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**Working Group of Government Experts  
on Technical Assistance****Seventh session**

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Item 4 of the provisional agenda\*

**Assistance in harmonizing national legislation with the  
United Nations Convention against Transnational  
Organized Crime and the Protocols thereto****Summary of responses to Omnibus self-assessment checklist****Note by the Secretariat****I. Introduction**

1. In General Assembly resolution 67/189, entitled “Strengthening the United Nations crime prevention and criminal justice programme, in particular its technical cooperation capacity” and in resolution 6/1, adopted by the Conference of the Parties to the United Nations Convention against Transnational Organized Crime, the need for the urgent adoption of the mechanism to review the implementation of the Organized Crime Convention and the Protocols thereto was underlined.
2. The Assembly and the Conference also urged States parties to continue to be actively engaged in this endeavour, on the basis of the work already accomplished by the open-ended intergovernmental working group on the review of the implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto. Furthermore, the Assembly encouraged Member States and the United Nations Office on Drugs and Crime to facilitate technical assistance for the purposes of the implementation of the Convention and Protocols thereto, taking into account the tools developed for such purposes, such as the omnibus self-assessment checklist, among others.
3. At its sixth meeting, held on 22 February 2013, the extended Bureau of the sixth session of the Conference of the Parties to the Organized Crime Convention agreed that a note verbale would be circulated to all Member States, inviting them to

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\* CTOC/COP/WG.2/2013/1.



complete the omnibus self-assessment checklist on a voluntary basis and that the note would briefly refer to the various technical assistance tools developed by the UNODC. It was also agreed that the information gathered in this manner could be considered by the Working Group on Technical Assistance at its seventh session, to be held from 28 to 30 October 2013.

4. In March 2013, a note verbale (CU 2013/58/DTA/OCB/CSS) was circulated to all Member States, inviting them to transmit to the Secretariat the completed omnibus self-assessment checklist by 15 May 2013. By 5 September 2013, five responses from Bahrain, Armenia, Republic of Korea, Lebanon and Mexico, were received. This document also contains a summary of a response to the omnibus self-assessment checklist, as received from El Salvador in 2012.<sup>1</sup>

5. The present conference room paper provides a summary of responses by States to the Omnibus self-assessment checklist on the Organized Crime Convention and the Protocols thereto.

## **II. Summary of responses on the articles of the Organized Crime Convention**

### *Use of terms*

6. For the purposes of the Convention, Article 2 includes the definitions of several terms. One of the key definitions is that of an organized criminal group, which means a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes in order to obtain, directly or indirectly, a financial or other material benefit. In the Convention, a structured group is defined in the negative: one that is not randomly formed for the commission of an offence and does not need to have a formal hierarchy. In order to comply with the Convention, a responding State has recently included such a definition in its national legislation. That definition follows the one contained in the Convention, including the elements of a structured group of three or more persons and existing for a period of time, but excluding the element of financial or other material benefit. The Convention definition does not apply to terrorist or insurgent groups, provided their goals are not related to a financial or other material benefit. This does not prevent States, such as the responding State in question, from adopting measures that are more strict or severe, as stipulated in Article 34, paragraph 3.

7. Another central definition contained in the Convention is that of the notion of serious crime, which means conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty. Two responding States reported that they have adopted a threshold approach whereby there is no exhaustive or indicative list of offences, but rather a penalty threshold for an offence to be considered a serious crime. This flexible approach enables the inclusion of new and emerging forms of crime in the scope of application, both for purposes of national legislation and the Convention itself. For the purposes of national legislation, the responding States have set the thresholds at different levels,

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<sup>1</sup> As agreed with the Permanent Mission of El Salvador to the International Organizations (Vienna).

ranging from maximum deprivation of liberty of at least four years to maximum punishment not exceeding ten years of imprisonment or, for particularly grave crimes, more than ten years of imprisonment.

*Criminalization of participation in an organized criminal group*

8. Article 5 requires the criminalization of participation in an organized criminal group with two options: a conspiracy type offence, i.e. agreeing to commit a serious crime; and/or an association-type offence, i.e. actual participation in the activities of an organized criminal group. In order to comply with the Convention requirements, a responding non-State party has recently undertaken legislative amendments to criminalize the participation in an organized criminal group. Responding States with a civil law tradition have chosen the association-type offence, i.e. criminalizing the organization or participation in a group whose purpose is to commit a crime punishable by a maximum deprivation of liberty of at least four years or more. A responding State with a socialist legal tradition has equally also adopted the association-type offence for persons involved in a criminal organization for participating in that organization and, in addition, has included a conspiracy type offence in specific articles of the Criminal Code. One responding State applies exclusively special investigative techniques to this type of crime. Such techniques include use of undercover agents, issue of rewards and electronic surveillance.

