



# Conference of the Parties to the United Nations Convention against Transnational Organized Crime

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**The use and role of joint investigative bodies in  
combating transnational organized crime**

### **The use and role of joint investigative bodies in combating transnational organized crime**

**Background paper prepared by the Secretariat**

#### **I. Introduction**

1. Joint investigations have been used as a specific form of international cooperation to combat cross-border crime, in particular transnational organized crime. However, this practice has evolved mostly on the basis of ad hoc arrangements and in response to a number of problems that have hampered both informal and formal law enforcement cooperation, the diversity of law enforcement structures being one of those problems. That diversity has led to confusion about which foreign law enforcement agency to contact, duplication of efforts and, in some cases, competition between agencies, thus causing inefficiencies in the use of available resources.

2. In terms of international standards, the emergence of key multilateral instruments addressing different forms of crime focused on overcoming such diversities and deficiencies and on strengthening international cooperation of an operational nature between law enforcement agencies, as well as other competent authorities, such as cooperation in conducting inquiries and establishing joint investigative teams or bodies. Reference is made, in this regard, to article 9, paragraph 1 (c), of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, article 19 of the United Nations Convention against Transnational Organized Crime and article 49 of the United Nations Convention against Corruption.

3. The negotiation and adoption of the Organized Crime Convention, in particular, 20 years ago, took place in an era when States parties were signalling their intention to establish lasting rules, based on mutual solidarity and shared responsibilities to combat transnational organized crime, including through enhanced mechanisms for international cooperation. That was illustrated in particular through the inclusion in the final text of the Convention of a wide array of concrete and focused provisions on international cooperation in criminal matters, covering not only traditional modalities

\* [CTOC/COP/WG.3/2020/1](#).



of cooperation, but also other forms – many of them new and emerging forms – of cooperation, such as joint investigations.

4. Practical experience has shown that these joint operations raise issues related to the legal standing and powers of officials operating in another jurisdiction, the admissibility of evidence obtained by an official from another State party, the giving of evidence in court by officials from another jurisdiction and the sharing of information between States parties before and during an investigation. Such practical issues could be addressed through the use of investigative planning approaches that deal with them in advance.

5. The present background paper was prepared by the Secretariat in order to facilitate discussions under item 2 of the provisional agenda of the eleventh meeting of the Working Group on International Cooperation. It presents an overview of the international framework related to joint investigations in relation to transnational organized crime, including but not limited to the Organized Crime Convention, and of legal and practical aspects pertaining to it, with a view to enabling further dialogue on good practices and challenges encountered in this field.

## II. Concepts of joint investigations

6. In principle, experiences around the world so far have shown that the range of collaborative efforts conducted within the framework of investigations labelled “joint investigations” can be classified in one of two categories: joint parallel investigations and joint investigative teams (JITs).

7. Joint parallel investigations basically refer to two separate investigations undertaken in two different States with a common goal. These are usually assisted by a liaison officer network or through personal contacts. The officials involved, which are non-co-located, are able to work jointly on the basis of long-standing cooperative practices and/or existing mutual legal assistance legislation depending on the nature of the legal system(s) involved. The evidence collected in the course of the two investigations is exchanged through the use of formal mutual legal assistance proceedings.

8. A JIT, on the other hand, is defined as an international cooperation tool based on an agreement between competent authorities – either judicial (judges, prosecutors, investigative judges) or law enforcement authorities – of two or more States, established for a limited duration and for a specific purpose, to carry out criminal investigations in one or more of the States involved. Depending on the operational powers of the members of JITs, they can be divided and characterized either as passive or active. An active team includes officers from another jurisdiction with the ability to exercise equivalent operational powers – or at least some such powers – under the control of the host country in the territory or jurisdiction in which the team is operating. The assignment of a foreign law enforcement officer or prosecutor to an operational team in another jurisdiction is usually based on either national legislation enabling a foreign officer to be appointed/designated or a technical assistance agreement.<sup>1</sup>

9. However, the Organized Crime Convention (article 19), as well as the Convention against Corruption (article 49) have introduced a third concept, that of joint investigative bodies (JIBs). A JIB is distinct from both a JIT and a joint parallel investigation in that it is intended to be a more permanent structure formed on the basis of a bilateral agreement. Whereas JITs are more likely to be formed for the investigation of particular criminal cases within a limited (although extendable) period of time (usually 6–18 months), JIBs would be more suitable for investigating

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<sup>1</sup> A characteristic example of a multilateral instrument containing a provision that authorizes the establishment of joint investigative teams is that of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (art. 9, para. 1 (c)).

certain types of crime (e.g., trafficking in persons) and not just isolated cases over a longer period of time (e.g., five years or more).<sup>2</sup>

### III. Normative framework

#### A. Article 19 of the Organized Crime Convention: structure, content and scope

10. Article 19 of the Organized Crime Convention<sup>3</sup> encourages, but does not require, States to enter into agreements or arrangements to conduct joint investigations, prosecutions, and proceedings in more than one State, where a number of States parties may have jurisdiction over the offences involved. Under the article, a State party shall consider bilateral or multilateral agreements or arrangements regarding the establishment of joint investigative bodies.<sup>4</sup>

11. Article 19 requires States parties to consider concluding agreements or arrangements on the establishment of joint investigative bodies in general terms. Technically, the expression “shall consider” makes this requirement semi-mandatory, which means that States parties are asked to seriously consider adopting the specific measure and to make a genuine effort to see whether adopting this measure would be compatible with their legal system.<sup>5</sup>

12. Article 19 further grants legal authority to conduct joint investigations on a case-by-case basis, even in the absence of a specific agreement or arrangement. This requirement is of a non-mandatory nature (“joint investigations may be undertaken”). The domestic laws of most States already permit such joint activities, and, for those few States whose laws do not so permit, this provision will be a sufficient source of legal authority for case-by-case cooperation of this sort.

