of the contraband by a law enforcement agent or other person may itself be a crime under domestic law. 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. 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.<sup>74</sup>

Further commentary on the use of special investigative techniques is found in the European context; see Council of Europe recommendation Rec(2005)10 on “special investigation techniques” in relation to serious crimes including acts of terrorism. The recommendation notes the need to balance the interests of ensuring public safety through law enforcement, with the need to ensure the rights of individuals. It suggests that having clear standard-setting will increase public confidence in the use of these “special investigative techniques”, defined as “techniques applied by the competent authorities in the context of criminal investigations for the purpose of detecting and investigating serious crimes and suspects, aiming at gathering information in such a way as not to alert the target persons”. For the purposes of the recommendation, the “competent authorities” means “judicial, prosecuting and investigating authorities involved in deciding, supervising or using special investigation techniques in accordance with national legislation”.<sup>75</sup>

The recommendation sets out a number of principles to guide States in the formulation of national laws and policy on this issue. The following major points are noted:

- The importance of adequate control of implementation of special investigative techniques, by judicial authorities or other independent bodies through prior authorization, supervision during the investigation and/or after the fact review
- The importance of ensuring proportionality of the special investigative technique used, when compared with the conduct being investigated (following the principle that the least invasive method suitable to achieve the objective should be used)
- The need for States to enact laws to permit the production of evidence gained through special investigative techniques in court, while respecting the right to a fair trial
- The importance of operational guidelines and training in the use of special investigative techniques

<sup>74</sup>*Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, pp. 183-184.

<sup>75</sup>Council of Europe Committee of Ministers, Recommendation Rec(2005)10 on “special investigation techniques” in relation to serious crimes including acts of terrorism, adopted on 20 April 2005. Available from [www.coe.int](http://www.coe.int).

- The need for States to make the greatest possible use of existing international arrangements for judicial and police cooperation in relation to the use of specialist investigative techniques, supplemented by additional arrangements where necessary

There are many different types of special investigative techniques. However, the present model legislative provisions focus only on those specifically noted in the Convention: controlled deliveries, undercover operations (involving the use of assumed identities) and electronic surveillance. For each form of the special investigative techniques, drafters will need to consider the following issues:

- Mechanism for approving the technique
- Threshold for grant of approval
- Conditions on use of technique
- Extent to which officers using special investigative techniques are protected from civil and criminal liability
- Use of evidence obtained through that technique
- Extent to which that information can be disseminated
- Supervision, review and oversight mechanisms
- International cooperation

### **Article 13. Controlled delivery**

1. For the purpose of this article, “controlled delivery” shall mean the technique of allowing illicit or suspect consignments [cash or transactions] to pass within, out of, through or into the territory of [*insert name of State*] with the knowledge and under the supervision of [*insert name of competent authorities*], with a view to the investigation and the identification of persons involved in offences that these model legislative provisions apply to.
2. A controlled delivery is lawful if it has been authorized in accordance with this article.
3. An official, or person assisting an official, who engaged in conduct authorized in accordance with this article shall not be criminally or civilly liable for that conduct.
4. A controlled delivery can be authorized by:

(a) [*Insert designated position holders, such as head and deputy head of relevant law enforcement agency and/or the head of the anti-corruption agency; prosecutor or investigative judge*]

5. A law enforcement officer may apply to an authorizing officer for authority to conduct a controlled delivery on behalf of the law enforcement agency or a foreign law enforcement agency.

6. Foreign agents can undertake controlled deliveries only if authorization has been provided in accordance with paragraph 4 [(a)] of this article.

7. An application can be made by any means, but a written record should be made of every request and the subsequent decision, including refusals.

8. The application must:

(a) Provide sufficient information to allow the authorizing officer to decide whether or not to grant the application; and

(b) State whether or not the matter has been the subject of a previous application.

9. The authorizing officer can:

(a) Authorize the controlled delivery, unconditionally or subject to conditions, including the substitution or the partial substitution of a consignment;

(b) Refuse the application.

10. The authorizing officer must not approve the application unless satisfied, on reasonable grounds, that:

(a) An offence to which these model legislative provisions apply has been, is being or is likely to be committed;

(b) The nature and extent of the suspected criminal activity are such as to justify the conduct of a controlled operation;

(c) Any unlawful activity involved in conducting the controlled delivery will be limited to the maximum extent possible consistent with conducting an effective controlled delivery;

(d) The operation will be conducted in a way that ensures that, to the maximum extent possible, any illicit goods involved in the controlled delivery will be under the control of a law enforcement officer at the end of the controlled delivery;

(e) The controlled delivery will not be conducted in such a way that a person is likely to be induced to commit an offence that the person would otherwise not have intended to commit; and

(f) Any conduct involved in the controlled delivery will not:

(i) Seriously endanger the health or safety of any person;

(ii) Cause the death of, or serious injury to, any person.

11. The [insert name of appropriate official/designate such as head of agency or relevant Ministry] is to report annually to [Parliament/a Parliamentary Committee/the public] about:

(a) The number of authorizations sought for controlled deliveries;

(b) The number that were granted; and

(c) The number of prosecutions where evidence or information obtained under an authorization provided by this article was used.

## COMMENTARY

Source: Organized Crime Convention, articles 2, subparagraph (i) (definition of “controlled delivery”); and 20 (special law investigative techniques).

Under article 20, paragraph 1, of the Organized Crime Convention, States are required, if permitted by the basic principles of their national legal systems, to allow for the appropriate use of controlled delivery, and where appropriate, for the use of other special investigative techniques, such as electronic surveillance and undercover operations in their territory, for the purpose of combating organized crime. The interpretative note on article 20 of the Convention contained in the *Travaux Préparatoires* confirms that paragraph 1 of article 20 does not imply an obligation on States parties to make provisions for the use of all the forms of special investigative techniques noted.<sup>76</sup>

<sup>76</sup>*Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, p. 206.

The definition of “controlled delivery” used in these model legislative provisions is based on the equivalent definition in article 2 (i) of the Convention. In defining this term, States may find it useful to include a reference to “facilitating” onward movement of illicit or suspect consignments. In the expert working group meeting, it was noted that controlled delivery can be both passive (in the sense of not stopping a delivery) but also active (in the sense of actively facilitating onward movement of the delivery). The inclusion of the word “facilitating” will allow for these more active forms of controlled delivery.

It is also important to consider the possibility of substituting the illicit consignments with licit or fake material in order to prevent the risk of losing the illicit consignments during the course of delivery. In order to effectively conduct such substitution and arrest the recipient of the substituted material, legal provision to criminalize the import, transfer or possession of material that are received or acquired “as illicit consignments” would be helpful for some States. Otherwise, the recipient of the substituted material will not be arrested for the possession of such material, because the material in possession is licit.

This draft article authorizes the use of controlled delivery on application to a senior official within relevant agencies. In some national legal systems, there may be a preference for further oversight, for example, by a judicial body. This needs to be balanced against the need for ensuring that controlled deliveries can be authorized quickly and at any time of the day or night. A balance could be struck by permitting the initial authorization to be given by the senior law enforcement official (allowing a quick response), which must then be reviewed and extended by a judicial body after a short period of time (such as seven days).

It is important that special investigative techniques be subject to a level of scrutiny. Otherwise, they can provide opportunities for misuse and even corruption. These model legislative provisions recommend that a senior official, such as the head of the law enforcement agency or Ministry of Justice, be required to report to Parliament or equivalent, on an annual basis, on the number of authorizations sought and granted and the number of prosecutions where evidence or information obtained through authorizations was used. In some legal systems, there may be a preference for additional scrutiny through, for instance, reporting and review by an independent oversight body. If this is the case, it will likely be necessary to have two levels of review: the first, which allows full review including access to sensitive operational information by an independent review body with a specific legislative mandate; and the second, which is a public review to the Parliament (for example), which does not disclose operational information, including methods and sources.

### ***Example***

There are provisions regarding “controlled deliveries” in the Customs Code of France:

Title II

Chapter IV. Powers of customs officers

Section 7. Controlled deliveries

Article 67 bis

In order to establish that offences against the Customs Code have been committed in respect of the import, export or possession of substances or plants classified as narcotic, to identify the perpetrators of and accomplices to such offences and also those who have participated as interested parties under the terms of article 399, and to effect the seizures provided for under this Code, customs officers authorized by the Minister for Customs may, in circumstances established by decree, after informing the Government procurator and under his control, monitor the transport of such substances or plants.

They shall not be criminally liable when, to that end, with the authorization of the Government procurator and under his control, they purchase, hold, transport or deliver such substances or plants or provide persons possessing such substances or plants or engaging in the customs offences referred to in the previous paragraph with legal support or means of transport, deposit or communication. Authorization may be granted only for actions that do not involve committing the offences referred to in the first paragraph.

The provisions of the previous two paragraphs shall be applicable for the same purposes to substances used for the illicit manufacture of narcotics the list of which shall be established by decree and to the equipment used for such manufacture.

Customs officers who, in respect of funds involved in the offence specified in article 415 and in order to establish that such an offence has been committed, carry out the actions referred to in the first two paragraphs shall not be liable to criminal punishment.<sup>77</sup>

### **Example**

The following definitions of “controlled operation” and “major controlled operation” are found in the Australian Crimes Act 1914 (Commonwealth):

#### 15GD Meaning of controlled operation and major controlled operation

- (1) A controlled operation is an operation that:
  - (a) involves the participation of law enforcement officers; and
  - (b) is carried out for the purpose of obtaining evidence that may lead to the prosecution of a person for a serious Commonwealth offence or a serious State offence that has a federal aspect; and
  - (c) may involve a law enforcement officer or other person in conduct that would, apart from section 15HA, constitute a Commonwealth offence or an offence against a law of a State or Territory.
- (2) A major controlled operation is a controlled operation that is likely to:
  - (a) involve the infiltration of an organised criminal group by one or more undercover law enforcement officers for a period of more than 7 days; or

<sup>77</sup> Available from [www.legifrance.gouv.fr](http://www.legifrance.gouv.fr).

- (b) continue for more than 3 months; or
- (c) be directed against suspected criminal activity that includes a threat to human life.

Australian law establishes a system whereby a law enforcement officer can apply to designated senior officials for authority, which can be granted only if certain conditions are met:

15GF Meaning of authorising officer etc.

- (1) Any of the following is an authorising officer for a controlled operation:
  - (a) if the operation is a major controlled operation and the investigation of the offence to which the controlled operation relates is within the functions of the Australian Federal Police—the Commissioner or a Deputy Commissioner;
  - (b) if the operation is not a major controlled operation, but the investigation of the offence to which the controlled operation relates is within the functions of the Australian Federal Police—any AFP authorising officer;
  - (c) if the investigation of the offence to which the controlled operation relates is within the functions of the ACC [Australian Crime Commission]—any ACC authorising officer;
  - (d) if the controlled operation relates to the investigation of a corruption issue (within the meaning of the Law Enforcement Integrity Commissioner Act 2006)—any ACLEI [Australian Commission for Law Enforcement Integrity] authorising officer.
- (2) The following are AFP authorising officers:
  - (a) the Commissioner;
  - (b) a Deputy Commissioner;
  - (c) a senior executive AFP employee who is a member of the Australian Federal Police and who is authorised in writing by the Commissioner for the purposes of this paragraph.
- (3) The following are ACC authorising officers:
  - (a) the Chief Executive Officer of the ACC;
  - (b) a member of the staff of the ACC who is an SES employee and who is authorised in writing by the Chief Executive Officer of the ACC for the purposes of this paragraph.
- (4) The following are ACLEI authorising officers:
  - (a) the Integrity Commissioner;
  - (b) the Assistant Integrity Commissioner;
  - (c) a member of the staff of the ACLEI who is an SES employee and is authorised in writing by the Integrity Commissioner for the purposes of this paragraph.

**Example**

Article 1.3 of the Model Legislation on Money-Laundering and Financing of Terrorism (civil law) includes a definition of controlled delivery:

L. "Controlled delivery" shall mean the technique of allowing illicit or suspect consignments and cash to pass within, out of, through or into the territory of [name of the country] with the knowledge and under the supervision of the competent authorities, with a view to the investigation of an offence and the identification of persons involved therein.

The 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 do not include a definition of controlled delivery.

## **Article 14. Assumed identities**

1. The acquisition and use of an assumed identity is lawful if it has been authorized in accordance with this article.
2. Officials and individuals assisting them are not subject to civil or criminal liability for conduct that has been authorized in accordance with this article.
3. A law enforcement officer from [*insert name of designated agencies*] may apply to acquire or use an assumed identity for the purpose of investigating an offence covered by these model legislative provisions [on behalf of the law enforcement agency, or a foreign law enforcement agency].
4. Use or acquisition of an assumed identity can be authorized by:
  - (a) [*Insert designated position holders, such as the head and deputy head of relevant law enforcement agency; and/or the head of the Anti-Corruption Agency*].
5. An application must be made in writing and must include:
  - (a) The name of the applicant;
  - (b) Details of the proposed assumed identity;
  - (c) Reasons for the need to acquire or use an assumed identity; and
  - (d) Details of the investigation or intelligence-gathering exercise for which the identity will be used (to the extent known).

6. After considering the application, the authorizing officer can:

(a) Authorize the use or acquisition of an assumed identity, unconditionally or subject to conditions; or

(b) Refuse the application.

7. The authorizing officer may not approve the application unless satisfied on reasonable grounds that the assumed identity is necessary for one or more of the following reasons:

(a) To investigate an offence covered by these model legislative provisions that has been, is being or is likely to be committed; and

(b) Any administrative function in support of subparagraph (a).

8. A copy of each authorization must be provided to [*insert name of relevant oversight body*].

9. A person acting under an authorization may request assistance from a person to acquire evidence of an assumed identity that has been approved under this article. Notwithstanding any other laws, a person may create or provide evidence of an assumed identity in response to a request under this article.

10. The Chief Officer of the [*insert names of relevant agencies*] must periodically review each authority granted by the [*insert details of relevant delegates*].

11. If, having reviewed an authority, the Chief Officer is of the view that the authority is no longer necessary, he or she must cancel the authority under [*insert paragraph*].

12. If, having reviewed an authority, the Chief Officer is of the view that the authority is still necessary, he or she must record his or her opinion, and the reasons for it, in writing.

13. Every [*insert relevant number of*] months the Chief Officer of [*agency*] must report to [*insert oversight body*] on:

(a) The number of assumed identities currently authorized; and

(b) How recently each has been reviewed and the outcome of that review.