*Criminalization of the laundering of proceeds of crime*

9. Article 6 of the Convention requires the criminalization of the laundering of proceeds of crime, i.e. the conversion or transfer of property, knowing that such property is the proceeds of crime or the concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime. All reporting States indicate that they have criminalized the offence. In order to comply with the Convention requirements, a responding non-State party has recently undertaken legislative amendments to comply with the Convention requirements. These amendments penalize the concealment, disguise and receiving of criminal proceeds as well as expand the scope of mutual legal assistance to money laundering. The State has further enacted legislation establishing a Financial Information Unit to report and analyse specific information on financial transactions. One responding State notes that it has developed an inter-agency coordination strategy aimed at preventing and fighting the commission of money-laundering offences/crimes as well as the financing of terrorism. The National Development Plan of the State includes actions aimed at setting up mechanisms to prevent the commission of money-laundering crimes/offences.

10. Article 6 further requires that the provision is applied to the widest range of predicate offences, including offences provided for under the Convention (participation in an organized criminal group, corruption and obstruction of justice), as well as offences provided for under the Protocols to which States are parties, and lastly, serious crime. A responding State has adopted a list-approach and indicates that not all relevant predicate offences are included in the list and that an expansion of the list is required. Another responding State has adopted a more flexible penalty threshold approach, which includes all above offences as predicate offences. Article 7 also establishes measures to combat money-laundering, including setting

up a comprehensive domestic regulatory and supervisory regime for banks and non-bank financial institutions. It also calls on State Parties to consider implementing feasible measures to detect and monitor the movement of cash and appropriate negotiable instruments across their borders. One responding State mentions that it has established a comprehensive national regulatory and supervisory regime that includes both bank and non-bank financial institutions. That State has recently adopted a law aimed at strengthening the regulation of non-bank financial institutions engaged in areas, such as real estate transactions, gambling, trade of jewellery and art. The same State notes that it has concluded five bilateral treaties and agreements on mutual assistance, notably on information exchange, in the field of money-laundering.

#### *Liability of legal persons*

11. Article 10 establishes liability of legal persons as a mandatory provision which may be covered through criminal, civil or administrative liability. In other words, criminal liability is not a mandatory requirement but the requirement may also be covered through civil or administrative liability. While there is widespread recognition of the need to ensure that criminals cannot avoid justice by hiding behind legal structures, the responding States have developed different modalities for ensuring the accountability and the sort of penalties that can be imposed on legal persons. One responding State reports that it has taken the necessary measures to implement Article 10 and that the liability of legal persons is fully enshrined in its national legal framework. Another State acknowledges that, in order to fully comply with the Organized Crime Convention, legislative amendments are underway to establish liability of legal persons for participation in all serious crimes involving an organized criminal group, expanding the range of crimes to which the liability applies. The State reports that the liability has been established with regard to certain offences only. That State also notes the importance of strengthening the capacity of their law enforcement agencies on the new provision. Another State notes that it would establish the liability of legal persons as part of the process of amending its Criminal Code. As regards sanctions, pecuniary sanctions, such as fines are reported.

#### *Prosecution, adjudication and sanctions*

12. Article 11 requires States parties to make the commission of an offence liable to sanctions that take into account the gravity of that offence. Responding States have adopted a broad range of penalty scales in line with their legal traditions. Article 11 further requires the establishment of a long statute of limitations period in which to commence proceedings for any offence covered by the Convention, if a statute of limitations is in place at all. One responding State, which has adopted a statute of limitations period, specifically refers to the extension of the period where the alleged offender has evaded the administration of justice.

#### *Confiscation and seizure*

13. As regards confiscation and seizure, stipulated in Article 12, responding States report that their national legislation enables the confiscation of proceeds of crime derived from offences covered by the Convention; of property, equipment or other instrumentalities used in or destined for use in such offences; and of proceeds of

crime transformed or converted into other property. In one responding State, confiscation of proceeds is enshrined in the Constitution and in specialized legislation on asset forfeiture, covering assets derived from, inter alia, the commission of organized crimes, kidnapping, crimes against public health and trafficking in persons. It was not clear, on the basis of a response, whether in another State, proceeds of crime intermingled with legitimately obtained property and income or other benefits derived from any of the above mentioned proceeds or property is covered. For those purposes, value-based confiscation is made available by the judicial authorities of that State, in accordance with Article 12, paragraph 1(a). Value-based confiscation means a method of confiscation that enables a court, once it has determined a benefit accruing directly or indirectly from criminal conduct, to impose a pecuniary liability, such as a fine, which is actionable against any asset of the individual. Another approach is to allow the confiscation without requiring a criminal conviction (non-conviction based confiscation), which a responding State has adopted.

14. A responding State has included a reverse onus provision in its confiscation legislation, namely it has reversed the burden of proof in respect of the lawful origin of proceeds. In that State, the reverse onus applies to public officials only. This approach mitigates the difficulties encountered by law enforcement authorities in proving that assets are derived from crime by establishing a presumption to that effect and leaving it to the public official to rebut the presumption. The responding State has also safeguarded the rights of bona fide third parties in accordance with Article 12, paragraph 8. In another State the status of bona fide parties remains unclear, as, in certain cases, property is subject to confiscation “irrespective of whether it is owned or possessed by the convict or any third person”.