13. The general limitation for States parties, contained in the third sentence of article 19, is to ensure that the sovereignty of the State party in whose territory such investigation is to take place is fully respected. Hence, States parties enjoy broad discretion with regard to the question of whether a case should be investigated jointly with other States parties; but if they decide to do so, respecting the sovereignty of the host country is mandatory.<sup>6</sup>

14. Article 19 does not contain a specific reference to the offences falling within its scope as is the case with articles 16 (extradition), 18 (mutual legal assistance), 21 (transfer of criminal proceedings) and 27 (law enforcement cooperation). However, in the light of article 3, on the scope of application of the Convention, article 19 applies by analogy to the offences covered by the Convention as provided in article 3, namely, offences established in accordance with articles 5, 6, 8 and 23 that are transnational (defined in article 3, paragraph 2) and involve an organized

<sup>2</sup> See Roger Britton and others, *Trafficking in Persons and Smuggling of Migrants: Guidelines on International Cooperation* (Vienna, UNODC Regional Programme Office for South-Eastern Europe, 2010), p. 41.

<sup>3</sup> Article 19 of the Organized Crime Convention reads as follows: “States Parties shall consider concluding bilateral or multilateral agreements or arrangements whereby, in relation to matters that are the subject of investigations, prosecutions or judicial proceedings in one or more States, the competent authorities concerned may establish joint investigative bodies. In the absence of such agreements or arrangements, joint investigations may be undertaken by agreement on a case-by-case basis. The States Parties involved shall ensure that the sovereignty of the State Party in whose territory such investigation is to take place is fully respected.”

<sup>4</sup> For a commentary on the text of article 19 of the Convention, see David McLean, *Transnational Organized Crime: A Commentary on the UN Convention and its Protocols*, Oxford Commentaries on International Law Series (Oxford, Oxford University Press, 2007), p. 238ff.

<sup>5</sup> United Nations Office on Drugs and Crime (UNODC), *Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime* (Vienna, 2016), para. 12.

<sup>6</sup> See Frank Zimmermann, “Article 49: joint investigations”, in *The United Nations Convention against Corruption: A Commentary*, Cecily Rose, Michael Kubiciel and Oliver Landwehr, eds., Oxford Commentaries on International Law Series (Oxford, Oxford University Press, 2019), p. 497.

criminal group (defined in article 2 (a)); serious crimes (defined in article 2 (b)) that are transnational and involve an organized criminal group; and offences established in accordance with the three Protocols to which States are parties (article 1, paragraph 2, of each Protocol). The lack of reference to the scope of applicable offences in article 19 may simply be due to the fact that States concluding a general agreement in accordance with the first sentence of article 19 will normally not limit the scope of such agreement to Convention offences, but include other offences linked to them that need to be investigated as elements of the overall criminal case under scrutiny for purposes of the proper administration of justice.

15. The reference in article 19 to “investigations, prosecutions or judicial proceedings” allows for considering the conduct of joint investigations at any stage of the criminal proceedings at stake and the competent authority in the respective State. However, experience has shown that it is prudent to make a decision to carry out joint investigations at the earliest opportunity so that sufficient evidentiary material can be gathered and shared.

## **B. Links of article 19 to other provisions of the Organized Crime Convention**

16. The Organized Crime Convention seeks to develop an efficient and flexible international cooperation framework that is based on existing complementarities among different forms of cooperation, including joint investigations. These complementarities are facilitated by the interrelationship between article 19 and other relevant provisions of the Convention as follows.

### **1. Article 15, paragraph 5 (Coordination between States parties)**

17. Joint investigations are particularly promising in cases where several States parties have criminal jurisdiction and wish to investigate a case. Thus, article 19 has a material connection with article 15 of the Convention on jurisdiction, in particular its paragraph 5, which is of a mandatory nature. The latter provision requires States parties that become aware that other States parties are conducting an investigation, prosecution or judicial proceeding in respect of the same conduct to consult with those countries and, as appropriate, to coordinate their actions. In some cases, this coordination will result in one State party deferring to the investigation or prosecution of another. In other cases, the States concerned may be able to advance their respective interests through the sharing of information that they have gathered. In yet other cases, States may each agree to pursue certain actors or offences, leaving other aspects of investigations to the other interested States. This obligation to consult is operational in nature and may not require any domestic implementing legislation. These steps also need to be taken into consideration when criminal proceedings are transferred between States and when States intend to engage in joint investigations.