14. The [head of the law enforcement agency] is to report annually to [Parliament/a Parliamentary committee/publically] on:

- (a) The number of assumed identities that were granted;
- (b) The number that were revoked; and
- (c) The number of prosecutions where evidence or information obtained through the use of an assumed identity was used [or played a role in the investigation or prosecution].

### **Article 15. Infiltration**

1. For the purpose of this article, infiltration consists of surveillance of persons suspected of committing offences covered by these model legislative provisions, carried out by [specialized] designated officers acting as participants to those offences. To that end, designated officers are authorized to use an assumed identity. They cannot act in a way that instigates the commission of offences.

2. Infiltration is lawful only if it has been authorized in accordance with this article.

3. Designated officers are authorized, without being criminally responsible:

(a) To acquire, detain, transport, copy or deliver items, products, documents and information coming from the commission of offences covered by these model legislative provisions or used to commit those offences;

(b) To make available legal and financial means, transport, storage, housing and communications needed for the perpetration of those offences;

(c) This immunity is extended to all persons officially requested [by the designated officer or by the investigator] to assist in the infiltration.

4. Infiltration shall be carried out only by specially trained, designated officers.

5. Infiltration shall be carried out only under the responsibility of an investigator who shall supervise the designated officers. This investigator will establish a report on the infiltration operation.

6. Authority for infiltration shall be sought from: [*insert designated position holders, such as the head and deputy head of relevant law enforcement agency; and/or the head of anti-corruption agency/prosecutor/investigative judge*].
7. The authorization must be requested by the specialized unit/agency and shall mention the suspected offences, the name of the investigator in charge, the duration of the infiltration which cannot exceed [...] months and shall state the reason why the infiltration is needed.
8. Authorization shall be granted only if [*insert relevant conditions*].
9. This authorization may be revoked at any time by [*the head and deputy head of relevant law enforcement agency; and/or the head of anti-corruption agency/prosecutor/investigative judge*]. At the end of the infiltration operation, the designated officer shall be given the time necessary for a safe withdrawal, which cannot exceed [...] months, [*time during which he will still be authorized to use his assumed identity and to commit offences as stated in paragraph 2*].

## COMMENTARY

*Source:* Organized Crime Convention, article 2, subparagraph (i) (definition of “controlled delivery”) and article 20 (special investigative techniques).

Under article 20, paragraph 1, of the Organized Crime Convention, States are required, if permitted by the basic principles of their national legal systems, to allow for the use, where appropriate, of undercover operations or infiltration of criminal operations in their territory, for the purpose of combating organized crime. The interpretative notes contained in the *Travaux Préparatoires* to the Convention confirm that paragraph 1 of article 20 does not imply an obligation on States parties to make provisions for the use of all the forms of special investigative techniques noted.<sup>78</sup>

It is vital for drafters to consider the issue of whether evidence obtained through infiltration/undercover operations can be adduced in court, and, if so, whether the undercover agent has to reveal their real identity. The French solution is to use the investigator (who is not the undercover agent) as a proxy. The investigator remains in charge of the operation, and he or she is the person who would draft any reports and appear in court. This undercover agent may testify by special means in order to protect his or her real identity. Another important issue for national drafters to consider is the strength of evidence obtained through infiltration: in some countries for example, conviction cannot be grounded solely on evidence obtained through infiltration. In all of this, it is important to balance the interests of justice (including the need to combat transnational organized crime), with the need to ensure a fair trial of the accused.

<sup>78</sup> *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, p. 206.

**Example**

The French Penal Code provides as follows:

**Article 706-81**

*(Inserted by Law no. 2004-204 of 9 March 2004, art.1, Official Journal of 10 March 2004, in force 1 October 2004)*

Where the needs of the inquiry or investigation into any of the felonies or misdemeanours falling within the scope of article 706-73 justify this, the district prosecutor or, after hearing his opinion, the investigating judge seized of the case, may authorise an infiltration operation to be carried out, under their respective supervision, in accordance with the conditions provided for by the present section.

Infiltration is when a specially authorised judicial police officer or agent, in accordance with the conditions determined by decree and acting under the authority of a judicial police officer appointed to oversee the operation, carries out surveillance on those persons suspected to have carried out a felony or a misdemeanour by passing himself off to these persons as one of their fellow perpetrators, accomplices or receivers of stolen goods. To this end, a judicial police officer or agent is authorised to use an assumed identity and to commit, where necessary, the actions mentioned in article 706-82. Under penalty of nullity, these acts may not constitute an incitement to commit any offences.

A report of the infiltration operation is drafted by the judicial police officer who coordinated the operation, and contains only those elements strictly necessary for the noting of any offences, without endangering the safety of the infiltrator agent or of those persons recruited in accordance with article 706-82.

**Article 706-82**

*(Inserted by Law no. 2004-204 of 9 March 2004, art.1, Official Journal of 10 March 2004, in force 1 October 2004)*

Without incurring criminal liability for their actions, judicial police officers or agents authorised to carry out an infiltration operation may, in all parts of the French national territory:

1° acquire, possess, transport, dispense or deliver any substances, goods, products, documents or information resulting from the commission of any offences or used for the commission of these offences;

2° use or make available to those persons carrying out these offences legal or financial help, and also means of transport, storage, lodging, safe-keeping and telecommunications.

The exemption from liability provided for by the first paragraph also applies, in respect of acts committed with the sole aim of infiltration, to those persons recruited by officers or agents of the judicial police in order to enable this operation to be carried out.

**Article 706-83**

*(Inserted by Law no. 2004-204 of 9 March 2004, art.1, Official Journal of 10 March 2004, in force 1 October 2004)*

Under penalty of nullity, the authorisation given in accordance with article 706-81 is issued in writing and must be specially reasoned.

It details the offence or offences which justify the choice of these proceedings and the identity of the judicial police officer under whose authority the operation will be carried out.

This authorisation determines the length of the infiltration operation, which may not exceed four months. The operation may be renewed under the same conditions of form and duration. The judge who authorised this operation may, at any time, order its suspension before the expiry of the fixed time limit.

The authorisation is attached to the case file after the infiltration operation has been completed.

**Article 706-84**

*(Inserted by Law no. 2004-204 of 9 March 2004, art.1, Official Journal of 10 March 2004, in force 1 October 2004)*

The true identity of judicial police officers or agents who have carried out infiltration operations under an assumed identity must not appear at any stage in the proceedings.

Divulging the identity of these judicial police officers or agents is punished by five years' imprisonment and by a fine of €75,000.

Where such a revelation has led to violence or assault and battery against these persons or their spouses, children or direct ascendants, the penalties are increased to seven years' imprisonment and a fine of €100,000.

Where such a revelation has caused the death of these persons or their spouses, children or direct ascendants, the penalties are increased to ten years' imprisonment and a fine of €150,000, without prejudice, where appropriate, to the application of the provisions of Chapter 1 of Title II of Book II of the Criminal Code.

**Article 706-85**

*(Inserted by Law no. 2004-204 of 9 March 2004, art.1, Official Journal of 10 March 2004, in force 1 October 2004)*

Where a decision is made to suspend the operation, or the period determined by the ruling which authorised the infiltration expires and is not renewed, the undercover agent may carry out the activities mentioned in article 706-82, without being criminally responsible, for only for such a period as is strictly necessary for him to put an end to his surveillance under conditions ensuring his safety, which may not exceed four months. The

judge or prosecutor who gave the authorisation provided for by article 706-81 is informed of this as quickly as possible. If, at the end of the four month period, the infiltrator undercover agent cannot end his operation in conditions that ensure his safety, the judge or prosecutor authorises a four month extension to this period.

#### **Article 706-86**

*(Inserted by Law no. 2004-204 of 9 March 2004, art.1, Official Journal of 10 March 2004, in force 1 October 2004)*

The judicial police officer under whose authority the infiltration operation is carried out may solely be heard in relation to this operation only in the capacity of a witness.

However, if it emerges from the report mentioned in the third paragraph of article 706-81 that the person placed under judicial investigation or appearing before a trial court has been implicated due to reports made by an agent who personally carried out infiltration operations, this person may request to be confronted with the agent under the conditions provided for by article 706-61. The questions asked of the undercover agent at this confrontation may not be designed to reveal, whether directly or indirectly, his true identity.

#### **Article 706-87**

*(Inserted by Law no. 2004-204 of 9 March 2004, art.1, Official Journal of 10 March 2004, in force 1 October 2004)*

No conviction may be returned solely on the basis of statements made by judicial police officers or agents who have carried out an infiltration operation.

The provisions of the present article are, however, not applicable where the judicial police officers or agents testify under their true identity.

### **Example**

The Dutch Code of Criminal Procedure provides as follows:

Undercover operations (including covert investigations)

Legal framework:

126h Dutch Code of Criminal Procedure (DCCP) (after the commission of an offence; by NL police officers), 126h(4) (by foreign police officers);

126p DCCP (not necessarily after the commission of an offence, but only in case of connection with planning or committing serious organized crime; by NL police officers);

126p(4) (by foreign police officers);

126w DCCP (after the commission of an offence; by civilians);

126x DCCP (not necessarily after the commission of an offence, but only in case of connection with planning or committing serious organized crime; by civilians).

## **Criminal Code of Procedure**

### **TITLE IV A. SPECIAL POWERS OF INVESTIGATION**

#### **PART ONE. SURVEILLANCE**

##### **Article 126g**

1. If it is suspected that an indictable offence has been committed, the public prosecutor may, in the interests of the investigation, order an investigating officer to follow a person or to observe his presence or behaviour on a systematic basis.
2. If the suspicions relate to an offence as defined in article 67, paragraph 1, which in view of its nature or connection with other offences committed by the suspect constitutes a serious breach of the legal order, the public prosecutor may, in the interests of the investigation, decide that in order to carry out the order referred to in paragraph 1, an enclosed place, not being a dwelling, may be entered without the permission of the title holder.
3. The public prosecutor may decide that in order to carry out the order referred to in paragraph 1, a technical device shall be used, provided it is not used to record confidential communications. No technical device shall be attached to a person without his permission.
4. The order shall be given for a period not exceeding three months and may be extended, on each occasion for a further three months.
5. A surveillance order shall be in writing and shall include:
  - a. the offence and, if known, the name or as accurate as possible a designation of the suspect;
  - b. the facts or circumstances demonstrating that the conditions set out in paragraph 1 have been fulfilled;
  - c. the name or as accurate as possible a designation of the person referred to in paragraph 1;
  - d. if paragraph 2 is applied, the facts and circumstances demonstrating that the conditions set out in that paragraph have been fulfilled, and the place to be entered;
  - e. the way in which the order is to be executed, and
  - f. the period for which the order is valid.
6. In urgent cases the order may be given verbally. In such cases, the public prosecutor shall then put the order in writing within three days.
7. As soon as the conditions set out in paragraph 1 are no longer fulfilled, the public prosecutor shall terminate the implementation of the order.

8. The order may be amended, supplemented, extended or terminated in writing, with reasons being given. In urgent cases the decision may be given verbally. In such cases, the public prosecutor shall then put his decision in writing within three days.

9. An order as referred to in paragraph 1 may also be given to a person in the public service of another State. Certain requirements may be imposed on that person by order in council. Paragraphs 2 to 8 shall apply, *mutatis mutandis*.

## PART TWO. INFILTRATION

### Article 126h

1. If it is suspected that an offence has been committed as defined in article 67, paragraph 1, which in view of its nature or connection with other offences committed by the suspect constitutes a serious breach of the legal order, the public prosecutor may, if this is urgently required in the interests of the investigation, order an investigating officer as referred to in article 141b, to join or assist a group of persons who can reasonably be suspected of planning or committing offences.

2. In carrying out the order referred to in paragraph 1, the investigating officer may not induce a person to commit an offence other than the one he was already intending to commit.

3. An infiltration order shall be in writing and shall include:

- a. the offence and, if known, the name or as accurate as possible a designation of the suspect;
- b. a description of the group of persons;
- c. the facts or circumstances demonstrating that the conditions set out in paragraph 1 have been fulfilled;
- d. the way in which the order is to be executed, including any activities which constitute an offence, insofar as this is possible to foresee at the time the order is issued, and
- e. the period for which the order is valid.

4. An order as referred to in paragraph 1 may also be issued to:

- a. a person in the public service of another State who complies with requirements laid down by order in council;
- b. an investigating officer as referred to in article 142, provided the said officer is cooperating pursuant to section 11, subsection 2 of the 1993 Police Act with investigating officers as referred to in article 141 (b).

Paragraphs 2 and 3 shall apply *mutatis mutandis*.

5. Article 126g, paragraphs 7 and 8 shall apply *mutatis mutandis*, on the understanding that an infiltration order may not be extended verbally.

**Article 126p**

1. In a case as referred to in article 126o, paragraph 1, the public prosecutor may, if this is urgently required in the interests of the investigation, order an investigating officer as referred to in article 141(b) to join or assist the organisation in question.
2. In carrying out the order referred to in paragraph 1, the investigating officer may not induce a person to commit an offence other than the one he was already intending to commit.
3. An infiltration order shall be in writing and shall include:
  - a. a description of the organisation;
  - b. the facts or circumstances demonstrating that the conditions set out in paragraph 1 have been fulfilled;
  - c. the way in which the order is to be executed, including any activities which constitute an offence, insofar as this is possible to foresee at the time the order is issued, and
  - d. the period for which the order is valid.
4. An order as referred to in paragraph 1 may also be issued to:
  - a. a person in the public service of another State who complies with requirements laid down by order in council;
  - b. an investigating officer as referred to in article 141 (c) or article 142, provided the said officer complies with the requirements of the order in council regarding training and cooperation with investigating officers as referred to in article 141 (b).

Paragraphs 2 and 3 shall apply *mutatis mutandis*.

5. Article 126g, paragraphs 7 and 8 shall apply *mutatis mutandis*, on the understanding that an infiltration order may not be extended verbally.<sup>79</sup>

**Example**

The Swiss Criminal Procedure Code of 5 October 2007 provides as follows:

**Section 5: Undercover Investigations****Art. 286 Requirements**

1. The public prosecutor may order an undercover investigation if:
  - a. it is suspected that an offence listed in paragraph 2 has been committed;
  - b. the seriousness of the offence justifies the covert investigation; and

<sup>79</sup> Available from [www.coe.int/t/dlapil/codexter/Source/pcti\\_questionnaireReplies/Netherlands%20reply.pdf](http://www.coe.int/t/dlapil/codexter/Source/pcti_questionnaireReplies/Netherlands%20reply.pdf).

