



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

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## Working Group on International Cooperation

Vienna, 15, 16 and 18 October 2012

Items 4 and 5 of the provisional agenda\*

**Fighting networks with networks: the role of regional networks and initiatives in tackling transnational organized crime**

**Sharing of best practices and experiences in using the United Nations Convention against Transnational Organized Crime for international cooperation, taking into consideration article 16, article 18, with particular reference to videoconferencing, bank information, covert investigations and controlled deliveries, and article 21**

## **Best practices and experiences in using the United Nations Convention against Transnational Organized Crime for international cooperation and the role of regional networks**

**Background paper prepared by the Secretariat**

### **I. Introduction**

1. In its decision 2/2, the Conference of the Parties to the United Nations Convention against Transnational Organized Crime decided to establish an open-ended working group of government experts on international cooperation to hold substantive discussions on practical issues pertaining to extradition, mutual legal assistance and international cooperation for the purpose of confiscation. Furthermore, in its decision 3/2, the Conference decided that the Working Group on International Cooperation would be a constant element of the Conference. To date, the Working Group has held three meetings: from 11 to 12 October 2006, from 8 to 10 October 2008 and from 20 to 21 October 2010. During those meetings, expert consultations were held on extradition, mutual legal assistance and international cooperation for the purposes of confiscation, and recommendations were made to the Conference on these issues.

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\* CTOC/COP/WG.3/2012/1.



2. The present paper has been prepared by the Secretariat to provide background information and to aid the discussions of the Working Group on the relevant agenda items.

## **II. Issues for discussion**

3. The Working Group on International Cooperation may wish to address the following issues:

- Share practical examples and good practices on the application of article 16 of the United Nations Convention against Transnational Organized Crime in general, and in particular, on the issue of non-extradition of nationals, the time and cost of extradition, as well as on building the capacity and expertise of practitioners in the areas of extradition law and practice.
- Share experiences and examples of the use of videoconferencing, including different scenarios in which it is used, the legislative provisions that provide the legal basis for its use and relevant case law that has allowed or disallowed its use. In addition to national laws, States are also encouraged to present and discuss relevant regional arrangements and Conventions that provide for or promote its use.
- Exchange experiences and best practice examples on the use of the Convention for mutual legal assistance for the purpose of exchange of bank information. The Working Group may also wish to propose practical ways in which the Secretariat can assist States parties in developing their capabilities to facilitate the exchange of bank information in order to fight organized crime.
- Exchange experiences on instances when they have implemented the provisions of article 20 of the Convention, noting successes, challenges and the lessons learned in using special investigative techniques.
- Share experiences, best practices and views on the possibilities and requirements for and legal and practical obstacles to transfers of proceedings, as stipulated in article 21.
- Discuss the possibility of transfers of cases involving leaders of criminal organizations, where there may be a risk of interference with the criminal proceedings that would lead to an unfair trial, in cases where the trial might jeopardize the security of a State or endanger the lives of witnesses.
- Discuss and share experience on the benefits, practices and implementation of various cooperation networks and platforms and provide guidance and recommendations for future action.

### **III. Sharing of best practices and experiences in using the Organized Crime Convention for international cooperation**

#### **A. Article 16 — Extradition**

4. At its meeting held in October 2010, the Working Group discussed current practices and experiences relating to the application of article 16 of the Convention. The use of the Organized Crime Convention as a legal basis for extradition was discussed in depth.

5. The issue of non-extradition of nationals, which continues to pose difficulties for a number of requesting and requested States, was also extensively discussed at that meeting. From those discussions, it became evident that this was an issue that called for continuous dialogue and discussion among States parties, with the view to improving the understanding of the differences in legal systems and finding ways of mitigating the resulting difficulties.

6. The duration of extradition proceedings has also continued to be a challenge for States, since extradition can be both time-consuming and expensive. The sheer size and scope of the domestic variations in substantive and procedural extradition law create the most serious obstacles to just, quick and predictable extradition.

7. Moreover, extradition remains a highly technical and specialized area of the law for which countries do not always have the required capacity. In recognition of these challenges, the Conference, in its resolution 5/6, called upon the United Nations Office on Drugs and Crime (UNODC) to develop a practical guide to facilitate the drafting, transmission and execution of requests for extradition and mutual legal assistance, pursuant to articles 16 and 18 of the Organized Crime Convention, in cases where the Convention is a legal basis for the request. The *Handbook on Mutual Legal Assistance and Extradition*, produced by UNODC, will be launched during the sixth session of the Conference. The Handbook is a technical assistance tool, designed to be used as a training manual and reference guide for practitioners.