18. It should be noted that the term “as appropriate” provides the flexibility not to consult, if doing so may not be advisable. However, in many cases, the successful investigation and prosecution of serious offenders relies upon the swift coordination of efforts among concerned national authorities, and coordination between States parties can ensure that time-sensitive evidence is not lost.<sup>7</sup>

### **2. Article 18 (Mutual legal assistance)**

19. Article 18 of the Convention, on mutual legal assistance, may also be of relevance in the context of joint investigations. During the negotiations for the elaboration of the Organized Crime Convention, the relevant draft text of the provision on joint investigations (article 14 bis) was based on a proposal submitted

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<sup>7</sup> See *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), p. 139.

by Italy at the fourth session of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime entrusted with the task of such negotiation and was linked to the corresponding draft provision on mutual legal assistance (article 14). The issue of whether to include a separate article on joint investigations was considered at a later stage. At the fifth session of the Ad Hoc Committee, Italy undertook to consider the presentation of a possible reformulation of article 14 bis. At its tenth session, the Ad Hoc Committee decided that joint investigations should be dealt with in a separate article of the Convention.<sup>8</sup>

20. In practice, and as also clarified in the guidance for the use of the redeveloped version of the United Nations Office on Drugs and Crime Mutual Legal Assistance Request Writer Tool,<sup>9</sup> in most States the submission of a mutual legal assistance request is not a legal requirement for creating a JIT, although a State's domestic law could require a mutual legal assistance request as a prerequisite for establishing a JIT. Regardless of the approach, JITs, once established and operational, are intended to function outside the mutual legal assistance framework.

21. However, as a JIT/JIB can operate only on the territory of the States that are parties to a relevant agreement for its establishment, the cooperation of other States will be sought through the submission of mutual legal assistance requests (or, alternatively, using an instrument giving effect to the principle of mutual recognition). In practice, parties to the JIT/JIB usually coordinate with each other, although the request is formally submitted by one of them.<sup>10</sup>

### **3. Article 21 (Transfer of criminal proceedings)**

22. Joint investigations conducted on the basis of article 19 of the Convention could also be seen as an alternative to the transfer of criminal proceedings pursuant to article 21. After such a transfer, the proceedings will normally be concentrated in one State party, whereas several States parties can continue their investigations under article 19 but conduct them jointly and in a coordinated manner ("mirror proceedings"). However, these two options do not exclude each other. Most importantly, States parties can decide to conduct joint investigations in order to find out which of them is in the best position to prosecute the case and transfer the proceedings to that State as soon as they have sufficient information. Once the proceedings have been transferred to one State party, the others should continue assisting that State, including by means of joint investigations, where appropriate.

### **4. Article 27 (Law enforcement cooperation)**

23. During the negotiations for the elaboration of the Organized Crime Convention, and before the final decision on the necessity of a separate provision on joint investigations, discussions were devoted to whether the issue of joint investigations should be dealt with in the context of article 19, paragraph 2 (c) of the draft convention (later approved as article 27, on "law enforcement cooperation, in the final text of the Convention).<sup>11</sup>

24. In practice, the JIT/JIB members are in many cases law enforcement authorities performing the investigative measures and operational activities required. When present and taking part in investigations outside their State of origin, appointed members operate with the status of "seconded JIT/JIB members".

### **5. Article 4 (Protection of sovereignty)**

25. Article 19 of the Convention requires States parties involved in joint investigations to ensure that the sovereignty of the State party in whose territory such

<sup>8</sup> Ibid., pp. 201, footnotes 1 and 2, and 202.

<sup>9</sup> [www.unodc.org/mla/en/index.html](http://www.unodc.org/mla/en/index.html).

<sup>10</sup> See Network of National Experts on Joint Investigation Teams, "Joint investigation teams: practical guide", document No. 6128/1/17 REV 1 (Brussels, 2017), p. 18.

<sup>11</sup> See *Travaux Préparatoires*, pp. 201, footnote 2, 202 and 235ff.

investigations are to take place is fully respected. From this perspective, article 19 is also linked to article 4 of the Convention, which is the primary vehicle for the protection of national sovereignty in implementing the provisions of the Convention.

26. As a starting point, the laws of the State in which joint investigations are taking place should be respected. The participation of foreign officials in those investigations in no way affects the application of the host country's legislation. An exception applies only where the host country's laws specifically allow for the application of foreign law. Since members of a JIT/JIB from another State are often not sufficiently familiar with the laws of the host country, a joint operation should normally be led by a representative (a prosecutor, magistrate or law enforcement officer) of the State party in whose territory the operation will be conducted.

27. Article 4, paragraph 2, of the Convention against Corruption contains a further expression of national sovereignty as it states that the Convention does not authorize States parties to perform functions within the territory of another State exclusively reserved for the competent authorities of that State. In practice, this means that in instances where agents of one State party perform functions within the territory of another State, this has to be done with the approval of that latter State so as not to breach the principle of territorial integrity.<sup>12</sup>

28. As a matter of principle, foreign officials should not exercise public authority. Within the host country's territory, this is the sovereign privilege of the competent authorities of that country, which are the only ones that can claim to have legitimacy for performing functions of public authority. An exception is conceivable where the legislation of the host country expressly so provides. Likewise, foreign officials need an authorization for all other activities that are subject to legal restrictions, such as the right to carry arms.<sup>13</sup>

## C. Implementation and enforcement

### 1. A digest of cases in the pipeline: the Mechanism for the Review of the Implementation of the Organized Crime Convention and the Protocols thereto

29. At the time of drafting the present background paper, the Secretariat was preparing, in accordance with a pertinent recommendation of the Working Group,<sup>14</sup> as endorsed by the Conference of the Parties to the Organized Crime Convention, a digest of cases in which the Convention has been used as the legal basis for international cooperation, with a view to expanding the information already available in the knowledge management portal known as Sharing Electronic Resources and Laws on Crime (SHERLOC).