- c. previous investigative activities have been unsuccessful or the enquiries would otherwise have no prospect of success or be made unreasonably complicated.

...

**Art. 287** Requirements for the persons deployed

1. The following persons may be deployed as undercover investigators:
  - a. members of a Swiss or foreign police force;
  - b. persons employed temporarily on police duties even if they have not received police training.
2. Only members of a police force may be deployed as command staff.
3. If members of a foreign police force are deployed, they are normally led by their regular commander.

**Art. 288** Cover and guarantee of anonymity

1. The public prosecutor may provide undercover investigators with a cover that gives them an identity that differs from their true identity.
2. It may guarantee to undercover investigators that their true identity will not be disclosed even if they appear in court proceedings as persons providing information or witnesses.
3. If undercover investigators commit an offence while deployed, the compulsory measures court shall decide on the identity under which criminal proceedings are brought.

**Art. 289** Authorisation procedure

1. The deployment of an undercover investigator requires the authorisation of the compulsory measures court.
2. The public prosecutor shall submit the following documents to the compulsory measures court within 24 hours of ordering the undercover investigation:
  - a. the order;
  - b. a statement of the reasons and the case documents relevant for authorisation.
3. The compulsory measures court shall decide and provide a brief statement of the reasons within 5 days of the undercover investigation being ordered. It may grant authorisation subject to a time limit or other conditions, or request further information or investigations.
4. The authorisation shall expressly state whether it is permitted:
  - a. to produce or alter official documents in order to create or maintain a cover;
  - b. to guarantee anonymity;
  - c. to deploy persons with no police training.

5. The compulsory measures court shall grant authorisation for a maximum of 12 months. Authorisation may be extended on one or more occasions for a maximum of 6 months at a time. If an extension is required, the public prosecutor shall file an application for the extension, stating the reasons therefor, before expiry of the current authorisation.

6. If authorisation is not granted or no authorisation has been obtained, the public prosecutor shall terminate deployment immediately. All records must be destroyed immediately. Findings made by means of the undercover investigation may not be used.

#### **Art. 290 Briefing before deployment**

The public prosecutor shall brief the commanding officer and the undercover investigator before deployment.

#### **Art. 291 Commanding officer**

1. During deployment, the undercover investigator is subject to the direct instructions of the commanding officer. During deployment, any contact between the public prosecutor and the undercover investigator shall take place exclusively via the commanding officer.

2. The commanding officer has the following duties in particular:

- a. he or she shall brief the undercover investigator in detail and continuously on the assignment and powers and on how to deal with the cover story.
- b. he or she shall instruct and advise the undercover investigator and continually assess the risk situation.
- c. he or she shall keep a written record of oral reports made by the undercover investigator and a full dossier on the operation.
- d. he or she shall inform the public prosecutor regularly and in full on the operation.

#### **Art. 292 Duties of undercover investigators**

1. Undercover investigators shall carry out their operation in accordance with their duties and in line with their instructions.

2. They shall report to their commanding officer regularly and in full on their activities and their findings.

#### **Art. 293 Scope of influence permitted**

1. Undercover investigators may not generally encourage others to commit offences or incite persons already willing to commit offences to commit more serious offences. They must limit their activities to substantiating an existing decision to commit an offence.

2. Their activities may only be of minor significance in the decision to commit a specific offence.

3. If required in order to bring about the main transaction, they may make trial purchases or provide evidence of their ability to pay.

4. If the undercover investigator exceeds the remit of the authorised operation, the court must take due account of this in assessing the sentence imposed on the person subject to the investigator's influence, or may dispense with imposing any sentence.

**Art. 294** Deployment in investigations under the Narcotics Act

Undercover investigators may not be convicted of an offence under Articles 19 and 20–22 of the Narcotics Act of 3 October 1951 if they are acting in the course of an authorised undercover investigation.

**Art. 295** Money for simulated transactions

1. At the request of the public prosecutor, the Confederation may provide sums of money via the National Bank in the required amounts, forms and denominations for the purpose of simulated transactions and to provide evidence of an ability to pay.
2. The request must be submitted to the Federal Office of Police together with a summary of the facts of the case.
3. The public prosecutor shall take the precautions required to protect the money provided. In the event of loss, the Confederation or the canton to which public prosecutor belongs is liable.

**Art. 296** Accidental finds

1. Where evidence of an offence other than that named in the investigation order comes to light in the course of an undercover investigation, the evidence may be used provided the ordering of a covert investigation would have been permitted in order to investigate the offence newly disclosed.
2. The public prosecutor shall order an undercover investigation immediately and begin the authorisation procedure.

**Art. 297** Conclusion of the operation

1. The public prosecutor shall terminate the operation immediately if:
  - a. the requirements are no longer met;
  - b. authorisation or an extension thereof is refused; or
  - c. the undercover investigator or the commanding officer fails to follow instructions or fails to carry out his or her duties in some other way, in particular by wilfully providing false information to the public prosecutor.
2. In cases under paragraph 1 letters a and c, the public prosecutor shall notify the compulsory measures court of the termination of the operation.
3. When terminating an operation, it must be ensured that neither the undercover investigator nor any third parties involved in the investigation are exposed to any avoidable risks.

**Art. 298 Notice**

1. The public prosecutor shall give notice to the accused at the latest on conclusion of the preliminary proceedings that he or she has been the subject of an undercover investigation.
2. Notice may be deferred or dispensed with, subject to the consent of the compulsory measures court, if:
  - a. the findings are not used as evidence; and
  - b. deferring or dispensing with notice is necessary to protect overriding public or private interests.
3. Persons who have been the subject of an undercover investigation may file an objection in accordance with Articles 393—397. The period for filing the objection begins on receipt of notice of the investigation.

**Example**

The Criminal Code of Procedure of Germany provides the following:

**Section 110a [Undercover Investigators]**

- (1) Undercover investigators may be used to clear up criminal offences where there are sufficient factual indications showing that a criminal offence of substantial significance has been committed
  1. in the sphere of illegal trade in drugs or weapons, of counterfeiting money or official stamps;
  2. in the sphere of national security (sections 74a and 120 of the Courts Constitution Act);
  3. on a commercial or habitual basis; or
  4. by a member of a gang or in some other organized way. Undercover investigators may also be used to clear up felonies where certain facts substantiate the risk of a repetition. Their use shall only be admissible where other means of clearing up the serious criminal offence would offer no prospect of success or be much more difficult. Undercover investigators may also be used to clear up felonies where the special significance of the offence makes the operation necessary and other measures offer no prospect of success.
- (2) Undercover investigators shall be officials in the police force who carry out investigations using a changed and lasting identity (legend) which is conferred on them. They may take part in legal transactions using their legend.
- (3) Where it is indispensable for building up or maintaining a legend, relevant documents may be drawn up, altered and used.

**Section 110b [Consent of the Public Prosecution Office; Consent of the Court; Non-Disclosure of Identity]**

(1) The use of an undercover investigator shall be admissible only after the consent of the public prosecution office has been obtained. In exigent circumstances and if the decision of the public prosecution office cannot be obtained in time, such decision shall be obtained without delay; the measure shall be terminated if the public prosecution office does not give its consent within three working days. Consent shall be given in writing and for a specified period. Extensions shall be admissible providing the conditions for the use of undercover investigators continue to apply.

(2) Use of undercover investigators

1. concerning a specific accused, or
2. which involve the undercover investigator entering private premises which are not generally accessible

shall require the consent of the court. In exigent circumstances consent of the public prosecution office shall suffice. Where the decision of the public prosecution office cannot be obtained in time, such decision shall be obtained without delay. The measure shall be terminated if the court does not give its consent within three working days. Subsection (1), third and fourth sentences, shall apply *mutatis mutandis*.

(3) The identity of the undercover investigator may be kept secret even after the operation has ended. The public prosecution office and the court responsible for the decision whether to consent to the use of the undercover investigator may require the identity to be revealed to them. In all other cases, maintaining the secrecy of the identity in criminal proceedings shall be admissible pursuant to Section 96, particularly if there is reason to fear that revealing the identity would endanger the life, limb or liberty of the undercover investigator or of another person, or would jeopardize the continued use of the undercover investigator.<sup>80</sup>

**Article 16. Electronic surveillance**

1. For the purpose of this article, electronic surveillance includes the monitoring, interception, copying or manipulation of messages or signals transmitted by electronic means.
2. Electronic surveillance is lawful if it has been authorized in accordance with this article.

<sup>80</sup>See [www.gesetze-im-internet.de/englisch\\_stpo/german\\_code\\_of\\_criminal\\_procedure.pdf](http://www.gesetze-im-internet.de/englisch_stpo/german_code_of_criminal_procedure.pdf).

3. Officials, individuals and legal persons assisting them are not subject to civil or criminal liability for conduct that has been authorized in accordance with this article.

4. A [senior official] from [*insert name of designated agencies*] may apply to [*insert name of relevant competent or judicial authorities*] for a [warrant] to undertake electronic surveillance. The application must specify:

- (a) The type of surveillance that is proposed;
- (b) The purpose for which the surveillance is to be undertaken;
- (c) The nature of the information that it is expected will be collected;
- (d) The individuals or devices that are the target of the surveillance; and
- (e) The measures that are in place to ensure that the privacy and other human rights of individuals is protected as far as is possible.

5. The [competent/judicial authority] may, at its discretion, issue a warrant authorizing the use of electronic surveillance.

6. The [warrant] may include any conditions attaching to the authority.

7. The [warrant] must specify the time period of validity up to a maximum of [*insert reasonable time period*]. Warrants may be renewed on application.

8. In exercising discretion under paragraph 2, the [competent authority] [judicial authority] shall consider whether:

- (a) The authority sought is reasonable and proportionate in all of the circumstances;

- (b) It ensures the human rights of all persons concerned, including the right to privacy, are protected as far as is possible in the circumstances.

9. A copy of each warrant must be provided to [*insert name of oversight body*].

10. The chief officer of the agency may authorize in writing officers and other individuals to carry out activities under the warrant.

11. An official may seek assistance from a person, including a provider of electronic communication services, to effect surveillance authorized.

12. Information obtained through electronic surveillance cannot be disseminated outside the [relevant law enforcement agency] without the approval of [the head of the law enforcement agency or delegate]. Such approval may be given only for the purposes of:

- (a) Preventing or prosecuting [serious crime];
- (b) Enhancing international cooperation on the prevention or prosecution of [serious crime]; or
- (c) Ensuring proper oversight of the activities of the agency.

13. The [head of the law enforcement agency] must ensure that information which has been collected under a surveillance devices warrant but which is not relevant to the prevention or prosecution [of a serious crime] is destroyed as soon as practical, and no later than six months after the expiry of the warrant.

14. Within six months of the expiry of a surveillance devices warrant the [head of the law enforcement agency] must cause a report to be provided to [*insert appropriate authority, such as Attorney General*] about the activities carried out in reliance on the warrant and the utility of the information obtained under the warrant. A copy of the report is to be provided to [*insert name of oversight body*].

15. The [head of the law enforcement agency] is to report annually to [Parliament/Parliamentary committee/publically] on:

- (a) The number of surveillance warrants sought;
- (b) The number that were granted; and
- (c) The number of prosecutions where evidence or information obtained under a surveillance warrant was used.

## COMMENTARY

*Source:* Organized Crime Convention, article 20.

This provision is drafted on the assumption that most States will already have laws that permit physical surveillance. This provision is intended to supplement pre-existing laws on this issue.

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.<sup>81</sup>

When defining electronic surveillance in national law, it is important to be technologically neutral; hence, these model legislative provisions recommend referring to “messages and signals transmitted by electronic means”. If specifying any list of technologies, it is also important to use inclusive language (“such as . . .”), to allow for future advances in technology.

It will never be possible to have full public scrutiny of covert operations as this would potentially jeopardize operations and methods and sources which need to be protected and may need to be reused. Accordingly, this draft article encourages the use of two levels of scrutiny of use of electronic surveillance. The first level involves reporting to an oversight body, tasked with scrutiny of the use of these techniques. Reports provided to this body can go into detail about the operations, and the oversight body then makes its own independent assessment of whether proper processes are being followed. The second level involves a more general reporting function to the Parliament about the number of warrants sought and granted, without providing any information about methods and sources.

### **Example**

On electronic surveillance, see the United Kingdom Regulation of Investigatory Powers Act (2000) ([www.legislation.gov.uk/ukpga/2000/23/contents](http://www.legislation.gov.uk/ukpga/2000/23/contents)).

## **Article 17. International law enforcement cooperation**

1. The functions of [*insert name/s of all relevant law enforcement authority/ies*] include assisting and cooperating, consistent with domestic legal and administrative systems, with foreign law enforcement agencies and competent international and regional organizations, to prevent, identify and combat offences to which these model legislative provisions apply.
2. Notwithstanding any other law, the [*insert name of national law enforcement authority*] may cooperate and provide personal or other information to a foreign law enforcement authority of another State and, where relevant, international regional organizations, for the purpose of preventing, identifying and combating the offences to which these model legislative provisions apply in either jurisdiction.

<sup>81</sup>Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto, pp. 183.

3. The [*insert name of national law enforcement authority*] may also cooperate with a foreign law enforcement authority or international regional organization, with regard to:

- (a) Providing items, substances, documents or records for analytical or investigative purposes;
- (b) Seconding or exchanging personnel, including by making experts available and the posting of liaison officers;
- (c) [Joint investigations;]
- (d) Witness protection, including relocation of the protected witness;
- (e) Other administrative assistance.

4. The [*insert name of national law enforcement authority*] may negotiate and conclude agreements with foreign law enforcement authorities or international regional organizations, for the purposes of enhancing law enforcement cooperation to prevent, identify and combat the offences to which these model legislative provisions apply.

## COMMENTARY

*Source:* Organized Crime Convention, article 27.

Article 27, paragraph 1, of the Convention requires States to cooperate 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 the Convention. The Convention also requires States to take more specific measures, regarding:

(a) Establishing or enhancing channels of communication between their competent authorities, agencies and services to facilitate the fast and secure exchange of information (article 27, paragraph 1 (a));

(b) Cooperation with regard to the identification and location of suspects, proceeds and instrumentalities of crime (article 27, paragraph 1 (b)).