#### *Jurisdiction*

15. Article 15 stipulates that States parties are to establish jurisdiction over the offences established in accordance with the Convention. Responding States report that their national legislation includes the territoriality principle, i.e. where the offence is committed wholly or partly within the territory of the State; and the flag principle, i.e. where the offence is committed on board a ship flying its flag or on board an aircraft registered under its laws. In one responding State, the legislation specifically includes embassy and consulate officials. As regards the discretionary provisions of active personality principle, i.e. where the offence is committed by a national or a habitual resident, many responding States have also implemented the provision. As regards the passive personality principle, i.e. where the victim or object of the crime is a national, permanent resident or a habitual resident, one responding State does not have jurisdiction over the offence committed by a stateless person who has his or her habitual residence in the territory, if the offence was committed in a foreign country and is not against the State or its nationals. Three States also reported that they applied the extradite or prosecute (*aut dedere aut judicare*) principle, but that the State may be prevented from prosecuting where the statute of limitation lapses or when the person sought has already been tried (*ne bis in idem*). A State notes that it has recently established universal jurisdiction over the offence of trafficking in persons when it is committed by a foreigner outside of the territory of the State. Another State has established universal jurisdiction and criminal liability of foreign nationals and stateless persons not permanently residing in its territory over crimes, which are provided for by international treaties to which

the State is a party, as well as over grave or particularly grave crimes. As regards the coordination of actions among the competent authorities of those States Parties conducting investigations or judicial proceedings in respect of the same conduct, one State responded that it has not taken measures to implement this provision.

#### *Extradition*

16. Article 16 recognizes the existence of distinct traditions in the field of extradition law and practice. State parties may make extradition conditional on the existence of a treaty between the requesting and requested States or may make provision in their domestic law to permit extradition even in the absence of an applicable treaty. A responding State indicates that it does not consider the absence of an international treaty as a ground for refusal and that it extradites also on the basis of reciprocity. States parties that do make extradition conditional on the existence of a treaty have an option of using the Convention as the legal basis for extradition. A non-State party notes that, as a monist country, it deems the provision of the Convention to be self-executing. Hence, once ratified, the Convention would become part of the national law of that State and will be considered a legal basis for extradition.

17. According to Article 16, extradition can be granted in connection to offences covered by this Convention, provided that they are punishable under the national law of both the requesting and the requested States (i.e. dual criminality principle). One State comments that this principle is enshrined in its law on extradition, as well as in each of the 31 bilateral extradition treaties it has concluded. The State further reports that, whilst the extradition law and the Organized Crime Convention could be used as a legal basis for extradition, it has constantly privileged the use of bilateral treaties. That State reports that, between 2010 and 2013, it has enabled the extradition of 193 suspects to as many as five requesting States, using its existing bilateral treaties as legal bases and that it has not yet used the Convention as the legal basis for extradition. According to the data provided, the majority of cases were related to crimes against public health and money laundering.

18. Responding States indicate that extradition could be granted for offences punishable by imprisonment or other deprivation of liberty of not less than 12 months or a more severe penalty. This penalty threshold approach allows for flexibility and the inclusion of new and emerging forms of crime. One responding State notes that extradition could also be granted for non-intentional crimes, providing that they are considered as serious crimes punishable by imprisonment in both countries. Responding States have divided the grounds for refusal into mandatory and discretionary. Besides refusal on the ground of absence of dual criminality, responding States listed the following mandatory grounds for refusal of the extradition request: reasons to believe that extradition has been requested due to race, religion, nationality, membership in a certain association or political opinion/affiliation. Furthermore, a serious risk that the person may be subjected to torture or inhuman or degrading treatment or punishment is mentioned as a ground for refusal. Where laws of the requesting State envisage death penalty for the crime concerned, the extradition request may be rejected if the requesting party does not provide sufficient guarantees that capital punishment shall not be applied. Also the *ne bis in idem* or double jeopardy principle was mentioned. Responding States do not extradite their own nationals, but, instead, apply the extradite or prosecute (*aut*

*dedere aut judicare*) principle. For one of the responding States, the refusal to extradite its nationals is discretionary: a national can consent to extradition in which case the court cannot refuse the extradition. In that State, the issuance of the final extradition order still remains with the executive, i.e. the Minister of Justice. In another State, at the approval of the Executive and under certain circumstances, nationals can be still be surrendered.

19. In line with the Convention, most responding States do not refuse extradition on the sole ground that the offence is also considered to involve fiscal matters. However, one State notes that some of its requests for extradition have been refused in connection to fiscal crimes. A responding State specified that, as long as the fiscal offence meets the dual criminality requirement, sufficient evidence is included to establish probable cause and the other treaty requirements are met, extradition is granted. Before refusing extradition, the State always requests supplementary documentation in an attempt to establish probable cause and in order to be able to grant extradition.