30. One example in the digest referred to joint investigations which were carried out on the basis of article 19 of the Convention and involved a collaboration between authorities of Brazil, Portugal and Spain in the investigation of an organized criminal group engaged in trafficking cocaine from Brazil via Portugal to Spain. The authorities of Spain and Brazil provided information to facilitate the investigation led by Portugal. Joint investigative teams were created under article 19 to intercept phone conversations, conduct surveillance and searches, and seize assets. The suspect was eventually convicted on charges of aggravated drug trafficking and sentenced to 14 years of imprisonment. All seized assets were confiscated.

31. The issue of joint investigations and the related review of implementation of article 19 of the Convention will be examined under the cluster on "Law enforcement and the judicial system" of the newly established Mechanism for the Review of the

<sup>12</sup> UNODC, *Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime*, para. 48.

<sup>13</sup> See Zimmermann, "Article 49", p. 499. See also Sebastian Trautmann and Otto Lagodny, "Commentary on §93 IRG" in *Internationale Rechtshilfe in Strafsachen*, Wolfgang Schomburg and others, eds., 5th ed. (Munich, Germany, Beck, 2012), marginal No. 4.

<sup>14</sup> Conference resolution 9/3, annex III, subpara. (j).

Implementation of the Organized Crime Convention and the Protocols thereto (years VII–X of the multi-year workplan for the functioning of the Mechanism).<sup>15</sup> The Mechanism will function on the basis of the procedures and rules that were adopted by the Conference in its resolution 9/1, adopted at its ninth session, in October 2018.

## 2. Comparative experience resulting from the reviews of the Mechanism for the Review of Implementation of the Convention against Corruption

32. For comparison purposes, the completed reviews of the first cycle of the Mechanism for the Review of Implementation of the Convention against Corruption, which have focused, inter alia, on the review of implementation of chapter IV (International cooperation) of the Convention, have been conducive to mapping national approaches to international cooperation and developing cumulative knowledge on obstacles to cooperation and on practical means to overcome them.

33. Specifically, in relation to the implementation of article 49 of the Convention, on joint investigations, 38 States parties reported being parties to agreements or arrangements allowing for the establishment of joint investigative bodies. More than half of the States mentioned that their internal legislation and practice (including the direct application of the Convention) enabled them to conduct joint investigations on a case-by-case basis, and a substantial number confirmed that they had done so on a number of occasions. Some States parties highlighted the obstacles they faced with the exchange of evidence between common law and civil law jurisdictions. To avoid these difficulties, parallel investigations were often carried out, and the evidence obtained through such investigations was exchanged through mutual legal assistance.<sup>16</sup>

## IV. Regional approaches

34. At the regional level, focusing on the European Union context, the European Union legal framework for setting up JITs between member States can be found in article 13 of the 2000 European Union Convention on Mutual Assistance in Criminal Matters and the Council Framework Decision of 13 June 2002 on joint investigation teams. The Framework Decision will cease to have effect once all member States have ratified the European Union Convention. Until then, the Framework Decision, as the legislation in force, defines the legal framework for JITs in the European Union.

35. JITs and JIBs can also be set up on the basis of other instruments, in particular with competent authorities of States outside the European Union. An example is the agreement on mutual legal assistance between the European Union and the United States of America of 2003 (article 5). On the other hand, the European Investigation Order cannot be used to request the setting up of a JIT.

36. Other regional instruments include the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, which regulates joint investigations in its article 20; the Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters of 2002 (the Chisinau Convention) (article 63) and the Southern Common Market (MERCOSUR) framework agreement of 2010.<sup>17</sup>

37. The new Regulation (EU) 2018/1727<sup>18</sup> on the European Union Agency for Criminal Justice Cooperation (Eurojust), which entered into force on 12 December

<sup>15</sup> Conference resolution 9/1, annex, appendix.

<sup>16</sup> UNODC, *State of Implementation of the United Nations Convention against Corruption: Criminalization, Law Enforcement and International Cooperation*, 2nd ed. (Vienna, 2017), pp. 254–255.

<sup>17</sup> Acuerdo Marco de Cooperación entre los Estados Partes del MERCOSUR y Estados Asociados para la Creación de Equipos Conjuntos de Investigación, adopted 2 August 2010.

<sup>18</sup> Regulation (EU) 2018/1727 also replaced Council decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust and amending decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime.

2019, contains specific provisions on the role of Eurojust with regard to JITs. Under that new regulation, one of the operational functions of Eurojust shall be to “provide operational, technical and financial support to Member States’ cross-border operations and investigations, including to joint investigation teams”; and “set up a joint investigation team in accordance with the relevant cooperation instruments” (art. 4, paras. 1 (f) and 2 (d), respectively). The national members of Eurojust shall have the power to participate in joint investigation teams including in setting them up (art. 8, para. 1 (d)).