In some contexts, there may be a concern that cooperating with foreign law enforcement agencies is beyond the competence of the national law enforcement authority/ies. In these instances, it may be useful for the State to specify through law that one of the functions of the authority is to cooperate with foreign law enforcement counterparts, including the agencies of other States parties to the Organized Crime Convention, as well as the International Criminal Police Organization (INTERPOL) and other relevant regional organizations.

While article 27, paragraph 1, refers only to combating the offences covered by this Convention, in line with the prevention focus of the Convention (see article 1 of the Convention), these model legislative provisions recommend empowering law enforcement authorities to cooperate with their counterparts to “prevent, identify and combat” offences covered by these model legislative provisions.

Paragraph 2 of this draft provision is intended to override privacy/secretcy provisions but not to compel the provision of information. It covers cooperation regarding information. It is intended that this would allow cooperation on all of the items listed more specifically in article 27, paragraph 1 (b) of the Convention, including, but not limited to:

(a) The identity, nature, composition, structure, location or activities of organized criminal groups (article 26, paragraph 1 (a)(i));

(b) Links, including international links, with other organized criminal groups (article 26, paragraph 1 (a)(ii));

(c) Offences that organized criminal groups have committed or may commit (article 26, paragraph 1 (a)(iii));

(d) Specific means and methods used by organized criminal groups, including routes and conveyances, and the use of false identities, altered or false documents or other means of concealing their activities (article 27, paragraph 1 (e)).

The Convention refers to States parties concluding bilateral agreements to facilitate law enforcement cooperation generally (to combat the offences covered by these model legislative provisions) as well as with regard to:

(a) Establishing or enhancing 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 these model legislative provisions;

(b) Promoting the exchange of personnel and other experts, including the posting of liaison officers;

(c) Exchanging information on specific means and methods used by organized criminal groups, including routes and conveyances, the use of false identities, altered or false documents or other means of concealing their activities.

Paragraph 3 of this draft provision is intended to empower specified law enforcement agencies to make such agreements. Legislative drafters may also wish to consider how communication of requests for cooperation and exchange of information shall be carried out, such as through the I-24/7 system of INTERPOL or any regional channels.

### **Examples**

The Australian Federal Police Act 1979 (Commonwealth) specifically lists the provision of support and assistance to foreign law enforcement agencies as a function:

### 8 Functions

- (1) The functions of the Australian Federal Police are:
- (a) ...
  - (bf) the provision of police services and police support services for the purposes of assisting, or cooperating with, an Australian or foreign:
    - (i) law enforcement agency; or
    - (ii) intelligence or security agency; or
    - (iii) government regulatory agency; [...]

## Article 18. Joint investigations

1. Where appropriate, the [*insert name of law enforcement authority*] may conclude arrangements with a foreign law enforcement agency and relevant international and regional organizations regarding the establishment of a joint investigative body.

2. In addition to the provision in paragraph 1, the [*insert name of national law enforcement authority*] may enter into agreements or arrangements with foreign law enforcement authorities and relevant international and regional organizations in relation to the prevention, investigation and prosecution of judicial proceedings for offences to which these model legislative provisions apply in one or more States.

3. Where such an agreement or arrangement has been made [or on a case-by-case basis even without agreement], the [national law enforcement authority] may engage in joint [operations/investigations] with the relevant State or international or regional organization.

### COMMENTARY

Optional.

*Source:* Organized Crime Convention, article 19.

While article 27 of the Convention focuses on encouraging and facilitating law enforcement cooperation across borders generally, article 19 has a more specific focus on the use of joint investigations.

Article 19 of the Organized Crime Convention encourages but does not require States parties to establish agreements or arrangements to facilitate joint investigative bodies. These could be a focal point through which States could undertake joint investigations for matters that are the subject of investigations, prosecutions and judicial proceedings in one or more States. In the absence of such agreements, States parties to the Convention recognize that such joint investigations may be undertaken by agreement on a case-by-case basis. States parties are required to ensure that the sovereignty of the State party in whose territory such investigations take place is respected.

The *Legislative Guides* suggests that little may be required by way of legislation to implement article 19 of the Organized Crime Convention through joint investigations. However, this needs to be considered in the light of the model of joint investigations that States want to adopt.

A meeting of an informal expert working group on joint investigations was held in Vienna from 2 to 4 September 2008 prior to the fourth session of the Conference of the Parties to the United Nations Convention against Transnational Organized Crime. Experts at the meeting identified two main models of joint investigations:

(a) *Parallel, coordinated investigations, with a common goal.* Under this model, the law enforcement authorities in each State undertake parallel investigations in their respective territories, possibly assisted by a liaison network or personal contacts. These investigations will be supplemented by mutual legal assistance requests for transferring evidence. The investigators in this model are not co-located. There may be limited or no need to establish a legal basis for parallel, coordinated investigations.

(b) *Integrated joint investigative teams.* Under this model, the investigative team includes officers from at least two States. Teams of this nature can be passive (for example, an officer from one State is integrated with officers from the host State but acts in an advisory role) or active (for example, the team includes officers from at least two jurisdictions, all of whom have the legal power to exercise at least some operational powers in the territory or jurisdiction where the team is operating). There will likely be a need to establish a legal basis for integrated joint investigative teams.

As noted by the informal expert working group on joint investigations:

Integrated teams are usually co-located, in the case of the integrated/passive team; this is on the basis of either national legislation enabling a foreign officer to be appointed/designated or a technical assistance agreement. In the case of the integrated/active team, foreign officers may also be designated based on existing national legislation providing it is adequate. Relevant legislation in States members of the European Union is based on the concept of a seconded foreign officer with the ability, subject to statutory discretion, to exercise powers under control of a team leader of the host State where the operational activity is taking place. The integrated/active model was described by one expert as a specially created infrastructure enabling officials from at least two countries to work in one jurisdiction with at least some equivalent operational powers. The officials allowed to participate in such a team will depend on the system in question, for instance, teams formed from officials of inquisitorial civil law systems will normally include a judge or prosecutor as well as law enforcement officers.

The expert working group identified various legal impediments relating to the establishment of joint investigations including:

- The lack of a clear legal framework or specific enabling legislation dealing with the establishment of joint investigations
- Lack of clarity regarding operational control, e.g. in relation to undercover officers
- Liability for costs of the joint investigation

Legislation will likely be required for establishment of the integrated/active model, as this involves the operational deployment of officers from foreign jurisdictions. For the purposes of the integrated/active model, the following issues were identified as requiring legislation:

- The equivalence of powers for foreign law enforcement officers
- Operational control and where this should lie
- Evidence-gathering by foreign law enforcement officers (especially with the use of coercive means) and thereafter its admissibility in any proceedings
- The possibility for a team member to gather evidence in their home jurisdiction without the necessity of a formal mutual legal assistance request
- The civil and criminal liabilities of foreign law enforcement officers
- The exchange of operational information and control over such information once exchanged

In the expert working group meeting on joint investigations, it was noted that the issue of equivalence of powers needs to be addressed in law before States can engage in integrated joint investigations. There are a variety of options for how this might operate. As noted by the expert working group:

The experience within the expert working group showed that foreign officers designated in countries under existing statutory powers (although this is generally not sufficient for the purposes of an integrated/active team) and on the basis of European Union legislation as seconded officers, exercised powers under host State control. Within the European Union, the issue of whether a seconded (foreign) officer could participate in investigative actions or be present when investigative actions were being carried out, or is to be excluded from such actions, was a matter of statutory discretion in most cases left to the day-to-day team leader of the joint investigation, and there were no specific examples of officers using hard coercive powers.

Other examples provided by experts from European Union member States showed that seconded officers were not able to exceed the extent of their domestic powers. In other words, they could not be granted more powers in the host State than they were entitled to exercise in their home jurisdiction, and in those European Union member States represented in the expert working group, there were no specific legislative provisions dealing with the carrying of weapons; this would be covered in the operational agreement on the basis of applicable national legislation.

### **Examples**

Ireland has a specific law regulating the making and receipt of requests for the establishment of joint investigative teams and the functions and powers of such teams (The Criminal Justice (Joint Investigation Teams) Act 2004).<sup>82</sup> The law includes criteria for when joint investigative teams might be established and also specifies the information that must be provided by the requesting State wanting to establish a joint investigation team. The provision for making a request is in section 3 (below), and an equivalent section for receiving requests is in section 4 (not reproduced here):

3.—(1) Where the Competent Authority is satisfied that—

(a) either—

(i) an offence has been committed, or there are reasonable grounds for suspecting that an offence has been committed, in the State and the investigation of the offence or suspected offence has links with another Member State or States, or

(ii) conduct which would constitute an offence if it occurred in the State has occurred, or there are reasonable grounds for suspecting that such conduct has occurred, partly in the State and partly in another Member State or States,

and

(b) there are reasonable grounds for believing that it is in the public interest, having regard to the benefit likely to accrue to the investigation of the offence or suspected offence concerned or into the conduct concerned, to establish a joint investigation team with that other Member State or those other Member States because—

(i) part of the investigation is being, or it is anticipated that it will be, conducted in that other Member State or those other Member States, or

(ii) the investigation requires coordinated and concerted action by the Member States (including the State) concerned,

the Competent Authority may request the competent authority or authorities of that other Member State or those other Member States to establish a joint investigation team to investigate the offence, suspected offence or conduct concerned.

(2) A request under subsection (1) shall specify the following:

(a) the competent authority making the request,

(b) the purpose of the request,

(c) the conduct to be investigated,

(d) the identity and nationality (if known) of the person or persons whose conduct is to be investigated,

(e) proposals in respect of the membership of a joint investigation team, and

<sup>82</sup> See [www.irishstatutebook.ie/pdf/2004/en.act.2004.0020.pdf](http://www.irishstatutebook.ie/pdf/2004/en.act.2004.0020.pdf).

- (f) the period for which a joint investigation team is required.
- (3) The Competent Authority shall furnish to the other competent authority or authorities concerned such other information (if any) as is specified to the Competent Authority and is reasonably required by that authority or those authorities to decide whether or not to agree to establish a joint investigation team.
- (4) Where any of the competent authorities concerned accedes to a request under subsection (1), the Competent Authority may, subject to this Act, agree with that authority and any other competent authority concerned to establish a joint investigation team to investigate the offence, suspected offence or conduct concerned.
- (5) The Competent Authority and the competent authority or authorities concerned may, pursuant to an agreement under subsection (4), establish a joint investigation team.

Irish national law also specifies the requirements of an agreement to establish a joint investigation team:

8.—(1) An agreement under section 3(4) or 4(3) to establish a joint investigation team shall be in writing and shall specify the following:

- (a) the parties to the agreement;
  - (b) the purposes for which the team is established;
  - (c) the identity and nationality (if known) of the person or persons whose conduct is to be investigated;
  - (d) the membership of the team, including the identity (if known) of the member of it who is to be the team leader in each of the Member States (including the State) establishing the team and in which it or a part of it is to operate;
  - (e) the period for which the team is to operate;
  - (f) the financial arrangements for the team, including arrangements for the payment to its members of remuneration and allowances for expenses (if any) incurred by them and the payment of other expenses that may be incurred by it in the performance of its functions;
  - (g) the participants (if any) in the team and whether section 7(5) is to apply to such participants; and
  - (h) such other terms and conditions (if any) as are agreed by the Competent Authority and the other competent authority or authorities concerned.
- (2) If the period for which a joint investigation team is to operate is extended under section 5(1), the agreement under subsection (1) to establish the team shall be amended accordingly.
- (3) If the Competent Authority agrees under section 5(3) with the other competent authority or authorities concerned to amend the agreement establishing a joint investigation team, the agreement under subsection (1) to establish the team shall be amended accordingly.

(4) If the State pursuant to an agreement under subsection (4) of section 5 joins a joint investigation team, the agreement to establish the team concerned, as amended by the agreement under that subsection, shall insofar as is reasonably practicable be in accordance with subsection (1).

(5) If another Member State pursuant to an agreement under section 5(5) joins a joint investigation team, the agreement under subsection (1) to establish the team concerned shall be amended to take account of that agreement under section 5(5).

### **Example**

The national law of Romania includes provisions on international cooperation and permits the establishment of joint investigation teams. Law no. 39/2003 regarding the preventing and combating of organized crime provides as follows:

Art. 26.(1) Upon request of Romanian qualified authorities or those of other states, on the territory of Romania can take place joint investigations, to the purpose of preventing and combating transnational offenses committed by organized criminal groups.

(2) The joint investigations stipulated in paragraph (1) shall take place according to the bilateral or multilateral conventions signed by the qualified authorities.

(3) The representatives of the Romanian qualified authorities may take part in joint investigations taking place on other states' territories, while abiding by the legislation of these states.<sup>83</sup>

### **Example**

Swedish national law includes a provision regulating the establishment of joint investigation teams (Act on Joint Investigation Teams for Criminal Investigations promulgated on 18 December 2003).<sup>84</sup>

Setting up a joint investigation team

Section 2.

A joint investigation team shall be set up for a specific purpose and for a limited period of time.

Section 3.

If a preliminary investigation is in progress in Sweden concerning criminal activity that a joint investigation team shall investigate, it is the prosecutor or authority leading the preliminary investigation that concludes the agreement to set up the joint investigation team.

If a joint investigation team cannot be set up under the first paragraph an agreement to set up a team may be concluded by

<sup>83</sup> Available from [www.diicot.ro/pdf/legislatie/en/law\\_39\\_2003.pdf](http://www.diicot.ro/pdf/legislatie/en/law_39_2003.pdf).

<sup>84</sup> Further information is available from [www.imolin.org/doc/amlid/Sweden\\_Act%20on%20Joint%20Investigation%20Teams.pdf](http://www.imolin.org/doc/amlid/Sweden_Act%20on%20Joint%20Investigation%20Teams.pdf); see also the Ordinance on Joint Investigation Teams for Criminal Investigations promulgated on 18 December 2003 ([www.imolin.org/doc/amlid/Sweden\\_Ordinance%20on%20Joint%20Investigation%20Teams%20.pdf](http://www.imolin.org/doc/amlid/Sweden_Ordinance%20on%20Joint%20Investigation%20Teams%20.pdf)).

1. the Office of the Prosecutor General or the regional public prosecution office designated by the Office of the Prosecutor General,
2. the National Police Board or the police authority designated by the National Police Board,
3. the Swedish Customs Service, or
4. the Swedish Coast Guard.

The agreement shall make clear which officials are members of the joint investigation team and the period of time during which the team shall operate.