#### *Transfer of sentenced persons*

20. According to Article 17, States parties may consider entering into bilateral or multilateral agreements on the transfer to their territory of persons sentenced to imprisonment or other forms of deprivation of liberty for offences covered by this Convention. One responding State reports that it has concluded 15 such bilateral treaties, although they have not yet led to the transfer of any sentenced persons.

#### *Mutual legal assistance*

21. Article 18 requires States parties to afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to offences covered by the Convention. All responding States report having in place national legislation on mutual legal assistance and that a request must be executed in accordance with the domestic law and/or existing bilateral treaties. A responding State reports that mutual legal assistance may also be executed in accordance with procedures as specified by the requesting country, provided that the procedures are not contrary to its national law. Two responding States report that the hearing of a witness or expert by the judicial authorities of another State would also possible by video conference. A responding State points out that mutual legal assistance can also be rendered in connection with legal persons. In addition to national legislation, States report on a number of bilateral and multilateral treaties and arrangements on mutual legal assistance, as well as on their implementation. It is also noted that, in the absence of a bilateral treaty, mutual legal assistance can be granted on the basis of reciprocity and good faith. A responding non-State party notes that, as a monist country, its Constitution permits the direct application of treaties. Hence, the Convention, once ratified, constitutes a legal basis for mutual legal assistance.

22. As regards the grounds for refusal, as a mandatory measure, a responding State may not provide mutual legal assistance where it might be detrimental to the sovereignty, national security, public peace and order, or public morals of that State. Furthermore, discrimination due to the race, nationality, gender, religion, social status, or the fact that the person belongs to a specified social organization or has a different political opinion, are mentioned as grounds for refusal. Mutual legal

assistance may be postponed if investigation is in progress or the trial is pending, until the procedure of such investigation or trial is completed in a responding State. On a discretionary basis, the State may still render mutual legal assistance in the absence of dual criminality. One responding State reports that it only requires dual criminality when it comes to mutual legal assistance that requires coercive measures. In line with the Convention, bank secrecy is not considered an admissible ground for declining a request for mutual legal assistance in the responding States.

#### *Joint investigations*

23. Article 19 deals with joint investigative bodies and how they are established. In the absence of bilateral or multilateral agreements or arrangements on joint investigations, they may also be undertaken by agreement on a case-by-case basis. A responding State reports having conducted parallel, coordinated investigations with other States. Under this model, the investigators are not co-located. The State also provides information on the establishment of a regional drug control centre for international cooperation. One State reports that it does not have the legal basis for joint investigations either in its legislation or in bilateral treaties. Reforms would be required in order to allow for the establishment of joint investigative bodies.

#### *Special investigative techniques*

24. Article 20 provides the legislative basis of the use of special investigative techniques both domestically and as part of international cooperation. A responding State has included in national legislation some provisions on electronic surveillance, including the interception of wire, electronic and oral communications, as well as controlled delivery. One responding State reports that the use of certain special investigative techniques (such as undercover agents, controlled delivery and electronic surveillance) are authorized under its constitution and the penal code. It states that the inclusion of other investigative techniques is foreseen as a result of the process to reform the justice system. The same State responds that provisions authorizing the use of special investigative techniques have been included in the bilateral treaties that it has concluded with several States on, inter alia, drug trafficking and mutual legal assistance.

#### *Transfer of criminal proceedings*

25. Article 21 enables States to transfer proceedings from one country to another where such transfer is considered in the interest of the proper administration of justice, in particular where several jurisdictions are involved in investigation and/or prosecution of the same offence, with a view to concentrating the prosecution. A responding State states that implementation of the provision is not contained in a policy, law or other measure because, as a monist country, the direct application of the provision is possible and the Convention could be considered a legal basis for such transfer of proceedings. The same applies to implementation of Article 22 which enables States to take into consideration any previous conviction in another State of an alleged offender, for the purpose of using such information in criminal proceedings. One State responds that it has taken no measures related to the implementation of this provision.

*Obstruction of justice*

26. Article 23 requires States parties to criminalize conduct involving the obstruction of justice. The reference to proceedings in Article 23 is intended to cover all official governmental proceedings which may include the pre-trial stage of a case. Two States report having criminalized offences related to the obstruction of justice, and in one case, it was done specifically to further ratification of the Organized Crime Convention. The legislation of one responding State focuses on the production of the evidence chain, including expert witnesses and translators; experts for giving a false statement and translators for incorrect translation in the administration of justice. Furthermore, close relatives of judges, prosecutors, investigators, defence counsel and enforcement officers fall under the scope of the legislation. Some responding States have reportedly supplemented the obstruction of justice provision with other related offences, such as the crime of violence, the use of physical force, threats or intimidation as well as perjury.

*Protection of witnesses*

27. Article 24 requires States to take appropriate measures within its means to provide effective protection from potential retaliation or intimidation for witnesses and, as appropriate, their relatives and others close to them who give evidence in criminal proceedings. Such measures include procedures that focus on providing physical protection through police protection or formal witness protection programmes, and evidentiary rules that permit witnesses to give evidence safely.