38. In practice, Eurojust support for JITs entails, in particular, the assessment of the suitability of the case for establishing a JIT; assistance in drafting the JIT agreement; legal and practical support throughout the lifetime of the JIT, including support to joint operations; coordination of investigative and prosecutorial strategies; settlement of jurisdiction; and financial support.

39. The involvement of the European Union Agency for Law Enforcement Cooperation (Europol) in joint investigations is regulated in European Union Regulation (EU) 2016/794 of 11 May 2016, which entered into force on 1 May 2017. Articles 4, paragraph 1 (c)(ii), (d) and (h) and 5 of the Regulation referred to the tasks of Europol to coordinate, organize and implement investigative and operational actions to support and strengthen actions by the competent authorities of the member States that are carried out in the context of joint investigation teams in accordance with article 5 and, where appropriate, in liaison with Eurojust; participate in joint investigation teams, as well as propose that they be set up; and support member States’ cross-border information exchange activities, operations and investigations, as well as joint investigation teams, including by providing operational, technical and financial support.

40. In the field of European Union activities to combat fraud and corruption, the operational and technical assistance of the European Anti-Fraud Office (OLAF) in related JITs may add value to the investigative activities. OLAF could support a JIT independently from any of its own investigations, when acting as the Commission’s direct contact and providing assistance to judicial and police authorities of the member States. Such assistance can be afforded in several possible ways (legal advice; data analysis and data processing; the Commission’s contact point for police and judicial authorities regarding issues of waiver of immunities, inviolabilities and the obligation of confidentiality; and coordination and exchange of information between member States in matters of customs where these matters are intermingled with the criminal aspects of joint investigation).<sup>19</sup>

41. The Network of National Experts on Joint Investigation Teams (JITs Network) was established in July 2005. Since mid-January 2011, the JITs Network has had a secretariat, hosted by Eurojust, which promotes the activities of the JITs Network and supports the national experts in their work. The objective of the JITs Network, consisting of at least one national expert per Member State, is to facilitate the work of practitioners. The JITs Network encourages the use of JITs, facilitates their setting-up and contributes to the sharing of experience and best practices. The national experts are representatives from law enforcement, prosecutorial and/or judicial authorities of the member States. Institutional bodies such as Eurojust, Europol, OLAF, the European Commission and the Council of the European Union have also appointed contact points to the JITs Network.

## V. Soft law

42. The Model Legislative Provisions against Organized Crime, which were developed by the United Nations Office on Drugs and Crime to promote and assist the efforts of member States to become parties to and implement the provisions of the

<sup>19</sup> See Stefan de Moor, “The difficulties of joint investigation teams and the possible role of OLAF”, *European Criminal Law Associations’ Forum*, No. 3 (2009), p. 97.

Organized Crime Convention and the Protocols thereto, provide further guidance on the development of legislation regulating joint investigations.

43. Chapter IV of the Model Legislative Provisions against Organized Crime provides a legal basis for measures intended to enhance operational and technical cooperation between law enforcement agencies in the States parties, in particular, joint investigations. In the commentary under article 18, on joint investigations, it is noted that legislation will likely be required for the establishment of the integrated/active model of JITs/JIBs, as this involves the operational deployment of officers from foreign jurisdictions. For the purposes of the integrated/active model, issues that may be required to be defined in statutory terms include the following: the equivalence of powers for foreign law enforcement officers; the 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; and the exchange of operational information and control over such information once exchanged.

44. Article 19 of the Model Legislative Provisions against Organized Crime refers to the “conferral of powers on foreign law enforcement officials in joint investigations”). While not strictly required by article 19 of the Convention, as a practical matter, States that wish to engage in joint investigations may need to consider a way of ensuring that conferring powers for a short period of time may be a useful option. Other considerations include the following: ensuring clarity with respect to supervision and the roles and responsibilities of seconded officers; and 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. Article 19 suggests conferring certain protections on seconded foreign officers, equivalent to those enjoyed by locally engaged law enforcement officials.

45. At the level of the European Union, a model agreement has been developed to facilitate the setting up of JITs.<sup>20</sup> This document can be downloaded, in all official languages and in editable format, on the websites of Eurojust and Europol. The JIT model agreement represents a common non-binding baseline that practitioners can tailor to the specific needs of a case. Hence, standard provisions are sometimes reworded to reflect the requirements of national legislation or ad hoc arrangements. The model agreement also provides a useful list covering most of the points that need to be addressed for a JIT to perform its activities in a secure manner. In practice, the European Union model is used in the vast majority of JITs set up between States members of the European Union. Furthermore, this model has proved to be sufficiently flexible to serve as a basis for discussions with States not members of the European Union, with some adaptation to the different legal bases. Some member States have also developed bilateral model agreements that may be helpful in anticipating issues that are likely to arise in this specific context and speed up discussions on the content of the JIT agreement.<sup>21</sup>

## VI. The added value and models of joint investigations

46. Although mutual legal assistance can facilitate the investigation and prosecution of transnational organized crime significantly, closer cooperation in the form of joint investigations may prove more effective, especially in complex cases. Experience has shown that where a State is investigating an offence with a cross-border dimension, particularly in relation to transnational organized crime, the investigation can benefit

<sup>20</sup> The Model Agreement on the Establishment of a Joint Investigation Team, annexed to Council resolution 2010/C-70/01 of 26 February 2010.