### **Article 19. Conferral of powers on foreign law enforcement officials in joint investigations**

1. Where [appropriate States/the States involved have an agreement covering conferral of powers in joint investigations], officials from foreign law enforcement agencies may be conferred with one or more of the following powers, which they can then exercise in [*insert name of State*], subject to [*insert name of State*] law:

(a) [The power to receive information and take statements, in accordance with the law of the State, provided this is not prohibited by [*insert name of State*] law];

(b) [The power to lay charges/record charges in the official record, including in a form required by their national law, provided this is not prohibited by [*insert name of State*] law];

(c) [The authority to undertake surveillance and/or undercover operations/infiltration].

2. Where an official from a foreign law enforcement agency has been conferred with specified powers under paragraph 1, he or she shall be entitled to the same protections as national law enforcement officials under [*insert name of relevant national laws*].

#### **COMMENTARY**

Optional.

*Source:* Organized Crime Convention, article 19.

Article 19 requires States parties to consider concluding bilateral and multilateral agreements or arrangements with regard to joint investigative bodies. In the absence of such agreements or

arrangements, article 19 provides that “joint investigations may be undertaken by agreement on a case-by-case basis. The State parties involved shall ensure that the sovereignty of the State party in whose territory such investigation is to take place is fully respected.”

While not strictly required by article 19 of the Convention, as a practical matter, States wanting 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 powers for a short period of time may be a useful option.

Other considerations include:

- (a) Ensuring clarity with respect to supervision, and roles and responsibilities of seconded officers;
- (b) Ensuring limits on which activities seconded officers can perform.

Another issue is whether officials who engage in conduct authorized by a joint investigation are criminally or civilly liable for that conduct. These model legislative provisions suggest taking account of this by conferring certain protections on seconded foreign officers, equivalent to those enjoyed by locally engaged law enforcement officials.

### **Example**

Ireland’s Criminal Justice (Joint Investigation Teams) Act 2004 addresses the issues of both civil and criminal liability of members of joint investigative teams:

- 13.—(1) The State shall be liable for any injury, loss or damage caused in another Member State by members of a joint investigation team or a part of such a team in the performance of their functions as seconded members of the team or the part in accordance with the law of the Member State in which the team or the part is operating.
- (2) The State shall reimburse another Member State in full in respect of any amount paid by that Member State to any person in respect of such injury, loss or damage as is referred to in subsection (1).
- (3) Where in the performance of their functions as seconded members of a joint investigation team or a part of such a team operating in the State, injury, loss or damage is caused by the seconded members, the State shall be liable to pay compensation or damages or provide another appropriate remedy in respect of such injury, loss or damage in the same manner and to the same extent (if any) as it would be liable to pay compensation or damages or provide such a remedy in respect of that injury, loss or damage if it were caused by the members of the team or the part aforesaid in the performance of their functions as such members.
- (4) Subsection (3) does not preclude the State from seeking reimbursement of any amount of compensation or damages it has paid or other loss it has incurred under that subsection from—
- (a) the competent authority of the Member State that appointed the seconded members of the joint investigation team or the part of it concerned who caused the injury, loss or damage concerned, or

(b) persons, other than another Member State or its competent authority, who may be liable for the injury, loss or damage concerned.

### **Examples**

France regularly initiates and sets up joint investigation teams. France first became a member of such a team in 2004, with Spain. By the end of 2008, France had been involved in 20 joint investigation teams. Eleven of the 20 teams were related to organized crime, and nine to terrorism activities (12 joint investigation teams were concluded with Spain, 4 with Belgium, 2 with Germany, 1 with the Netherlands and 1 with Romania). Belgium (Operation Nougaro) and France (Operation Artigat) were the first to set up a joint investigation team to counter terrorism.<sup>85</sup>

The following laws, found in the French Criminal Code of Procedure, establish the necessary legal basis for a joint inspection team in the French context:

Article 695-2

(Inserted by Law no. 2004-204 of 9 March 2004, art.17, I Official Journal of 10 March 2004)

Where there is need to carry out, in the context of a French prosecution, either complex inquiries involving the mobilisation of extensive resources and which concern other member states or where several member states are carrying out inquiries into offences which call for coordinated and concerted action between the member states concerned, with the prior agreement of the Minister of Justice and the consent of the member state or states concerned, the competent judicial authority may create a joint investigation team.

Foreign agents seconded by another member state to a joint investigation team may, within the limits of the powers conferred on them by their role, and under the supervision of the competent judicial authorities, have as their mission, as appropriate, over the whole of the national territory:

1° the establishment of any felonies, misdemeanours or petty offences, and to record these in an official record, if necessary in the forms provided for by the law of their state;

2° the reception of the official reports of any statements made to them by any person liable to provide information on the facts in question, if necessary in the forms provided for by the law of their state;

3° the secondment of French judicial police officers in the exercise of their duties;

4° the carrying out of any surveillance and, if they are authorised for this purpose, infiltration, under the conditions provided for by articles 706-81 onwards, and which is necessary for the application of articles 694-7 and 694-8.

Foreign officers attached to a joint investigation team may carry out these missions subject to the consent of the member state which has implemented their secondment.

<sup>85</sup>Europol Annual Report 2007, p. 55.

These officers may only carry out the operations for which they have been designated. None of the powers which are the preserve of the French judicial police officer who is in charge of the team may be delegated to them.

The original copy of the official records which they prepare, and which must be drafted or translated into French, is attached to the case file.

Article 695-3

(Inserted by Law no. 2004-204 of 9 March 2004, art.17, I Official Journal of 10 March 2004)

In the context of a joint investigation team, French judicial police officers and agents attached to a joint investigation team may carry out operations ordered by the head of the team, over the whole of the territory of the State in which they are operating, within the limit of the powers conferred on them by the present Code.

Their tasks are defined by the authorities of the Member State competent to direct the joint investigation team in the territory where the team is working.

They may receive statements and record offences in the forms provided for by the present Code, subject to the consent of the State in whose territory they are operating.

## Chapter V.

# Prosecution of convention offences

### INTRODUCTORY COMMENTARY

This chapter includes provisions that are intended to address some of the procedural matters that arise in the prosecution of Convention offences, including discretion to prosecute and the granting of immunity in certain circumstances.

### Article 20. Exercise of discretion to prosecute

The [competent authority] shall, in the exercise of its discretion to prosecute an offence to which these model legislative provisions apply, take into account the fact that these offences are considered to be crimes of sufficient gravity as to be the subject of an international, binding agreement on this issue.

### COMMENTARY

*Source:* Organized Crime Convention, article 11, paragraph 2.

Not all States have a system that allows prosecutors discretion as to when to prosecute. However, as noted in the *Legislative Guides*, in those States that do have prosecutorial discretion, article 11, paragraph 2, requires the following:

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 main offences covered by the Convention, the offences established in accordance with the three Protocols (to the extent States are parties to the Protocols) and serious crimes.<sup>86</sup>

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<sup>86</sup> *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, p. 133.

In those States where prosecutorial discretion is available, it will be critical for States to implement measures such as guidelines in order to ensure consistency in decision-making and guarantee that each decision on whom to charge and what charges to prefer is made carefully, with full consideration of the facts and due regard for what is required in the public interest, in relation to any offence covered by these model legislative provisions.

## **Article 21. Leniency and immunity from prosecution**

1. Subject to the provisions in paragraph 5, the [competent authority] may, in its discretion, [grant immunity from prosecution to] [decide not to prosecute] a person who provides useful information and proves to be effectively cooperating in the investigation or prosecution of an offence to which these model legislative provisions apply, or other offences revealed as a consequence of that cooperation.
2. This article applies irrespective of whether the cooperation given was in relation to an investigation or prosecution in [*insert name of State*] or in any other State.
3. Where an agreement is in place between [*insert name of State*] and another State, substantial cooperation can include cooperation provided to the competent authorities in that State. The agreement between States may be entered into before or after the relevant prosecution is commenced.
4. When a person has voluntarily cooperated, providing useful information and assisting law enforcement agencies to investigate and/or prosecute other offences to which these model legislative provisions apply, the judge may decide to be more lenient in sentencing if the cooperation proved to be effective to identify or prove the participation of other participants of the organized criminal group, to locate the living victims of the crimes or to recover, totally or partially, the product and proceeds of the crime.
5. In any case, immunity from prosecution shall not be granted to those defendants who organized or directed the commission of a serious crime involving an organized criminal group or were the leaders of the organized criminal group.

## COMMENTARY

Optional.

*Source:* Organized Crime Convention, article 26, paragraph 3.

As noted in the *Legislative Guides*, the investigation of organized crime can be greatly assisted by the cooperation of members and other participants in the criminal group. The same considerations apply in the context of preventing organized crime: a tip-off from an insider can lead to actually preventing a planned criminal act from occurring.<sup>87</sup> Accordingly, the Convention requires that States take measures to encourage the cooperation of insiders, consistent with the fundamental legal principles of each State. In some States, cooperation with the authorities is promoted through the granting of immunity from prosecution, in other States through a reduction in sentence for offenders who provide such cooperation. The *Legislative Guides* state that “the specific steps to be taken are left to the discretion of States, which are asked, but not obliged, to adopt immunity or leniency provisions.”<sup>88</sup>

The *Legislative Guides* further state:

Affording immunity from prosecution (art. 26, para. 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.<sup>89</sup>

When considering the issue of immunity from prosecution, there are a number of considerations for drafters to bear in mind. In most countries where immunity is given, the immunity is conditional or confined in some way. For example, there may be a requirement that the cooperation given reflect honestly held views (even if the information turns out to be incorrect), or a requirement of a link between the crime for which immunity is granted and the crime that the suspect testifies on. Different responses may be needed depending on the value of the suspect’s evidence and its actual impact (for example, stopping or preventing a crime from occurring). Some countries have transactional immunity, meaning that leniency in sentencing is provided if truthful and complete testimony is given. This is not a form of mitigation.

Member States should not take measures that prevent accountability, such as granting or endorsing amnesties for international crimes or gross violations of human rights.

### *Example*

Article 371.1 of the Criminal Procedure Code of the Russian Federation, states that the suspect or accused is entitled to file a motion on conclusion of a pretrial cooperation agreement. In this motion, the suspect or accused indicates what actions he or she undertakes in order to assist the investigation

<sup>87</sup>Ibid., p. 165.

<sup>88</sup>Ibid.

<sup>89</sup>Ibid., p. 175.

to detect and investigate the crime, incriminate and prosecute other accomplices of the crime, as well as search for the property, acquired as a result of a crime.

The Criminal Code of the Russian Federation further stipulates that a person who voluntarily discontinued his or her participation in a criminal association or in the structural division thereof or in the meeting of organizers, managers (leaders) or other representatives of organized groups and who was actively assisting in the revelation or prevention of such crimes shall be released from criminal liability if there is no other *corpus delicti* in his or her actions.

## Chapter VI.

# Special procedures and evidentiary rules

### INTRODUCTORY COMMENTARY

This chapter includes provisions that are intended to provide a legal basis for the special procedural and evidentiary rules that may facilitate the effective prosecution of transnational organized crime, such as extended time to commence prosecutions and admission of evidence obtained through special investigative techniques.

### Article 22. Statute of limitation

1. Subject to paragraph 2, a criminal proceeding to which these model legislative provisions apply is time-barred [*insert number of years*] after the commission of the offence.
2. [Where a suspect has deliberately sought to evade the administration of justice for an offence to which these model legislative provisions apply, the limitation period in paragraph 1 is suspended.]

### COMMENTARY

Optional.

*Source:* Organized Crime Convention, article 11, paragraph 5.

States have different approaches to the issue of time limits on the commencement of prosecutions. Some States have statutes of limitations that prescribe the time limit within which prosecutions must be commenced. Other States do not have such limits.

As noted in the *Legislative Guides*, the Convention requires States that do have statutes of limitations to introduce long periods for all offences covered by this Convention, especially for offenders who have deliberately sought to evade the administration of justice. Article 11, paragraph 5 does not operate so as to require States without a statute of limitations to establish one.<sup>90</sup>

In some States, time limits may be stopped or extended if the accused flees or fails to appear at proceedings. The *Legislative Guides* state that:

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. In such cases, the additional delay, which may make defending against the charges more difficult, is justified by the misconduct of the accused.<sup>91</sup>

### **Examples**

Finland's Criminal Code 39/1189, chapter 8 (Statute of limitations), section 1 (Time-barring of the right to bring charges (297/2003)), provides as follows:

- (1) The right to bring charges for an offence for which the most severe sentence is life imprisonment does not become time-barred. (212/2008)
- (2) The right to bring charges is time-barred if charges have not been brought
  - (1) within twenty years, if the most severe penalty provided for the offence is fixed-term imprisonment for over eight years,
  - (2) within ten years, if the most severe penalty is imprisonment for more than two years and at most eight years,
  - (3) within five years, if the most severe penalty is imprisonment for over a year and at most two years, and
  - (4) within two years, if the most severe penalty is imprisonment for at most a year, or a fine.
- (3) The most severe penalty refers to the maximum penalty provided for the offence in the applicable provision.
- (4) The minimum period during which the right to bring charges for offences in office becomes time-barred, however, is five years. The minimum period during which the right to bring charges for impairment of the environment, an environmental offence and a building protection offence becomes time-barred is ten years. The right to bring charges for impairment of the environment by a foreign vessel in the Finnish economic zone referred to in section 28 of the Act on the Prevention of Ship-Source Pollution (300/1979), aggravated impairment of the environment, an environmental infraction and negligent impairment of the environment becomes time-barred

<sup>90</sup>Ibid., p. 135.

<sup>91</sup>Ibid.

in three years. The minimum period during which the right to bring charges for a fishing offence committed from a foreign vessel in the Finnish economic zone becomes time-barred is three years. (1161/2005)

(5) The right to bring charges for sexual abuse of a child and aggravated sexual abuse of a child becomes time-barred at the earliest when the complainant reaches the age of twenty-eight years. The same applies to rape, aggravated rape and coercion into sexual intercourse directed at a person under the age of eighteen years. (1161/2005)

Germany's Criminal Code, chapter 5, section 78 (Limitation period), provides as follows:

(1) The imposition of punishment and measures (section 11(1) No 8) shall be excluded on expiry of the limitation period. Section 76a(2) 1st sentence No 1 remains unaffected.

(2) Felonies under section 211 (murder under specific aggravating circumstances) are not subject to the statute of limitations.