28. Witnesses fall into three categories: victim-witnesses, justice collaborators, i.e. informants and other participants in the criminal conduct, and other types of witnesses such as innocent bystanders, expert witnesses and others. With regard to victim-witnesses, a responding State affords crime victim-witnesses some procedural rights, including the right to consult with the criminal investigator with regard to the relevant criminal case or to attend the trial or other proceedings and make a statement. The State may also, if requested by the crime victim, provide him or her with information pertaining to criminal proceedings, such as the results of the investigation to persons alleged to be perpetrators, a date for a public trial, the results of the trial, execution of a sentence, and the current status on the execution of the sentence of probation. Moreover, as per legislation, the State is to take measures to protect the reputation and privacy of crime victims, in particular, where crime victims are in danger of retaliatory violence due to their statements or testimony during criminal proceedings, appropriate measures are to be taken. In another responding State, such measures include the change of identity documents, address, school and workplace, as appropriate. With regard to justice collaborators, a State reports that its protection measures apply to cases where any retaliation is likely to be taken against informants or their relatives. When any retaliation is likely, judicial police officers, prosecutors or the court of that State may designate an assistant to the informants. Moreover, personal safety measures may be taken without delay. Such safety measures include protection in a specific facility and security guard for a certain period, escort for a witness or a reference when attending or returning from court or law enforcement agency, periodic patrol of the informant's residence and other measures that are purported to be necessary for personal safety. With regard to other types of witnesses, a responding State has

introduced legislation to protect public interest whistle-blowers, his or her relatives or cohabitants. Such legislation includes a confidentiality obligation.

29. As regards vulnerable witnesses, some States report the use of video or another remote transmission system for the examination of witnesses. In one of the States, a password-protected online network aimed at facilitating the use of video conferences (including with authorities from other States) in connection to criminal proceedings has been introduced. One State reports that a partitioning facility can also be installed to protect the witness from direct confrontation with the defendant. In terms of capacity building in the field of witness protection, a responding State is mandated to provide necessary education and training to persons who engage in criminal investigations, persons who provide counselling and medical services to crime victims, and other persons who engage in activities relating to protection and support for crime victims.

*Assistance to and protection of victims*

30. Article 25 requires States parties to provide assistance and protection to victims of offences covered by the Convention, in particular in cases of threat of retaliation or intimidation. In terms of policy response, a responding State has formulated plans to provide counselling, medical services, payment of relief funds, legal aid and employment assistance, dwelling support, and other plans necessary for protecting crime victims, proportionate to the degree of harm to crime victims and to the necessity for protection and support. In terms of legal response, a responding State reported on the recent adoption of a national law for the protection of victims of crime. Article 25 focuses on the establishment of appropriate procedures to provide access to compensation and restitution for victims of offences covered by the Convention. Restitution is a form of repayment for losses suffered by the victim, paid by the offender. In contrast, in some responding States, compensation is paid from a fund administered by the State. The funds are classified into the bereaved family relief fund, disability relief fund, and serious injury relief fund and paid in lump sum.

31. With regard to the right of the victim to present and have his or her views and concerns considered at appropriate stages of criminal proceedings, a responding State extended the right to include his or her spouse, lineal relative or sibling, if the victim has passed away.

*Measures to enhance cooperation with law enforcement authorities*

32. Article 26 requires States parties to take appropriate measures to enhance cooperation with law enforcement authorities, in recognition that investigation of organized crime can be greatly assisted by the cooperation of members and other participants in the criminal group. Such measures to enhance cooperation include the discretion to prosecute and the granting of immunity in certain circumstances. Not all States have a system that allows prosecutorial discretion. As noted in the Legislative Guide,<sup>2</sup> such 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

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<sup>2</sup> Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto, p. 133.

with the three Protocols (to the extent States are parties to the Protocols) and serious crimes. In those States, where prosecutorial discretion is available, it is important for States to implement measures, such as guidelines, in order to ensure consistency in decision-making and guarantee that each decision is made carefully. In the responding States, the options of mitigation of punishment and/or immunity are introduced. Two responding State report that the immunity is conditional on substantial cooperation. The States have also introduced the option of granting a reward, one of them specifically in anti-corruption cooperation.

#### *Law enforcement cooperation*

33. In terms of law enforcement cooperation, mandated by Article 27, the responding States have specified, through their national law, that one of the functions of the authority is to cooperate with foreign law enforcement counterparts, including the International Criminal Police Organization (INTERPOL). In addition, regional mechanisms, such as Europol and Arabpol, as well as the posting of liaison officers are mentioned. A responding State has established a Digital Forensic Center to respond to transnational organized crime committed through the use of modern technology. One responding State gives examples of law enforcement cooperation, notably of exchanges of information with other States on drug-related cases. It also reports having in place a national database containing more than 400 million fingerprints, ballistics tests, pictures etc. The State has concluded eight bilateral agreements with third countries on the exchange of information and technical assistance in the field of organized crime among law enforcement authorities.