<sup>21</sup> See Network of National Experts on Joint Investigation Teams, “Joint investigation team”, p. 8.

from the participation of authorities from other States in which there are links to the offences in question, or where coordination is otherwise useful.

47. One of the great advantages of joint investigations is the potential to effectively bypass cumbersome procedures of mutual legal assistance treaties, as members of the investigation team, acting on foreign soil, would be enabled to directly request the authorities of their home country to take the needed investigative measures.<sup>22</sup> This is critical because such authorities would then be obligated to take the measures requested under the conditions that would apply if they had been asked as part of a domestic investigation.

48. The basis for these collaborative and cooperative approaches and joint investigative practices varies depending on the legal system in question and include either joint investigations established on the basis of general or ad hoc agreements; existing mutual legal assistance legislation and mutual legal assistance treaties; agency-to-agency memorandums of understanding; or flexible cooperation arrangements based on long-standing cooperative practices assisted by liaison officer networks and/or existing mutual legal assistance legislation.

49. Compared with traditional forms of law enforcement and judicial cooperation, joint investigations have their own added value and benefits: they enable the direct gathering and exchange of information and evidence without the need to use traditional channels of mutual legal assistance. Information and evidence collected in accordance with the legislation of the State in which the team operates can be shared on the sole basis of an agreement on the establishment of joint investigative bodies or JIT agreement. Moreover, seconded members of the team or body (i.e., those originating in a State other than the one in which the JIT or JIB operates) are entitled to be present and to take part – within the limits foreseen by national legislation and/or specified by the JIT leader – in investigative measures conducted outside their State of origin. Other benefits of joint investigations include the reduced number of requests involved and the best possible use of existing resources.

50. Although the experience so far has shown that joint investigations are usually limited to the more serious forms of criminality, they may also be useful even in cases of less serious forms of criminality. This is because a JIT/JIB can facilitate cooperation in a specific case and also prepare the groundwork for future JITs by building mutual trust and providing experience in cross-border cooperation.

51. Two models of joint investigations are commonly used in practice. Either model can be used as a basis for implementation of article 19 of the Organized Crime Convention:<sup>23</sup>

(a) The first model consists of parallel, coordinated investigations with a common goal assisted by a liaison officer network or through personal contacts and supplemented by formal mutual legal assistance requests in order to obtain evidence. The officials involved may be non-co-located and able to work jointly on the basis of long-standing cooperative practices and/or existing mutual legal assistance legislation depending on the nature of the legal system(s) involved;

(b) The second model consists of integrated joint investigation teams with officers from at least two jurisdictions. These teams can be further categorized as either passive or active. A passively integrated team could be, for example, one where a foreign law enforcement officer is integrated with officers from the host State in an advisory or consultancy role or in a supportive role based on the provision of technical assistance to the host State. An actively integrated team would include officers from at least two jurisdictions with the ability to exercise equivalent operational powers,

<sup>22</sup> Stefano Betti, “New prospects for inter-state co-operation in criminal matters: the Palermo Convention”, *International Criminal Law Review*, vol. 3, No. 2 (January 2003), pp. 151, 157–158.

<sup>23</sup> UNODC, *Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime*, para. 596.

or at least some operational powers, under host State control in the territory or jurisdiction where the team is operating.

## **VII. Practical and legal considerations**

52. A series of practical and legal considerations need to be taken into account to make the use of joint investigations fully functional and more efficient. These involve legal matters, issues of attitude and trust among law enforcement agencies and procedural questions. There are also a number of practical problems in the organization of joint investigations, including the lack of common standards and accepted practices and issues related to the supervision of the investigation, as well as the absence in some cases of mechanisms for quickly solving these problems.

53. In the vast majority of joint investigations, parallel investigations are ongoing in the concerned States. However, investigations may have been opened only in one or several of the States concerned when the establishment of a JIT/JIB is considered. In such situations, the first step is often to trigger the opening of domestic investigations in the other States concerned.

54. When already ongoing, the respective stage of national investigations may be a decisive factor for considering the establishment of a JIT/JIB. National authorities may be more inclined to engage in a joint investigation when their own investigation is at a preliminary stage and the respective investigations being carried out in the other countries are at an equivalent stage.

55. When the case is found to have elements that involve more than two countries, their respective level of involvement is also taken into account. Sometimes it is agreed that, at the first stage, a JIT/JIB will not be established between all countries concerned but between only those countries most involved and that the cooperation of other countries concerned will be sought by means of mutual legal assistance.

56. In cases of transnational crime, there is a need for clarity and consistency in the way that joint investigations are conducted and information is exchanged. Experience has shown that joint investigations have been established in relation to a number of crimes, including drug trafficking, trafficking in persons, smuggling of migrants and various forms of transnational organized crime, as well as cybercrime, corruption and terrorism. The nature of these crimes and the challenges they pose to investigators may create specific problems for establishing joint investigations.