(3) To the extent that prosecution is subject to the statute of limitations, the limitation period shall be

1. thirty years in the case of offences punishable by imprisonment for life;
2. twenty years in the case of offences punishable by a maximum term of imprisonment of more than ten years;
3. ten years in the case of offences punishable by a maximum term of imprisonment of more than five years but no more than ten years;
4. five years in the case of offences punishable by a maximum term of imprisonment of more than one year but no more than five years;
5. three years in the case of other offences.

(4) The period shall conform to the penalty provided for in the law defining the elements of the offence, irrespective of aggravating or mitigating circumstances provided for in the provisions of the General Part or of aggravated or privileged offences in the Special Part.

### **Article 23. Transfer of criminal proceedings**

1. With respect to transferring criminal proceedings from a foreign jurisdiction:

(a) The [Prosecutor, General Prosecutor, Central Authority, Ministry of Justice...] may decide to take over the prosecution of an offence covered by these model legislative provisions which is prosecuted in a foreign jurisdiction and on which [national courts have jurisdiction] [the law of [...] applies], when it is considered to be in the interests of the proper administration of justice [and when it is so requested by the foreign authorities];

(b) The taking over of a prosecution is, however, not possible against a person who has already been convicted and who has executed a sentence for the same facts.

2. With respect to transferring criminal proceedings to a foreign jurisdiction:

(a) The [Prosecutor, General Prosecutor, Central Authority, Ministry of Justice...] may decide to transfer the prosecution of an offence covered by these model legislative provisions to a foreign jurisdiction when it is considered to be in the interest of the proper administration of justice and when it is so requested by the authorities of the foreign jurisdictions. The transfer of criminal proceedings may be limited to specific facts, offences, or individuals [persons/suspects];

(b) The transfer of a prosecution shall be decided before [*indicate here the stage of the proceedings after which it is not reasonable to transfer a case, for example, indictment*];

(c) The [Prosecutor, General Prosecutor, Central Authority, Ministry of Justice...] shall, if practicable, allow the suspect [accused] to present his or her views on the alleged offence and on the intended transfer;

(d) The [Prosecutor, General Prosecutor, Central Authority, Ministry of Justice...] shall, if practicable, allow victims of the alleged offence to present their views on the alleged offence and on the intended transfer to ensure that their rights [to proper compensation and restitution] are not affected negatively or unjustifiably;

(e) The decision to transfer suspends the prosecution without prejudice to further investigations and mutual legal assistance;

(f) The prosecution shall be closed when the [Prosecutor, General Prosecutor, Central Authority, Ministry of Justice...] is informed that the foreign jurisdiction has definitively disposed of the transferred case.

## COMMENTARY

Optional.

Source: Organized Crime Convention, articles 15, paragraph 5; and 21.

Situations may arise where it is possible for more than one State to commence and maintain an investigation and prosecution of the same offence. Article 21 requires States to consider the possibility of

transfer proceedings from one country to another, where such transfer is considered 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.

As a practical matter, in order to effectively transfer the prosecution to another country, several steps may be required. First, there would need to be consultation between the two States, on matters including sharing and transfer of information and evidence. Article 15, paragraph 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. Second, if the matter had already reached the courts, it would be necessary for the court to “stay” or suspend the prosecution, pending resolution in another country. This draft article is intended to facilitate this process. It is also important to note that the disposal of the case, mentioned in paragraph 2 (f), includes acquittal, conviction and dismissal.

The United Nations Model Treaty on the Transfer of Proceedings in Criminal Matters (General Assembly resolution 45/118, annex) is also available.

The issue of double jeopardy may become relevant in this context. The principle of double jeopardy (or *ne bis in idem*) is part of international law including international human rights law. Article 14, paragraph 7, of the International Covenant on Civil and Political Rights (General Assembly resolution 2200 A (XXI), annex) provides as follows:

No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

As noted in the Association of Southeast Asian Nations (ASEAN) Handbook on International Cooperation:

While the principle of double jeopardy is of long standing, debates on its application are frequent. The most common issue concerns whether an alleged “second prosecution” is for the same offence or cause of action, such that the double jeopardy principle should be invoked. This question will often arise if a later charge relates to the same conduct but the offence is categorized differently or if substantial new evidence has come to light.<sup>92</sup>

This can be avoided or minimized by careful drafting of relevant legislation. The Revised Manual on the Model Treaty on Extradition, for example, in its paragraph 52 recommends that in preparing legislation to give effect to the double jeopardy principle:

States may wish to consider what criteria and evidentiary information are appropriate and necessary to measure whether a second prosecution is for the same offence, particularly in complex and continuing group crimes.<sup>93</sup>

<sup>92</sup>Pauline David, Fiona David and Anne Gallagher, *ASEAN Handbook on International Legal Cooperation in Trafficking in Persons Cases* p. 122. Available from [www.aseansec.org](http://www.aseansec.org).

<sup>93</sup>Available from [www.unodc.org](http://www.unodc.org).

**Example**

The Criminal Code of Slovakia provides as follows:

Title Three: Taking over and transfer of the criminal case

Taking-over of a Criminal Case from Abroad

Section 383a

The prosecution general shall rule on a motion by the pertinent body of a foreign country to have the criminal prosecution of a citizen of the Slovak Republic for crimes committed on the territory of that country taken over by the pertinent bodies of the Slovak Republic and in case of a decision in favour of the motion it shall immediately submit a petition to the competent body with substantive and territorial competence to commence criminal prosecution pursuant to the provisions of this act.

Transfer of a Criminal Case to a Foreign Country

Section 383b

If a criminal prosecution is conducted against a citizen of a foreign country for a crime committed on the territory of the Slovak Republic the prosecution general, and after filing the indictment the ministry of justice, may transfer the criminal prosecution to the appropriate body of the foreign country the accused persons is a citizen of.

Transport for the Purposes of Proceedings Abroad

Section 383c

If a transport of person for the purposes of criminal proceedings abroad is requested by a foreign country the supreme court shall rule on the admissibility of transport upon a motion by a foreign country. The provisions of Title Two are applied as appropriate to the decision on the admissibility of transportation and security measures.

Taking-over of a Person from a Foreign Country in Order to Perform a Procedure on the Territory of the Slovak Republic and His/Her Return

Section 383d

/1/ If the presence, either to serve as a witness or for confrontation, of a person is necessary for the purpose of a criminal prosecution on the territory of the Slovak Republic and this person is detained abroad or serves an imprisonment sentence abroad, the judge in the pretrial proceedings upon a motion by the prosecutor and the presiding judge of panel in proceedings before a court shall rule that this person will be in detention on the territory of the Slovak Republic during the temporary transfer and shall ask the Ministry of Justice of the Slovak Republic for other measures.

/2/ In the decision pursuant to paragraph 1 the judge and in the proceedings before a court, the presiding judge of panel shall state that detention commences as of the day of such person's taking-over.

/3/ The person temporary transferred by a foreign country shall be taken-over by bodies of the Prison and Justice Guard Corps and they shall notify of the taking-over the body issuing the detention decision without delay.

/4/ After the performance of necessary procedures, however, the latest in the term stipulated by the foreign country, this person shall be returned.

/5/ The return of the person to the foreign country after the decision on release from detention ordered pursuant to paragraph 1 shall be arranged by the Ministry of Justice of the Slovak Republic.

#### Transfer of an Accused Foreigner or an Accused Person without Citizenship for the Performance of Procedures Abroad

##### Section 383e

/1/ Upon a motion by a foreign country an accused foreigner or an accused person without a citizenship who is in detention or serving a sentence of imprisonment may be temporarily transferred to the territory of a foreign country in order to give testimony or confrontation.

/2/ Such a person may be temporarily transferred provided the following conditions shall be satisfied:

- a) the person stipulated in paragraph 1 will give his/her consent to it,
- b) his/her absence shall not change the purpose of detention or execution of the sentence enforced on the territory of the Slovak Republic,
- c) the temporary transfer shall not extend inappropriately the duration of the custody enforced on the territory of the Slovak Republic,
- d) the temporary transfer shall not extent an inappropriately duration of the execution of the imprisonment sentence enforced on the territory of the Slovak Republic.

/3/ In the pre-trial proceedings the Prosecution General of the Slovak Republic and in the proceedings before a court the Ministry of Justice of the Slovak Republic shall rule on the permission of a temporary transfer of the person stipulated in paragraph 1 herein, after the conditions stipulated in paragraphs 1 and 2 herein are satisfied. The Ministry of Justice of the Slovak Republic shall arrange the transfer of the person to the bodies of the foreign country.

/4/ The body deciding on the temporary transfer of the person stipulated in paragraph 1 herein shall, at the same time, determine the appropriate term during which the person temporarily transferred shall be returned to the territory of the Slovak Republic. This term shall not be longer than 30 days.

/5/ The person transferred shall stay in detention on the territory of the foreign country and this shall be stated in the decision of the body which ruled pursuant to paragraph 3 herein. The same shall also apply when such a person is escorted over the territory of a third country.

/6/ The time spent in detention abroad shall not be included in the duration of terms pursuant to section 71 paragraphs 1 and 2. Ruling on this shall be made by the court and in the pretrial proceedings by the judge upon prosecutor's motion (section 71, paragraph 7). However, the time spent in custody abroad shall be included into the duration of the execution of a sentence served in the Slovak Republic. The court ordering sentence enforcement shall rule on it.

## **Article 24. Ensuring offenders do not flee for Convention offences**

1. Where a suspect has been charged with an offence to which these model legislative provisions apply, pretrial detention should be considered by the [court/competent authority].
2. Pretrial detention should be limited to a period of [*insert time limit*].
3. When considering the issue of pretrial detention, the [court/competent authority] should consider the risk of:
  - (a) The suspect failing to appear at subsequent criminal proceedings;
  - (b) Tampering with the witnesses or the evidence;
  - (c) The suspect otherwise obstructing the course of justice.
4. Where pretrial detention is not ordered, the [judicial authority/competent authority] may impose conditions on suspects pending trial or appeal to ensure their presence at the subsequent criminal proceedings and to ensure the administration of justice, including:
  - (a) Confiscation of travel or other identity passports;
  - (b) Notification of the relevant authorities at ports of entry and departure;
  - (c) Holding of a substantial surety bond;
  - (d) Restrictions on movement;
  - (e) Other measures to prevent witness tampering and obstruction of justice.

**COMMENTARY**

*Source:* Organized Crime Convention, article 11, paragraphs 3 and 4.

Article 11, paragraph 3 requires that, with respect to the offences established under the Convention, each State take appropriate measures, in accordance with its domestic law and with due regard for the rights of the defence, to seek to ensure that conditions imposed in connection with decisions on release pending trial or appeal take into consideration the need to ensure the presence of the defendant at subsequent criminal proceedings.

As noted in the *Legislative Guides*, the criminal operations of organized crime groups may generate considerable profits with the result that large sums of money may be available to defendants. In these situations, the effectiveness of bail as a way of ensuring defendants do not abscond before trial may be reduced. Accordingly, as noted in the *Legislative Guides*, article 11, paragraph 3 of the Convention

points to this risk of imprudent use of pretrial 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.<sup>94</sup>

While not strictly required by the Convention, the capacity of the suspect to tamper with the witnesses or the evidence or take other steps to undermine the administration of justice may need to be considered in decision-making concerning pretrial release or detention. Accordingly, these factors are mentioned for consideration in this drafting option in the model legislative provisions.

## **Article 25. Evidence of prior convictions of Convention offences**

In any proceeding for an offence to which these model legislative provisions apply, a court in its discretion may admit evidence of any prior conviction for [insert list of Convention offences] [or other serious crime] in [any State] [any Convention State], [where the probative value of that evidence outweighs the likely prejudicial effect that that evidence may have on the proceeding].

**COMMENTARY**

*Source:* Organized Crime Convention, article 22.

Evidence of prior convictions can have a prejudicial effect in that it can lead the court or jury to think that the individual committed another crime and therefore must have committed the present crime as well. However, there are circumstances where it may be relevant to bring evidence that a suspect has been

<sup>94</sup>*Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, p. 134.

convicted of an offence in another jurisdiction. For example, it may be relevant to the sentencing judge to know that the offender has engaged in these actions before in other countries. In such situations, the probative value of the evidence will need to be carefully weighed against the likely prejudicial effect that the evidence may have on the course of justice. Accordingly, these considerations are specifically noted in this drafting option to implement article 22 of the Convention.

As a practical matter, it may be necessary for States to put in place an administrative procedure whereby information about prior convictions can be obtained from other States. This could be undertaken through the mutual legal assistance process, or it may also be efficient to consider establishing another process for this to be undertaken.

### ***Example***

European Union Council Framework decision 2009/315/JHA of 26 February 2009, on the organization and content of the exchange of information extracted from the criminal record between Member States in its article 6 provides as follows:

When information from the criminal record of a Member State is requested for the purposes of criminal proceedings against a person or for any purposes other than that of criminal proceedings, the central authority of that Member State may, in accordance with its national law, submit a request to the central authority of another Member State for information and related data to be extracted from the criminal record.

## Chapter VII.

# Protection of witnesses

### INTRODUCTORY COMMENTARY

Article 24, paragraph 1, requires a State party to “take appropriate measures within its means” to provide effective protection from potential retaliation or intimidation for witnesses (and their relatives and others close to them, as appropriate) who give evidence in criminal proceedings for Convention offences. As inferred in article 24, paragraph 4, a victim may be a witness in some circumstances, and where this is the case, the provisions of article 24 apply.

Article 24, paragraph 2, of the Convention gives two examples of such measures: first, procedures that focus on providing physical protection through police protection or formal witness protection programmes, and secondly, evidentiary rules that permit witnesses to give evidence safely. There are many other strategies that may be useful beyond this. These model legislative provisions give various examples of legislative strategies that could be used. UNODC is in the process of developing a model law on witness protection.

As noted in *Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime*, the ability of a witness to give testimony in a judicial setting and to cooperate with law enforcement without fear of intimidation or reprisal is essential to maintaining the rule of law. The concept of witness protection encompasses many different measures, ranging from simple inexpensive measures to more formal witness protection programmes:

Protection may be as simple as providing a police escort to the courtroom, offering temporary residence in a safe house or using modern communications technology (such as video-conferencing) for testimony. There are other cases, though, where cooperation by a witness is critical to successful prosecution but the reach and strength of the threatening criminal group is so powerful that extraordinary measures are required to ensure the witness’s safety. In such cases, resettlement of the witness under a new identity in a new, undisclosed place of residence in the same country or even abroad may be the only viable alternative.<sup>95</sup>

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<sup>95</sup> *Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime* (2008), p. 1.