#### **B. Article 18 — Mutual legal assistance**

##### **1. Videoconferencing**

8. The use of videoconferencing to facilitate mutual legal assistance was also considered by the Working Group at its meeting in October 2010.<sup>1</sup> At that meeting, the Working Group concluded that a number of issues should be considered further.

9. The Working Group recommended that UNODC should develop a guide for practitioners on the use of videoconferencing testimony, taking into account the main points made during the meeting of the expert group on technical and legal obstacles to the use of videoconferencing, held in Vienna on 14 and 15 October 2010,

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<sup>1</sup> See also the conference room papers entitled “The technical and legal obstacles to the use of videoconferencing” (CTOC/COP/2010/CRP.2) and “Expert Group Meeting on the Technical and Legal Obstacles to the Use of Videoconferencing” (CTOC/COP/2010/CRP.8), available at [www.unodc.org/unodc/en/treaties/CTOC/CTOC-COP-session5.html](http://www.unodc.org/unodc/en/treaties/CTOC/CTOC-COP-session5.html).

and reflecting both the advantages and challenges of videoconferencing. The guide, which is being developed by UNODC, will aim to provide background information and guidance that can assist prosecutors, magistrates and judges in obtaining testimony by videoconference, where there has been no prior experience and where there is no specific legal provision or case law permitting its use. The guide will also explain the ease, cost effectiveness and reliability of this technology.

## **2. Bank information**

10. The principle of bank secrecy has, in the past, been a ground of refusal for mutual legal assistance by some States. Over the years, the overriding need to fight organized crime and to prevent the funding of terrorism has gradually eroded this principle. Most States now have legislative and regulatory frameworks, requiring banks and financial institutions to report suspicious transactions. Many States have functioning Financial Intelligence Units and law enforcement units that have the capacity to analyse and investigate suspicious financial activities, key functions in the fight against money-laundering.

11. Article 18, paragraph 8, of the Convention prohibits States parties from declining to render mutual legal assistance on the ground of bank secrecy. Moreover, in accordance with paragraph 22 of that article, States parties may not refuse to provide assistance on the sole ground that the offence is also considered to involve fiscal offences.

12. Cooperation among State parties in the exchange of financial information held by banks and other financial institutions is central to the fight against organized crime. The ability of financial investigators to identify and trace the financial assets of members of criminal groups across bank accounts and through other forms of fiduciary holdings are important steps towards the prosecution of financial crimes and the confiscation or forfeiture of the proceeds of their crimes.

## **C. Article 20 — Special investigative techniques**

13. Article 20 of the Convention stipulates that States parties, if permitted by the basic principles of their domestic legal systems, shall take the necessary measures to allow for the appropriate use of controlled delivery and, where it deems appropriate, for the use of other special investigative techniques, such as electronic or other forms of surveillance and undercover operations, by its competent authorities in its territory for the purpose of effectively combating organized crime. Article 20 also encourages States parties to conclude agreements or arrangements for using such special investigative techniques in the context of cooperation at the international level. States parties could also, in the absence of standing agreements or arrangements, make decisions to use special investigative techniques on a case-by-case basis. Covert (undercover) investigations and controlled deliveries are two of the range of special investigative techniques regularly used by law enforcement to investigate organized criminal activities, which take place on the territory of one or more States.

14. The use of special investigative techniques, such as covert investigations and controlled deliveries, can cause problems due to the differences in how States regulate the use of these techniques. With respect to controlled deliveries, some

common legal issues that have been identified are: (a) whether judicial authorization is required; (b) whether there is an exemption from criminal liability of the involved law enforcement agents; and (c) whether the replacement or substitution of the consignment, in whole or in part, is permitted. In some States, the replacement or substitution of a substance is obligatory. In some transit countries, if the shipment is replaced, it is not accepted, as there is no physical evidence of an illegal substance.