57. Consequently, JIT/JIB members may wish to consider additional arrangements for joint investigations in trafficking in persons and smuggling of migrants cases in order to ensure that victims of such trafficking and smuggled migrants are properly treated and protected. In drug trafficking cases, the handling of samples and their further forensic examination, including coverage of expenses, may also need to be the focus of specific arrangements within joint investigations. With regard to money-laundering, there is often the need for specific arrangements to tackle challenges encountered in financial investigations and address practical issues relating to the identification, tracing, freezing or seizure, confiscation, management and sharing of proceeds of crime among JIT/JIB members (and, if applicable, with States not involved in the JIT/JIB), including the need for urgent measures to prevent dissipation of the assets. In relation to cybercrime, specific arrangements may be needed to describe and define the terms of involvement of private sector parties such as communication service providers.

### **A. Planning joint investigations**

58. Practical issues and challenges encountered in joint investigations could be addressed through the use of investigative planning approaches that recognize and deal with them in advance. A JIT/JIB requires, primarily, that competent authorities of the States concerned identify a common purpose and interest to establish such a

cooperation framework, which presupposes that the connections of the investigation in the different States are established and verified. Practical considerations that should be taken into account to assess the need for establishing a JIT/JIB include, for example, the complexity and sophistication of the criminal network/activities under investigation, the number and complexity of investigative measures to be carried out in the States involved, and the extent to which investigations in the States involved are interconnected.

59. As a second step, an agreement to establish a JIT/JIB should be reached between the competent authorities in the States concerned. The decision may need, where applicable, to be preceded by the transmission of an official request to set up a JIT. When a decision has been made to draft such an agreement, efforts should be made to ensure that the content of the agreement is clear and concise.

60. During the lifetime of the JIT, the initial agreement can be amended by mutual agreement between the parties in the event a change in content is needed (e.g., changes in crimes investigated, involvement of a new party, composition of the team, the defined purposes of the JIT or an extension of its duration).

61. In planning joint investigations, cooperating authorities need to address a variety of issues before undertaking any work or in the course of joint activities, as deemed appropriate. These include the identification of the criteria for deciding on a joint investigation, with guarantees to respect the principle of proportionality and the suspect's human rights; the identification of criteria for choosing the location of a joint investigation (i.e., near the border, near the main suspects); the designation of a lead investigator to direct and monitor the investigation; the description of how the investigation will be managed and conducted; identifying and describing the different operational roles and tasks of each member, as well as the special operations/investigative techniques that will be employed during the investigation; and specifying any issues related to administration, equipment, resources and costs.

## **B. Setting up a joint investigative team or joint investigative body**

62. Joint investigative teams or bodies can be set up when a criminal investigation requires close cooperation between two or more States. They consist of representatives of law enforcement agencies or other competent authorities of the States concerned. Depending on which States are involved and the nature of the facts under investigation, members of those teams and bodies can include prosecutors, judges, law enforcement officers and experts. The question of competence that invariably arises when representatives of authorities from different States come together to work on operational issues is dealt with by designating a representative of the host State as the leader of the team or body and by requiring that the team/body carry out its operations in accordance with the law of that host State. Furthermore, in carrying out their tasks, the members of the team or body take into account the conditions that have been set by their own authorities.<sup>24</sup>

63. In most cases, two types of circumstances in particular require setting up a JIT/JIB: first, where difficult and demanding investigations having links with other States are ongoing; and second, when a number of States are conducting investigations in which the circumstances of the case necessitate coordinated and concerted action.<sup>25</sup>

64. The team or body is set up in the cooperating party in which investigations are expected to be predominantly carried out. In practice, parties may agree that one of them, for example, the State that is most significantly affected or has the most complete overview of the activities of the organized criminal group, shall take more

<sup>24</sup> See [A/CONF.203/9](#), para. 17.

<sup>25</sup> See article 20, paragraph 1, of the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters; and article 1, paragraph 1, of the Framework decision 2002/465/JHA on joint investigation teams.

of an initiative and/or de facto organizes cooperation between national authorities. Such an arrangement may be useful to ensure appropriate coordination within the JIT/JIB, in full compliance with national authorities' prerogatives.

### C. Operation of a joint investigative team or joint investigative body

65. JITs and JIBs operate for a specified period of time, and their function may be prolonged and extended by mutual consent. Joint investigations require the effective coordination of operational activities carried out by their members. In practice, more informal solutions may be pursued to increase efficiency. Periodic meetings among members of the JIT or JIB can also be used for coordination and planning. Whatever the format found to be preferable, it is recommended to record practical arrangements concerning any operational activities that are not already set out in the JIT/JIB agreement.

66. Complex legal questions may arise during the operation of JITs and JIBs. In particular, the suspect's legal position (in particular his or her right to a fair trial and an effective defence) should not be weakened as a result of the fact that officials from different States are participating in the joint investigation. Agreements under article 19 of the Organized Crime Convention should therefore clearly determine which law applies. (It is normally the law of the host State.) In addition, formal mechanisms of control (for example, the requirements of judicial authorization for specific investigative measures) should apply just as in a normal criminal proceeding.<sup>26</sup>

67. Further challenges exist as long as it is not clear in which State the subsequent trial will be held. The application of the legislation of the host country for the gathering of evidence may result in problems pertaining to the admissibility of evidence in another State. This matter is regulated by national legislation. In practice, a potentially early concentration of proceedings in one State party may provide solutions or be desirable under certain circumstances.