## Article 26. Safety of witnesses

1. The [competent authority] shall take all appropriate measures to ensure that a victim or witness of an offence to whom these model legislative provisions apply, and his or her family, is provided adequate protection if his or her safety is at risk, including measures to protect him or her from intimidation and retaliation by suspects, offenders and their associates.
2. Victims and witnesses of offences to whom these model legislative provisions apply shall have access to any existing witness protection measures or programmes.

### COMMENTARY

*Source:* Organized Crime Convention, article 24.

Mandatory.

The obligation to take measures to provide effective protection for witnesses from retaliation or intimidation is mandatory. However, it is subject to what is reasonable within the means of the country in question. This provision is intended simply to establish the requirement that witnesses (and persons close to them) be given access to witness protection where required, and it is intended that the detail of the parameters of any programme would be set out in supplementary regulations/subordinate law.

This article makes reference to the definition of a “witness” contained in the definitions section of these model legislative provisions.

As noted in *Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime*, it is the function of the witness—as a person in possession of information important to the judicial or criminal proceedings—that is relevant rather than his or her status or the form of testimony. Witnesses fall into three main categories: justice collaborators (informants, other participants in the criminal conduct), victim-witnesses, and other types of witnesses (innocent bystanders, expert witnesses and others).

As noted in *Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime*, it is necessary to distinguish between a witness protection programme and witness assistance or support measures. A witness protection programme is defined as follows in the Guide:

*“Witness protection programme”*: a formally established covert programme subject to strict admission criteria that provides for the relocation and change of identity of witnesses whose lives are threatened by a criminal group because of their cooperation with law enforcement authorities.

It is important to consider whether protections exist for personnel such as court staff, interpreters, transcribers, court reports, judges and jurors. In most countries, it is only in exceptional circumstances

that judges, prosecutors, undercover agents, expert witnesses and interpreters are included in witness protection programmes. Intimidation or threats against their lives are considered to relate to their posts and the performance of their duties. They can qualify for special police protection, job transfers or early retirement, but their protection differs in nature from the protection measures intended for at-risk witnesses.

*Resources:* United Nations Office on Drugs and Crime, *Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime*, (2008).

## Article 27. Judicial protection of witnesses

A court hearing matters related to an offence to which these model legislative provisions apply may make orders to protect a witness [before, during and after] proceedings, including orders relating to:

- (a) Closing the court;
- (b) Giving of evidence from behind a screen or other barrier;
- (c) Giving of evidence via video link or other remote means;
- (d) The use of translators and interpreters;
- (e) [Suppression/non-publication] of identity;
- (f) Use of voice distortion and facial disguise;
- (g) Attendance of support persons;
- (h) Sealing records of the trial; and
- (i) Any other matters the court considers necessary or appropriate.

### COMMENTARY

Optional.

Source: Organized Crime Convention, article 24.

It is important to ensure that witnesses can participate safely and without intimidation in any criminal justice process.

In case the court does not already have an inherent discretion to provide “in court” protections to witnesses in transnational organized crime cases, this draft article provides it. The provision is expressed very broadly to ensure that the court has the discretion to do whatever it considers necessary to protect witnesses. This might include, for example, not only making non-publication orders with regard to names and addresses of witnesses but also allowing the use of facial disguises.<sup>96</sup>

#### Example

The Criminal Procedure Code of the Russian Federation, in its articles 376 and 389 as well as Federal Law No.# 39-FZ of 2011, allows for the use of videoconferences. As a procedural guarantee, the federal law envisages the presence of a judge on both sides of the video transmission.

In the Federal Law No.# 119-FZ (“On State Protection of Victims, Witnesses and Other Participants of Criminal Proceedings”) of 2004, the following security measures are envisaged:

- (a) Providing for personal security and security for the dwelling and property;
- (b) Granting special measures of individual protection, communications and danger warning;
- (c) Providing for confidentiality of information about the protected person;
- (d) Moving to another place of residence;
- (e) Changing of documents;
- (f) Changing of appearance;
- (g) Changing the place of work (service) and education;
- (h) Temporarily placing in a safe location;
- (i) Applying additional security measures in respect of the protected person who is kept in custody or is in the place of serving his sentence, including transfer from one place of custody or a place of serving punishment to another one.

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<sup>96</sup>Further information is available in *Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime*.

## Chapter VIII.

# Restitution and compensation for victims of Convention offences

### INTRODUCTORY COMMENTARY

This chapter includes provisions that are intended to assist States to implement article 25, paragraph 1, of the Organized Crime Convention. This article requires States parties to establish appropriate procedures to provide access to compensation and restitution for victims of Convention offences.

### **Article 28. Compensation and/or restitution by the offender**

1. Where a person is convicted of an offence to which these model legislative provisions apply, the court may order the offender to pay compensation or restitution to the victim, in addition to or in place of any other punishment ordered by the court.
2. When imposing an order for compensation or restitution, the court shall take the offender's means and ability to pay compensation or restitution into account and [shall give priority to a compensation or restitution order over a fine].
3. The aim of an order for restitution shall be to give back to the victim the value of wrongful gain taken by the offender.
4. The aim of compensation shall be to compensate the victim for any loss suffered. An order for compensation may include payment for or towards:
  - (a) Costs of medical, physical, psychological or psychiatric treatment required by the victim;

(b) Costs of physical and occupational therapy or rehabilitation required by the victim;

(c) Costs of necessary transportation, temporary childcare, temporary housing or the movement of the victim to a place of temporary safe residence;

(d) Lost income and due wages according to national law and regulations regarding wages;

(e) Legal fees and other costs or expenses incurred, including costs incurred related to the participation of the victim in the criminal investigation and prosecution process;

(f) Payment for non-material damages, resulting from moral, physical or psychological injury, emotional distress, pain and suffering suffered by the victim as a result of the crime committed against him or her; and

(g) Any other costs or losses incurred by the victim as a direct result of the conduct of the offender and reasonably assessed by the court.

5. The immigration status or the return of the victim to his or her home country or other absence of the victim from the jurisdiction shall not prevent the payment of compensation and/or restitution under this article.

6. Where not payable by the offender, the victim shall be eligible for compensation from [*insert name of public fund*].

7. Where the offender is a public official whose actions constituting an offence under these model legislative provisions were carried out under actual or apparent State authority, the court may order the State to pay compensation to the victim [in accordance with national legislation]. An order for State compensation under this article may include payment for or towards all or any of the items under paragraph 4 (a)-(g).

## COMMENTARY

Source: Organized Crime Convention, article 25, paragraph 1.

Mandatory.

This provision is intended to provide guidance on the matters that States might want to consider when developing laws on both restitution and compensation for victims of organized crime. Restitution is

a form of repayment for losses suffered by the victim, paid by the offender. In some legal systems, payment of restitution may depend on a conviction. In contrast, compensation is generally paid by the State, and it may or may not depend on there being a conviction. Provisions on ensuring access to both restitution and compensation need to be included only if procedures for ensuring compensation and restitution are not already available under national laws.

**Example**

The United Kingdom Powers of Criminal Courts (Sentencing) Act, 2000, provides the following:

130 Compensation orders against convicted persons.

(1) A court by or before which a person is convicted of an offence, instead of or in addition to dealing with him in any other way, may, on application or otherwise, make an order (in this Act referred to as a "compensation order") requiring him—

- (a) to pay compensation for any personal injury, loss or damage resulting from that offence or any other offence which is taken into consideration by the court in determining sentence; or
- (b) to make payments for funeral expenses or bereavement in respect of a death resulting from any such offence, other than a death due to an accident arising out of the presence of a motor vehicle on a road;

but this is subject to the following provisions of this section and to section 131 below.



## Chapter IX.

# Transfer of sentenced persons

### INTRODUCTORY COMMENTARY

Article 17 of the Organized Crime Convention encourages States parties to consider entering into agreements and arrangements for the transfer of persons sentenced for offences covered by the Convention. Transfer of sentenced persons is a complex issue likely requiring both the conclusion of bilateral or other agreements and supporting domestic legislation. This chapter includes the basics of what might need to be addressed in a national law on this issue. This could form the basis of a stand-alone law on transfer of prisoners, or this could be incorporated into existing criminal laws.

There are many pragmatic reasons to support the transfer of sentenced persons. As noted in the UNODC Handbook on the International Transfer of Sentenced Persons,

All other things being equal, sentenced persons who serve their sentences in their home countries can be better rehabilitated, resocialized and integrated back into the community better than elsewhere. This is a positive reason for transferring sentenced persons to a State with which they have social links to serve their sentences. Imprisonment in a foreign country, away from family and friends, may also be counterproductive, as families may provide prisoners with social capital and support, which improve the likelihood of successful resettlement and reintegration.<sup>97</sup>

Although the rehabilitative goals of transfer are extremely important, transfer of sentenced persons can also serve a number of other diplomatic and practical purposes. For example, transfer can ease the diplomatic tension that may arise when one country imprisons the national of another country. Transfer is also a mechanism that States can use to secure the return of their nationals who may be imprisoned in harsh 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. Transfer has important law enforcement benefits, as the administering country gets valuable information about the returning

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<sup>97</sup>Handbook on the International Transfer of Sentenced Persons.

national that would not be available should the person simply serve their sentence overseas and then seek to return home. Finally, when a particularly dangerous offender is returned to his or her home country, the transfer process may also provide that country with the opportunity to utilize whatever laws and procedures it may have in place to supervise the transferred offender.

Transfer of sentenced persons has a strong basis in international human rights law. For example, article 10, paragraph 3, of the International Covenant on Civil and Political Rights, which has been ratified or acceded to by 167 countries as of 31 August 2012, 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 article 31, paragraph 3, that “States parties shall endeavour to promote the reintegration into society of persons convicted of offences covered by this Convention”.

As noted in the Handbook on the International Transfer of Sentenced Persons, many States have acceded to multilateral schemes and concluded bilateral agreements that facilitate the transfer of sentenced persons.<sup>98</sup> Even though much of the framework around the transfer of sentenced persons will be found in relevant treaties, as with other forms of international cooperation, domestic legislation can operate to complement and ensure the efficient administration of transfer of sentenced persons. As noted in the Handbook on the International Transfer of Sentenced Persons:

The implementation of national legislation can also assist with the creation of an effective transfer regime. A domestic statutory framework assigns authority, ensures clarity in relation to the principles behind the transfers and gives legality to the transfer process.<sup>99</sup>

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.

Other relevant considerations include: whether the prisoners are entitled to be represented by counsel, and if so, at what stage of the proceeding; whether juveniles and mentally ill persons are eligible for transfer and if so, whether special procedures and protections apply; the transferability of prisoners on parole, probation or other forms of conditional release; the impact that transfer has on the civil, political or civic rights of returning nationals and the immigration status of transferred prisoners; the identification of limitations on subsequent prosecutions of conduct forming the basis of the transferred offence, and any specific reporting requirements of the sentencing and administering countries.

<sup>98</sup>United Nations Office on Drugs and Crime, Handbook on the International Transfer of Sentenced Persons.

<sup>99</sup>Ibid.

## Article 29. Objective

The object of this chapter is to facilitate the transfer of prisoners subject to a final criminal sentence [for serious crimes] who satisfy the other prerequisites of transfer set forth herein.

### COMMENTARY

*Source:* Organized Crime Convention, article 17.

Optional.

A statement of objectives may be useful in guiding the interpretation of provisions on transfer of prisoners.

#### **Example**

The International Transfer of Prisoners Act 1997 (Commonwealth) of Australia provides as follows:

#### 3 Objects of Act

The objects of this Act are:

- (a) to facilitate the transfer of prisoners between Australia and certain countries with which Australia has entered agreements for the transfer of prisoners so that the prisoners may serve their sentences of imprisonment in their countries of nationality or in countries with which they have community ties; and
- (b) to facilitate the transfer of prisoners to Australia from countries in which prisoners are serving sentences of imprisonment imposed by certain war crimes tribunals.

## Article 30. Definitions and use of terms

In this chapter:

(a) “Administering” or “receiving” country shall mean the State agreeing to administer or enforce the transferred sentence;

(b) “Central Authority” shall mean [*insert name of relevant State authority or body that operates as the competent national authority for transfer of sentenced persons*];

(c) “Dual criminality” shall mean that at the time of transfer of an offender the offence for which he or she has been sentenced is still an offence in the transferring country and is also an offence in the receiving country. [With regard

to a country that has a federal form of Government, an act shall be deemed to be an offence in that country if it is an offence under the federal laws or the laws of any state or province thereof];

(d) “Finally convicted” means a prisoner has been finally convicted and sentenced, the prisoner has no appeals or collateral [attacks/appeals] pending on the underlying sentence or conviction, and the period for such appeal has expired;

(e) “Imprisonment” shall mean a penalty imposed by a court under which the individual is confined to an institution;

(f) “Prisoner” shall mean a person who is serving a sentence of imprisonment or other form of conditional release;

(g) “Sentence” shall mean any punishment or measure involving deprivation of liberty ordered by a court or tribunal for a determinate or indeterminate period in the exercise of its criminal jurisdiction;

(h) “Sentencing” or “transferring” State shall mean the State that imposed the sentence of imprisonment;

(i) “Transfer” shall mean a transfer of an individual for the purpose of the execution in one country of a sentence imposed by the courts of another country.

## COMMENTARY

*Source:* Organized Crime Convention, article 17.

### **Example**

The Transfer of Prisoners Act 2001 of Mauritius provides as follows:

“imprisonment” includes -

- (a) placement of a juvenile in a place of detention referred to in section 25 of the Juvenile Offenders Act;
- (b) onfinement following an order issued pursuant to section 115 of the Criminal Procedure Act;
- (c) any other similar form of restraint of liberty that applies in a designated country;

“offender”-

- (a) means a person who -
  - (i) is a citizen of Mauritius or a person whose transfer appears to the Minister to be appropriate having regard to any close ties that person may have with Mauritius; and
  - (ii) has been convicted and sentenced in a designated country to -
    - (A) a term of imprisonment of which the unexpired portion at the time that an application is made is not less than 6 months; or
    - (B) an indeterminate period of imprisonment;
- (b) includes an offender released on licence from such sentence;

“prisoner” means a foreign offender or an offender;<sup>100</sup>

### **Example**

The International Transfer of Prisoners Act 1997 (Commonwealth) of Australia provides as follows:

sentence of imprisonment means any punishment or measure involving deprivation of liberty ordered by a court or tribunal for a determinate or indeterminate period in the exercise of its criminal jurisdiction and includes any direction or order given or made by the court or tribunal with respect to the commencement of the punishment or measure.

prisoner means a person (however described) who is serving a sentence of imprisonment and includes:

- (a) a mentally impaired prisoner; and
- (b) a person who has been released on parole.