### **III. Summary of responses on the Trafficking in Persons Protocol**

34. Article 3 of the Trafficking in Persons Protocol includes the definition of trafficking, which is broken into three elements: act, means and the purpose of trafficking, which is always a form of exploitation. The list of forms of exploitation in the Protocol is non-exhaustive. Article 5 requires States parties to criminalize such conduct. The responding States have implemented various definitions on trafficking in persons, often reflecting the spirit rather than the exact wording of the Protocol. In order to comply with the Trafficking in Persons Protocol, a State had recently adopted legislation where the act elements include obtaining and maintaining another person under his or her control or under control of a third person. At the same time, it also includes buying or selling a person and is applicable to a person who obtains and maintains control over another person for the purpose of transporting him or her out of the country. The purpose element in the definition includes an exhaustive list of forms of exploitation, including the acquisition of organs, with different penalty scales. The exhaustive list of forms of exploitation reflects the conviction that a law has to be clear and ascertainable, in line with the principle of legality. Another responding State, in its definition, includes an expanded list of means, including abuse of confidence and abuse of power. The abuse of official position is also included as an aggravating factor. The legislation enables the State to confiscate property and impose deprivation of the right to hold certain positions or to engage in certain activities for a certain period.

35. Article 5 requires States parties to adopt such legislative and other measures as may be necessary to criminalize trafficking in persons. All responding States have criminalized trafficking in persons in their legislation, many after becoming a party to the Protocol. The constitutional provisions of one responding State has prohibited trafficking in persons. Moreover, the State notes the existence of more than 20 pieces of State-level anti-human trafficking legislation.

36. Article 6 requires States parties to protect the privacy and identity of victims of trafficking. Responding States have included guarantees to that effect in their legislation, including the principle position of ensuring human dignity of all victims of crime and protecting their reputation and privacy. In addition, in some responding States, the legislation gives victims the right to participate in relevant proceedings and to make a statement. One responding State may, if requested by the victims, provide them with information pertaining to criminal proceedings, such as the results of the investigation, a date for a public trial, the results of the trial, execution of a sentence, and the current status on the execution of the sentence of probation. Another State reports that such information is provided to victims through lawyers appointed by a non-governmental organization.

37. Article 6 further requires States parties to consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking. A responding State allows, among other legislative measures, a person providing support to the victim to accompany the victim, *ex officio* or upon a motion by the victim, her/his legal representative, or the public prosecutor. Moreover, a court in that State may examine a vulnerable witness through a video or any other transmission system or install a partitioning facility to place the person behind the facility for examination. Such measures are implemented after hearing arguments from the public prosecutor and the defendant or the defence counsel. The State is further to formulate plans necessary to provide counselling, medical services, payment of relief funds, legal aid and employment assistance, dwelling support, including protective facilities, and other plans necessary for protecting crime victims, proportionate to the degree of harm to crime victims and to the necessity for protection and support. In addition, it has set up education and training programmes. It is noteworthy that the above measures are applicable to all victims of crime and therefore not dependant on the final determination of the crime type. In another State, the above measures are guaranteed through a memorandum of understanding. A responding State notes a lack of technical and financial resources necessary to assist the victims of human trafficking, in particular for providing them with psychological support.

38. Article 7 requires States parties to consider permitting victims of trafficking to remain in its territory, temporarily or permanently. A responding State has adopted a visa system whereby victims are allowed to remain in its territory for up to one year to participate in investigations against their traffickers. In another State, the power to grant the victim the right of residence during the investigative proceedings is with the investigating and the trial judges.

39. Going beyond the requirements of the Protocol, a responding State applies the non-liability principle whereby victims are not punished for crimes committed as a direct result of being in a trafficking situation. In another responding State, the non-liability of the victim applies to crimes of minor or medium gravity which are committed due to compulsion.

40. Article 8 requires States parties to facilitate and accept the return of a victim of trafficking, with due regard for the safety of that person, without undue or unreasonable delay. Preferably, the return shall be voluntary. As a monist State, a respondent refers to the self-executing nature of the provision.

41. Article 9 concerns policies, programmes and other measures to prevent trafficking and to protect its victims. States refer to a wide variety of campaigns to raise awareness of trafficking in persons for sexual exploitation, in some cases adopting a human rights and gender equality approach. States report that these activities target vulnerable groups, such as teenagers and wives of their nationals who were foreign citizens, as well as personnel from law enforcement institutions, security forces and the Office of the General Prosecutor. In one reporting State a specialized prosecutor's office on crimes of violence against women and human trafficking is nominated to take the lead. In another State, a specialized anti-human trafficking unit is established within the Attorney General's Office. Furthermore, to protect the victims, a responding State publicizes on buses, electronic billboards, subways, and in foreign language publications the Emergency Support Center for Migrant Women hotline, which has operators trained to assist trafficking victims. Another responding State has identified female foreign workers as a vulnerable group and prevention campaigns are carried out in collaboration with the civil society.