68. A more specific issue to be addressed is whether information shared within the framework of joint investigations is subject to the rule of speciality or any other restriction or limitation, particularly in view of subsequent domestic criminal proceedings. Under the speciality principle, such information may in principle be used only for the purposes for which the team was set up. However, the agreement establishing the JIT or JIB may allow a more extensive and flexible use of the information.

69. Another issue that often arises in a joint investigation is how to clarify disclosure requirements prescribed in national laws of the JIT/JIB members. One added value of joint investigations, in comparison to the exchange of mutual legal assistance requests, is the possibility of sharing information directly between JIT members. However, national legislation may vary with regard to, first, the extent to which information received can (or must) be included in the proceedings and serve as evidence in court; and, secondly, the extent to which this information may (or must) be disclosed to interested parties, and the stage of the proceedings when such disclosure is to take place. To facilitate the operation of a joint investigation, the clarification of applicable domestic rules already at the setting-up stage (see paras. 62–64, above) may be advisable. Practitioners may also wish to consult and share among themselves pertinent information on applicable national laws. As a common practice, a copy or a summary of domestic laws of relevance can also be annexed to the agreement establishing the JIT/JIB.<sup>27</sup>

70. The operation of a JIT/JIB is a costly endeavour given that the nature of the tool entails the active exchange of information and evidence, increased communication among JIT/JIB members and the possibility of involving foreign officers in investigative activities. Consequently, the States concerned will have to ensure that

<sup>26</sup> See Zimmermann, "Article 49", p. 500.

<sup>27</sup> See Network of National Experts on Joint Investigation Teams, "Joint investigation teams", p. 18.

significant financial resources are in place to cover translation and interpretation expenses, travel and daily allowances accommodation of seconded members, and data traffic and communication expenses.<sup>28</sup>

#### **D. Evaluation and closure of a joint investigative team or joint investigative body**

71. When the agreement on joint investigations is due to expire, practitioners are encouraged to jointly carry out an evaluation. Special attention should be given to situations in which, due to different time frames, the competent authorities of one State need to conclude their investigation – and therefore put an end to their involvement in a JIT/JIB – while cooperation needs with the other partners still exist.

72. Before the closure of the JIT/JIB at the latest, the settlement of jurisdiction and practical steps related thereto (e.g., review of the scope of respective proceedings, sharing and/or possible transfer of jurisdiction, etc.) may need to be considered among partners, although the arrangements taken can be implemented after the closure of the JIT/JIB. Parties should also consider inclusion of a dispute resolution mechanism within the overall arrangements.

### **VIII. Conclusions and recommendations**

73. The present background paper contains a mapping of the legal and practical considerations, as well as challenges pertaining to the use of joint investigations, in particular the implementation of article 19 of the Organized Crime Convention. Its objective is to facilitate the exchange of views and experiences on, among other things, the use of the Organized Crime Convention as a legal basis for joint investigations. The background paper also builds on, and goes beyond, the draft report of the informal expert working group on joint investigations, including its conclusions and recommendations,<sup>29</sup> echoing more recent trends and patterns in the field of joint investigations as well as the current ratification status of the Organized Crime Convention.

74. The Working Group may wish to use the background paper as reference material for drawing the attention of the Conference of the Parties to the necessity of further up-to-date work in this area, subject to the availability of resources. Such up-to-date work may implement a previous recommendation of the Conference contained in its resolution 5/8<sup>30</sup> and thus take the form of a “matrix identifying legal and practical issues that could arise in the implementation of article 19 of the Organized Crime Convention and by establishing modalities for conducting joint investigations, including by creating joint investigative bodies, as well as possible solutions for those issues, including by collecting examples of arrangements or agreements concluded between States parties for that purpose”, or take the form of legal, practical and operational guidelines on the implementation of article 19 of the Organized Crime Convention.

75. The Working Group may wish to recommend that the Conference:

- (a) Continue to encourage States parties to make use, where appropriate, of article 19 of the Organized Crime Convention as a legal basis for joint investigations;
- (b) Encourage States parties to exchange best practices and lessons learned in the field of joint investigations, especially those on the implementation of article 19 of the Organized Crime Convention;

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<sup>28</sup> See Rosita Zaharieva, “The European Investigation Order and the joint investigation team: which road to take – a practitioner’s perspective”, ERA Forum, vol. 18, No. 3 (September 2017), p. 403.

<sup>29</sup> CTOC/COP/2008/CRP.5.

<sup>30</sup> Conference resolution 5/8, para. 2 (d).

(c) Encourage States parties to facilitate training activities for judges, prosecutors, law enforcement officers or other practitioners engaged in joint investigations, and invite the Secretariat, subject to the availability of resources, to develop and implement technical assistance activities in this area, including where applicable and appropriate, the further promotion of the use of the redeveloped Mutual Legal Assistance Request Writer Tool, which contains, inter alia, guidance on how to draft a request for conducting a joint investigation.

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