## **Article 31. Requirements for transfer**

A prisoner is eligible for transfer if the prisoner:

- (a) Is a national of the administering or receiving State; or
- (b) Has significant ties to the administering or receiving country such as the presence of close family members, [having resided for a number of years in the country, educational or work history, property ownership or professional licences, other];

<sup>100</sup> Available from [www.unodc.org](http://www.unodc.org).

- (c) And all the following conditions are met:
  - (i) The judgement and sentence are final;
  - (ii) The sentencing State, administering State and prisoner all consent to the transfer;
  - (iii) Dual criminality exists;
  - (iv) Any pending extradition request has been resolved;
  - (v) Six months or more remains to be served on the sentence.

## COMMENTARY

*Source:* Organized Crime Convention, article 17; note also the *International Covenant on Civil and Political Rights*, the Convention on the Rights of the Child and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

As noted in the *Handbook on the International Transfer of Sentenced Persons*, historically, the consent of the sentenced person has always been a precondition for international transfers. The *Handbook* notes the following:

The requirement that prisoners must consent to the transfer ensures that transfers are not used as a method of expelling prisoners or as a means of disguised extradition. Moreover, since prison conditions vary considerably from country to country, and the prisoner may have very personal reasons for not wishing to be transferred, it seems preferable to base the transfer agreements on the consent requirement. It is also usually the case that the social rehabilitation of a prisoner is better served by transferring only sentenced persons who consent to such transfer.<sup>101</sup>

In order for a determination to be made whether the prisoner's consent is voluntary and made knowingly, the prisoner needs to be able to consult with legal counsel.

It is up to individual States to determine how far they wish to extend coverage beyond individuals who are nationals. For example, the Model Treaty on the Transfer of Supervision of Offenders Conditionally Sentenced or Conditionally Released provides that prisoner transfer is available only to sentenced persons who are "ordinary residents" in the administering State.

### *Example*

The Criminal Procedure Code of the Russian Federation, in its article 469, requires a decision of a court to allow a convict to serve his or her punishment in the State of his or her nationality. The transfer may

<sup>101</sup>United Nations Office on Drugs and Crime, *Handbook on the International Transfer of Sentenced Persons*.

be refused if there is no dual criminality. The punishment cannot be executed in a foreign State if no guarantees were received about the execution of the conviction, if there was no consent of the convict or if the convict has a place of permanent residence in the Russian Federation.

### **Example**

The Transfer of Prisoners Act of the United Republic of Tanzania, 2004, provides the following:

(4) Where an application for transfer of a prisoner to Tanzania has been made by a prisoner or consent for transfer to Tanzania has been given by another person on behalf of a prisoner, then, if that prisoner is habitual resident of Tanzania Zanzibar, the Minister shall before making any decision, consult with the Minister responsible for the custody of offenders in the Revolutionary Government of Zanzibar regarding the application, and, where there is consensus in the affirmative, the provisions of this Act shall, *mutatis mutandis*, apply to such transfer.

(5) In determining the request for transfer made under subsection (1), the Minister shall not agree to a transfer where the prisoner has less than six months of the sentence remaining to be served except on exceptional circumstances.

## **Article 32. Notice of the right to apply for transfer**

Prisoners who are eligible for transfer have a right to be informed of their eligibility to apply for transfer, within a [*insert reasonable time period*] after the judgement and sentence becomes final.

### **COMMENTARY**

It is important that foreign prisoners who may be eligible for transfer are made aware of this process and how they might seek to apply for transfer.

## **Article 33. Application for transfer**

1. The prisoner or their [legal] representative or the prisoner's country of nationality may apply to the [central authority] to initiate the transfer of the prisoner to another State under this chapter.
2. The application shall include:
  - (a) The name of the country to which transfer is requested;
  - (b) Information regarding nationality or community ties to that State.

## COMMENTARY

The transfer of prisoners needs to be supported by an administrative decision-making process. Consideration should be given to developing a uniform application that covers (but not be limited to) seeking information about nationality, the location of family members, residence history, educational background, work history, other community ties and whether the prisoner has dual nationality.

### *Examples*

The Criminal Code of Procedure of France provides the following with respect to the transfer of convicted persons:

#### **Article 728-2**

(Inserted by Law no. 2004-204 of 9 March 2004, art.162, I IV Official Journal of 10 March 2004, in force 1 January 2005)

Where, pursuant to an international Convention or agreement, a person detained for the execution of a sentence imposed by a foreign court is transferred to French territory to serve in France the remainder of the sentence, the execution of the penalty is carried out in accordance with the provisions of the present Code, and in particular the present Chapter.

#### **Article 728-3**

(Inserted by Law no. 2004-204 of 9 March 2004, art.162, I Official Journal of 10 March 2004, in 1 January 2005)

As soon as he arrives on French soil, the detained convicted person is presented to the district prosecutor of the place of arrival, who then interrogates him as to his identity and drafts an official record thereof. However, if the interrogation cannot take place immediately, the convicted person is sent to the remand prison, where he may not be detained for more than twenty-four hours. At the end of this period, the prison governor, acting on his own motion, brings him before the district prosecutor.

Upon seeing the documents establishing the agreement of the States for the transfer and the consent of the person concerned, as well as the original or a copy of the foreign sentence accompanied, if necessary, by an official translation, the district prosecutor orders the immediate incarceration of the convicted person.

#### **Article 728-4**

(Inserted by Law no. 2004-204 of 9 March 2004, art.162, I Official Journal of 10 March 2004, in force 1 January 2005)

The penalty imposed on the foreigner is directly and immediately enforceable on the French national territory in respect of the part remaining to be served in the foreign State, in consequence of the international Convention or agreement.

However, where the penalty imposed is more severe in kind or in length than the penalty provided by French law for the same offence, the correctional court of the place of detention,

to which the district prosecutor or the convicted person refers the case, replaces it with the closest-corresponding penalty in French law, or reduces this penalty to the enforceable legal maximum. It determines the type and, within the limit of the period that still remained to be served in the foreign State, the length of the sentence to be executed.

**Article 728-5**

(Inserted by Law no. 2004-204 of 9 March 2004, art.162, I Official Journal of 10 March 2004, in force 1 January 2005)

The court decides in open court, after hearing the public prosecutor, the convicted person and, if applicable, the advocate chosen by him or appointed ex officio upon his request. The judgment is immediately enforceable despite the filing of any appeal.

**Article 728-6**

(Inserted by Law no. 2004-204 of 9 March 2004, art.162, I Official Journal of 10 March 2004, in force 1 January 2005)

The time taken for the transfer is deducted in its entirety from the length of the sentence executed in France.

**Article 728-7**

(Inserted by Law no. 2004-204 of 9 March 2004, art.162, I Official Journal of 10 March 2004, in force 1 January 2005)

Any procedural objections made in respect of the execution of the remainder of the custodial sentence to be served in France are filed before the correctional court of the place of detention.

The provisions of article 711 of the present Code are applicable.

**Article 728-8**

(Inserted by Law no. 2004-204 of 9 March 2004, art.162, I Official Journal of 10 March 2004, in force 1 January 2005)

The enforcement of the sentence is governed by the provisions of the present Code.

## **Article 34. Protection of prisoners in the transfer process**

The central authority shall ensure that [any planned or actual] transfer of a prisoner is consistent with international law, including human rights, refugee law and humanitarian law, including the principle of *non-refoulement*, the principle of non-discrimination, the right to life, the prohibition on torture and other forms of cruel, inhuman or degrading treatment or punishment, and where a child is involved.

**COMMENTARY**

*Source:* Convention relating to the Status of Refugees, International Covenant on Civil and Political Rights, Convention on the Rights of the Child, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

The transfer of prisoners raises potential issues under human rights and refugee law. Accordingly, it is vital that States take account of these obligations when considering the transfer of prisoners.

### **Article 35. Enforcement or administration of the transferred sentence**

1. Where a prisoner is transferred, the [Attorney General/*insert relevant authority who is responsible for administering the transferred sentence*] may direct that:

(a) The sentence imposed by the foreign jurisdiction be enforced as if it had been imposed by a Court of [*insert name of State*], provided that the term of the sentence is not longer than the maximum penalty for the same offence in [*insert name of State*]; or

(b) A different sentence of imprisonment be substituted for that imposed by the transferring country, based on the facts found by the court in the transferring State but in accordance with the laws of [*insert name of State*].

2. The conviction of, and the sentence imposed upon, the prisoner in the country from which the prisoner is transferred shall not be subject to any appeal or any form of review in [*insert name of State*].

3. The full period of deprivation of liberty served in the transferring State shall be deducted from the length of the sentence executed in [*insert name of State*].

**COMMENTARY**

National laws will also likely be required to ensure that any sentence imposed in another country can be lawfully recognized and enforced in the country receiving the sentenced person. As noted in the UNODC *Handbook on the International Transfer of Sentenced Persons*, there are two modes of recognition of foreign sentences: continued enforcement and conversion. As explained in the *Handbook*:

“Continued enforcement” refers to a process whereby, through a court or administrative order, the sentence imposed by the sentencing State is enforced by the administering State. The sentence is not normally altered by the administering State. If, however, this sentence is by its nature or duration incompatible with the law of the administering State, or its law so requires, the administering State may adapt the sentence to a punishment prescribed by its own law for a similar offence. The adapted sentence must, as far as possible, correspond with the initial sentence. It must not aggravate, by its nature or duration, the sanction imposed in the sentencing State, nor exceed the maximum prescribed by the law of the administering State. In practice, this means that where the process of continued recognition is followed, the powers of the administering State to change the initial sentence are quite limited.

The process of converting a foreign sentence is also explained in the *Handbook*:

“Conversion of the sentence” refers to a process whereby the administering State, through a judicial or administrative procedure, imposes a new sentence based on the facts found by the court in the sentencing State. The administering State is bound by these facts but imposes the new sentence in terms of its national law. Such a sentence may be less severe than that imposed initially by the sentencing State, but it may not be more severe. There are usually further restrictions as well. For example, the European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders provides that the administering State cannot replace a prison sentence with a pecuniary sentence and that it must deduct any time already served in prison from the new sentence. The administering State is not bound, however, by its own minimum sentences for similar offences. The administering State may, however, adapt a sentence for a particular offence by reducing it to the national statutory maximum for that offence.

Drafting options for both models are included in this chapter.

### **Example**

United States Code §4105 (Transfer of offenders serving sentence of imprisonment) of the United States provides as follows:

- (a) Except as provided elsewhere in this section, an offender serving a sentence of imprisonment in a foreign country transferred to the custody of the Attorney General shall remain in the custody of the Attorney General under the same conditions and for the same period of time as an offender who had been committed to the custody of the Attorney General by a court of the United States for the period of time imposed by the sentencing court.

### **Example**

The Transfer of Prisoners Act 2001 of Mauritius provides as follows:

- 6. Effect of transfer
  - (1) Where an offender is transferred to Mauritius, a conviction and sentence recorded by the court in the designated country from which he was transferred shall, subject to subsection (2),

be deemed for all purposes to be a conviction recorded and a sentence imposed by a court of competent jurisdiction in Mauritius.

(2) Subject to subsection (3), the conviction of, and the sentence imposed upon, a transferred offender shall not be subject to any appeal or to any form of review in Mauritius.

(3) Where a sentence imposed upon a transferred offender is by its nature or duration, incompatible with the law of Mauritius, he may apply to the Judge in Chambers for a variation of the sentence to accord with the law of Mauritius, and the Judge shall, after hearing the application, grant such relief as he considers appropriate having regard to all the circumstances.

(4) Where the Judge in Chambers decides to vary the sentence imposed –

(a) he shall be bound by the findings of facts as they appear from the judgment imposed in the designated country;

(b) he shall not convert a sanction involving deprivation of liberty to a pecuniary sanction;

(c) he shall deduct the full period of deprivation of liberty served by the offender;

(d) he shall not be bound by any minimum term of imprisonment which the law of Mauritius provides for the offence or offences committed.

### **Example**

The International Transfer of Offenders Act 2004 of Canada provides as follows:

(13) The enforcement of a Canadian offender's sentence is to be continued in accordance with the laws of Canada as if the offender had been convicted and their sentence imposed by a court in Canada.

(14) Subject to subsection 17(1) and section 18, if, at the time the Minister receives a request for the transfer of a Canadian offender, the sentence imposed by a foreign entity is longer than the maximum sentence provided for in Canadian law for the equivalent offence, the Canadian offender is to serve only the shorter sentence.

(15) For the purposes of the application of any Act of Parliament to a Canadian offender, the Minister shall identify the criminal offence that, at the time the Minister receives their request for a transfer, is equivalent to the offence of which the Canadian offender was convicted.<sup>102</sup>

### **Example**

The Australian International Transfer of Prisoners Act 1997 (Commonwealth) allows for both direct enforcement and conversion of sentences, based on a direction of the Attorney-General:

<sup>102</sup> Available from <http://laws-lois.justice.gc.ca/PDF/I-20.6.pdf>.

## 42 Sentence enforcement in Australia

The Attorney-General may direct that a sentence of imprisonment imposed on a prisoner by a court or tribunal of a transfer country, or on a Tribunal prisoner by a Tribunal, be enforced on transfer of the prisoner to Australia under this Act:

- (a) without any adaptation of the duration of the sentence of imprisonment or its legal nature, or with only such adaptations to the duration of the sentence or its legal nature as the Attorney-General considers are necessary to ensure that enforcement of the sentence is consistent with Australian law (in this Act called the continued enforcement method); or
- (b) by substituting a different sentence of imprisonment for that imposed by the transfer country or Tribunal (in this Act called the converted enforcement method).<sup>103</sup>

***Other references***

See also the Model Treaty on the Transfer of Supervision of Offenders Conditionally Sentenced or Conditionally Released (General Assembly resolution 45/119, annex).

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<sup>103</sup> Available from [www.comlaw.gov.au](http://www.comlaw.gov.au).







# UNODC

United Nations Office on Drugs and Crime

Vienna International Centre, P.O. Box 500, 1400 Vienna, Austria  
Tel.: (+43-1) 26060-0, Fax: (+43-1) 26060-5866, [www.unodc.org](http://www.unodc.org)

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