#### **IV. Summary of responses on the Smuggling of Migrants Protocol**

42. Article 3 of the Smuggling of Migrants Protocol includes the definition which is broken into three elements: procurement of an illegal entry for financial or other material benefit. In addition to smuggling of migrants, Article 5 requires States parties to criminalize related conduct, i.e. producing, procuring, providing or possessing a fraudulent travel or identity document as well as enabling illegal stay. The responding States have adopted various definitions on smuggling of migrants, often reflecting the spirit rather than the exact wording of the Protocol. A responding State has criminalized smuggling of migrants and enabling illegal stay in a single article to ensure broad coverage of a range of conduct integral to the smuggling process. Another State reports having criminalized these behaviours in its migration and penal laws, as well as in the law against organized crime. One responding State has developed guidelines on assistance to migrants, as well as enacted legislation on the protection of migrants and members of their families.

43. Article 6, paragraph 3 requires States to establish as aggravating circumstances to the smuggling offence circumstances that endanger, or are likely to endanger, the lives or safety of the migrants or that entail inhuman and degrading treatment, including for exploitation. A responding State reports that such circumstances are considered aggravating in jurisprudence. Moreover, other possible charges include assault, abandonment of lineal ascendant and abuse. Two States have included the aggravating circumstances in legislation dealing with migration.

44. The Smuggling of Migrants Protocol is not aimed at criminalizing smuggled migrants but those who smuggle them. In line with article 6, paragraph 4, the Protocol however does not prevent States parties from taking measures against

smuggled migrants, too. A responding State points out that, in legal practice, a migrant, who is only the object of smuggling, does not become liable to criminal prosecution. An administrative fine may be imposed for illegal immigration in that State.

45. In addition, Article 16 requires States to preserve and protect the rights of smuggled migrants, in particular the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment. A responding State has prohibited discrimination. If a smuggled migrant is detained, the State must inform the consular officers in accordance with the Vienna Convention on Consular Relations.<sup>3</sup>

46. Article 7 requires full cooperation by States parties, in accordance with the international law of the sea. Article 27 of the United Nations Convention on the Law of the Sea<sup>4</sup> establishes that the criminal jurisdiction of the coastal State should not be exercised on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed on board the ship during its passage, save only in the following cases: if the consequences of the crime extend to the coastal State; if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea; if the assistance of the local authorities has been requested by the master of the ship or by a diplomatic agent or consular officer of the flag State; or if such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances. Two responding States report having taken measures to partially implement this article, notably by amending their respective laws of the sea.

47. Article 8 deals with assistance in suppressing the use of a vessel in the smuggling of migrants. The flag State may authorize to board and search the vessel and, if evidence is found that the vessel is engaged in smuggling, to take appropriate measures with respect to the vessel and persons and cargo on board. The State is required to promptly inform the flag State of the results. A monist responding State refers to the self-executing nature of the provisions.

48. Article 9 includes the safeguard clauses, including ensuring the safety and humane treatment of the persons on board, the need to not endanger the security of the vessel or its cargo, not to prejudice the commercial or legal interests of the flag State or any other interested State and to ensure that any measure taken is environmentally sound. Where the grounds for measures taken prove to be unfounded, the vessel is to be compensated for any loss or damage. A responding State refers to the partially self-executing nature of the Convention on the Law of the Sea in general and, in particular, article 110 on the right of visit and article 111 on hot pursuit when the competent authorities of the coastal state have good reason to believe that the ship has violated the laws and regulations of that State.

49. Article 10 focuses on exchange of information among States Parties on matters such as embarkation and destination points, the identity and methods of smuggling organizations, the authenticity and proper form of travel documents in a State, means and methods of concealment and transportation of persons, legislative practices and scientific and technological information useful to law enforcement.

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<sup>3</sup> United Nations, *Treaty Series*, vol. 596.

<sup>4</sup> United Nations, *Treaty Series*, vol. 1833.

Responding States emphasize the importance of exchanging such information globally and in particular with their neighbouring countries. One State has set up, within its migration authority, a specialized unit on the analysis of documents. It also reported that cooperation with other States is one of the cornerstone principles of its migration law and that, in this regard, it has concluded bilateral agreements on the exchange of information. That State underlines the utility of existing bilateral mechanisms (i.e. bilateral committees and high level task forces) for the purpose of enhancing cooperation and the exchange of information.

## V. Summary of responses on the Firearms Protocol

50. Article 3 of the Firearms Protocol includes various key definitions such as firearms, parts and components, ammunition, illicit manufacturing, illicit trafficking as well as tracing.

51. Article 5 further requires States parties to adopt and implement legislation criminalizing the illicit manufacturing and trafficking of firearms, their parts and components and ammunition. Three responding States report having criminalized these behaviours in their respective penal codes. One State also refers to its laws on organized crime and firearms. Two States have included relevant firearms provisions at the constitutional level. In one case, a State has limited permission for manufacturing and selling of firearms, but does not cite any legislation criminalizing illicit manufacturing or trafficking per se.