15. With respect to controlled deliveries, it should also be noted that this technique may be authorized in different laws that regulate its use by different law enforcement agencies (such as border, customs, drug control or other agencies). Therefore, the roles and responsibilities of different agencies/actors can be unclear both at the national level, and to other States. This situation can lead to delays in responses to operational requests from States, as well as to inconsistent information being provided to requesting States. In addition, time requirements to obtain all the permissions for a controlled delivery can vary from 24 hours to 10 days.

16. Since controlled deliveries and undercover operations frequently require the cooperation and collaboration of multiple law enforcement agencies of different countries, international cooperation is essential to facilitating the smooth conduct of such operations. It is important to note that, while some forms of covert investigations may be legal in some jurisdictions, they may be unacceptable in others. Article 20 is significant in that it provides the opportunity for States parties to anticipate and settle problems that may arise from differences in domestic laws relating to the use of special investigative techniques prior to undertaking transnational special investigation.

#### **D. Article 21 — Transfer of criminal proceedings**

17. It may occur that more than one State commences and maintains the investigation and prosecution of the same offence. Article 21 requires States to consider the possibility of transferring proceedings to one another, in cases 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.

18. The very nature of transnational organized crime is such that criminal activities span more than one State's jurisdiction. Therefore, it is not unusual to have criminal acts committed and victims located in several States, with proceeds of the criminal acts laundering through the financial systems of multiple States and members of the criminal organization operating or living in yet other States. Therefore, there is need for effective and practical coordination among the different States, which have jurisdiction over the activities of the criminal organization.

19. One of the advantages of the application of article 21 of the Organized Crime Convention is that such cooperation should allow for a concentration of all or most of the available evidence in one case file, thereby raising the chances of successful prosecutions.

20. From a practical point of view, in order to effectively transfer the prosecution to another State, several steps may be required. First, the two States would need to share and transfer 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. Secondly, if the matter had already reached the courts in one State, it would be necessary to “stay” or suspend the prosecution, pending resolution in the other State.

21. One situation, when it may be required to transfer criminal proceedings transferred to another jurisdiction, may involve leaders of criminal organizations, who are powerful to a degree that they may interfere with the course of justice or the security and stability of a State. In such cases, a State may enter into an arrangement with another State which would be in a position to handle the prosecution.

#### **IV. Networks fighting networks: the role of regional networks and initiatives in tackling transnational organized crime**

22. One of the most effective means of facilitating international cooperation is through regional and international coordination mechanisms and networks. The Conference, in its resolution 5/8, requested the Secretariat to continue to foster international and regional cooperation by, inter alia, facilitating the development of regional networks active in the field of cooperation in the fight against transnational organized crime, where appropriate, and by facilitating cooperation among all such networks with a view to further exploring the possibility of Member States envisaging a global network.

23. Furthermore, at its meeting held in October 2010, this Working Group adopted the following recommendations concerning regional cooperation networks, which are contained in the report on that meeting:<sup>2</sup>

(a) States and UNODC should promote and facilitate the establishment of regional cooperation networks of central and other competent authorities in regions where no such networks existed;

(b) States and UNODC should promote the strengthening of central authorities;

(c) UNODC should continue working with regional networks and platforms to develop practical tools for facilitating international cooperation.

24. The issue of regional cooperation networks was also raised at the Conference of the States Parties to the United Nations Convention against Corruption, particularly in the context of cooperation on asset recovery and mutual legal assistance.<sup>3</sup>

25. It should be noted that regional networks enhance personal contacts that build trust between officials and lead to a better understanding of their respective legal and procedural/operational requirements. These are crucial for law enforcement agencies in the context of sharing criminal intelligence, as well as for investigators, prosecutors and magistrates when they develop cases or request and respond to

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<sup>2</sup> See CTOC/COP/WG.3/2010/1.

<sup>3</sup> See CAC/COSP/WG.2/2010/3.

requests for mutual legal assistance and extradition, since timeliness and confidentiality are always a concern. For example, while the mutual legal assistance and extradition processes can be lengthy, such judicial platforms/networks can expedite them, since knowing your counterpart can sometimes make the difference between success and failure.

26. At the level of the exchange of experience and capacity building, more developed countries within a regional network can support the less developed States within their region. Furthermore, networks in one region, with experience or expertise in some areas, can share that with other networks.

27. Presently, there exists a wide range of regional networks and platforms related to asset recovery, international cooperation in criminal matters, to prosecutors working in the area of organized crime and to law enforcement cooperation and information sharing.

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