52. Furthermore, article 5 requires the criminalization of falsifying or illicitly obliterating, removing or altering the marking(s) on firearms. A responding State has adopted detailed provisions on permission for manufacturing industry and sales; disqualification for makers; and restriction on carrying, transport, use, remodelling of guns, swords, gas sprayers, electronic shock machines and cross bows. The same national provisions implement the requirement in article 6, paragraph 2, on prevention of illicit manufacturing and trafficking in firearms, parts and components and ammunition.

53. Other specific measures required by the Firearms Protocol, in Article 6, include the confiscation, seizure and destruction of firearms illicitly manufactured or trafficked. Three responding States refer to the confiscation provisions in their penal codes and procedural codes. One State has also included provisions in its anti-organized crime laws.

54. Article 7 of the Firearms Protocol requires the maintenance of records for at least 10 years in order to identify and trace firearms. A responding State has recently established a firearms safety management computer system, maintained by the National Police Agency. This system contains all firearm-related information in the country in a consolidated manner. Consequently, the National Police Agency is enabled to trace and identify firearms more systematically. Moreover, as the system is synchronized with criminal records of individuals, including prior records on illicitly manufacturing or trafficking of firearms, it will facilitate law enforcement efforts to combat the crime. One State refers to the provisions of its national legislation dealing with the record-keeping of firearms.

55. Article 8 of the Firearms Protocol requires States parties to mark firearms, permitting identification of the manufacturer, and the country of and year of import. A responding State requires manufacturers of firearms to mark serial codes, consisting of alphabet letters and numbers, on its firearms, providing information on the manufacturer, type and gauge of firearm, as well as the year of its production. Moreover, the State has strictly regulated the import of firearms by an import licencing system. In order to fully comply with the Firearms Protocol, the responding State considers requiring appropriate marking on each imported firearm in accordance with article 8, paragraph 1(b) of the Firearms Protocol. With regard to Article 8, paragraph 1(c), States parties are required to ensure the appropriate unique marking of a firearm transferred from government stocks to permanent civilian use. Two responding States are yet to implement the provision. One State reports that every history of possession and disposition is recorded in the firearms safety management computer system operated by the National Police Agency.

56. With regard to deactivation of firearms, States parties are required to take appropriate measures to prevent the illicit reactivation of deactivated firearms. A responding State reports that a deactivated firearm are cut into pieces and several parts are melted in a metal-recycling factory. National Police Agency supervises deactivation procedures thoroughly to make sure that the firearm would be rendered permanently inoperable. Police begin deactivating procedures by collecting all firearms which are subjected to be deactivated. Subsequently, police took these firearms to a disposal facility like a metal factory. They observe the deactivating process and make sure that all firearms become inoperable. When the firearms are deactivated, an officer responsible for the official retention of firearms must issue the deactivation report after confirming that the firearms are properly deactivated. Another reporting State party's Ministry of National Defence ensures the proper deactivation of firearms and issues licenses to owners that must be furnished for modification or repair of a firearm.

57. Article 10 of the Firearms Protocol requires States parties to take measures to implement a comprehensive system to control the import, export and transit movement of firearms, their parts and components and ammunition. The system underscores the central principle underlying the Protocol, that firearms and related items cannot be imported or exported without the awareness and consent of all States involved and that cases in which this is not complied with attract criminal investigation, prosecution and punishment.

58. One non-State party reports that permissions for importing and exporting firearms and related items are one-off licenses and need to be obtained each time. Another State party reports that the importer/exporters must send the Ministry responsible for issuing the authorization a list of the items and the objective of the transaction, the name of the receiver and the sender and have to prove that the firearms have not been diverted from their original course or to third countries. This State party also reported that all imported firearms must undergo ballistic examinations prior to exhibition or sale. One responding State has not taken measures to implement paragraph 4 of Article 10, requiring the importing State party to inform the exporting State party of the receipt of goods, upon request, but has taken complementary measures under its Customs Act.

59. Articles 12 and 13 of the Firearms Protocol establish a framework for cooperation that supplements the more general provisions of the Organized Crime

Convention. Article 12 of the Protocol addresses the information exchange obligations of States parties. States are to exchange relevant case-specific information on a range of possible matters. This obligation is to be fulfilled in a manner consistent with a State's existing domestic and administrative systems, leaving the manner and form of implementing this obligation to the discretion of States.

60. One responding State reports having participated in several international conferences with key countries and international organizations to share information and investigation skills in order to prevent firearm-related crimes. Another State party reports being a member State of a regional convention that has a similar cooperation requirement. This State party also reports sharing information regarding scientific and technological information useful to law enforcement authorities, pursuant to Article 12(3), with Interpol, with the purpose of preventing and eradicating those illicit activities. In addition, this State reports having cooperated with key bilateral partners and Interpol in tracing firearms, by sharing its national electronic registry, in accordance with Article 12(4) of the Protocol. Another responding State reports that the Office of the General Prosecutor has concluded bilateral agreements on the exchange of information with counterparts from five different States. It also refers to an inter-agency mechanism of coordination on the prevention and control of the illicit trafficking of firearms that is being used to facilitate the exchange of information at the national and bilateral levels. The same State reports having engaged on firearms-related capacity training activities in at least four countries.

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